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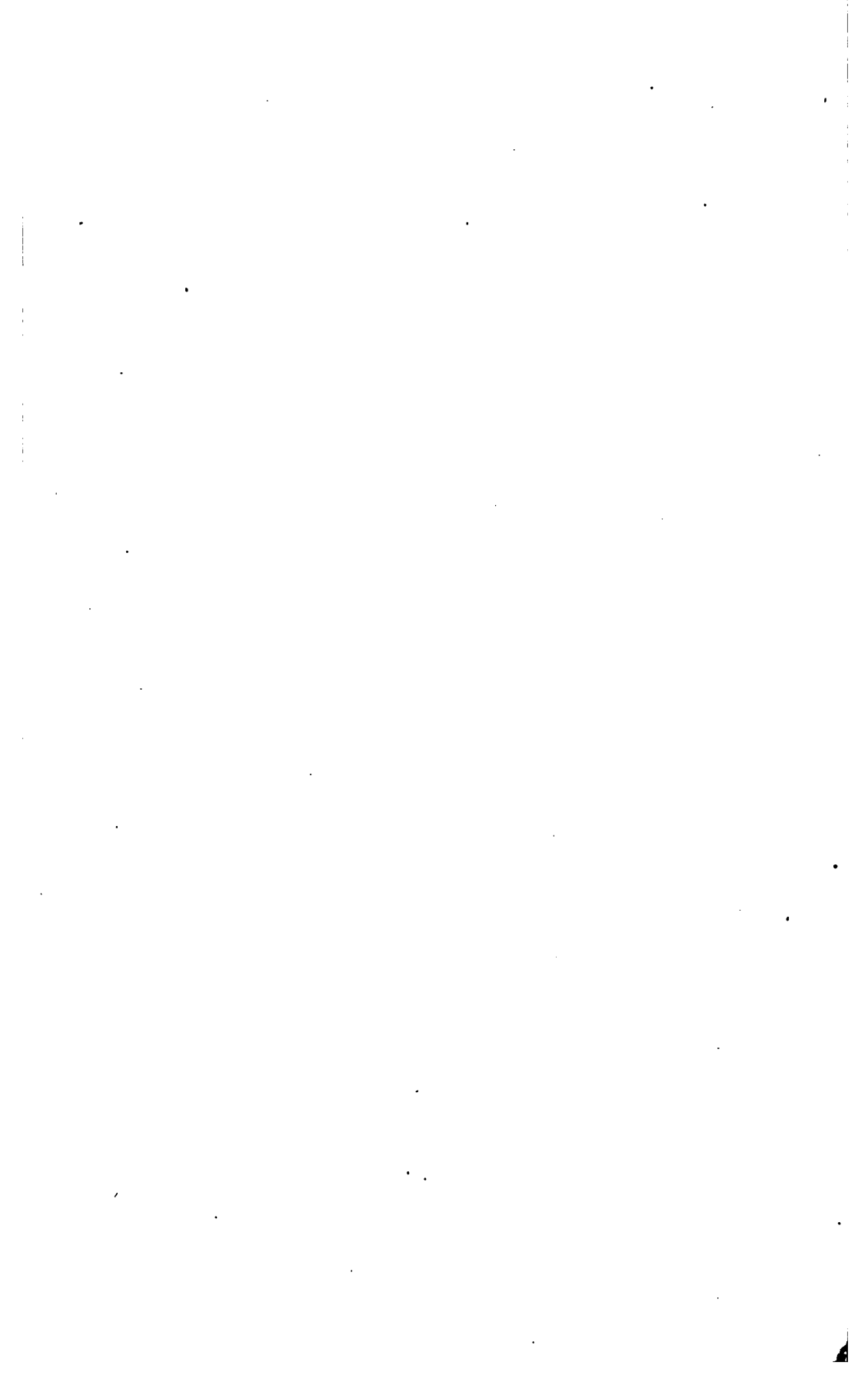
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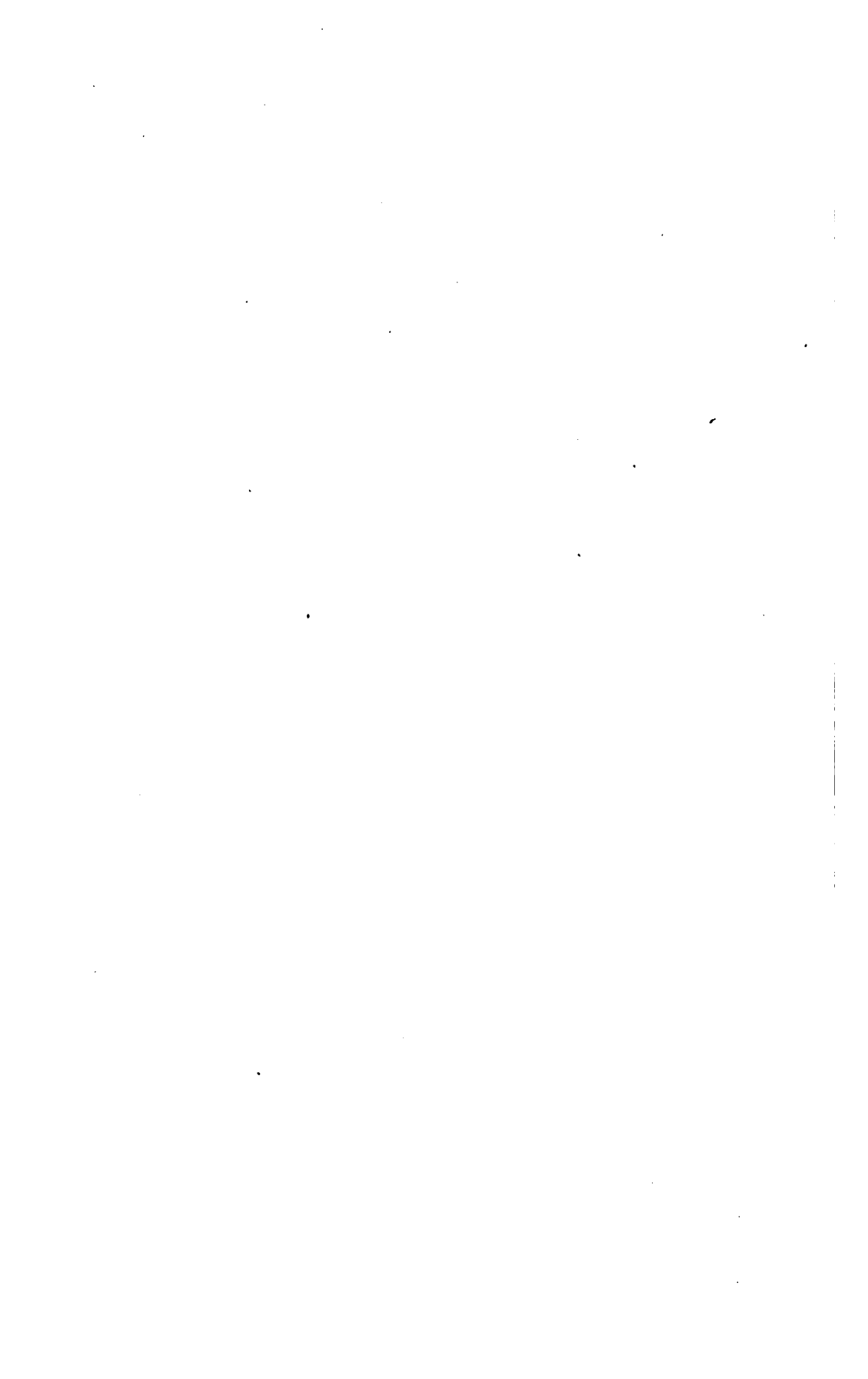
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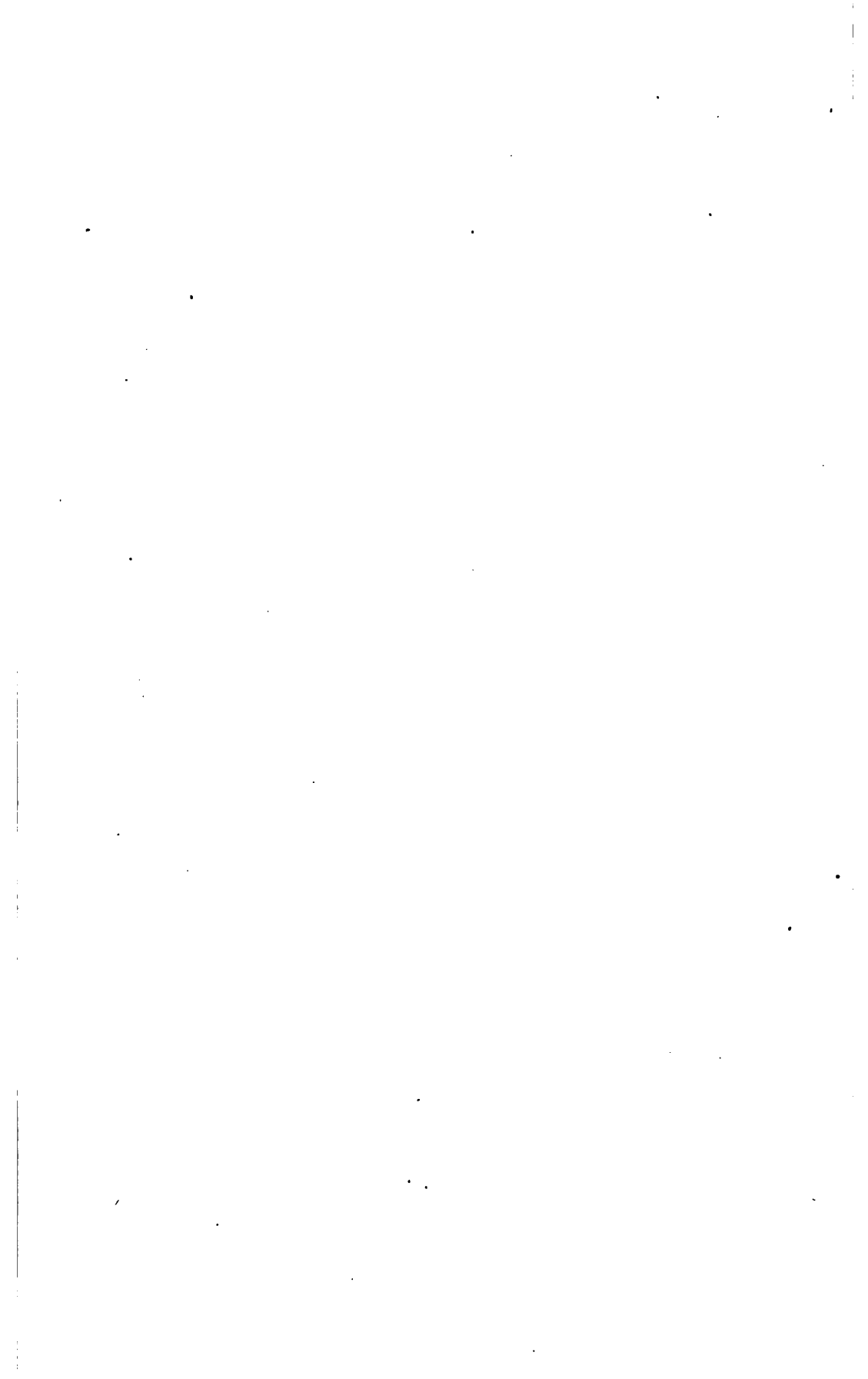
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THE
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ANNOTATED

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ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
BURDETT A. RICH, EDITOR, HENRY
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LAWYERS' REPORTS,

ANNOTATED.

ILLINOIS SUPREME COURT.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, *Appl.*,

v.

Edward S. RICHARDS, Surviving Partner of Richards, Maynard & Company.

(182 ILL. 59.)

1. A statute making the judgment of the appellate court conclusive on all questions of fact does not violate the provisions of the Illinois Constitution authorizing appeals and writs of error to the supreme court in all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved, and "in such other cases as may be provided by law."
2. A motion to direct a verdict for defendant is abandoned by proceeding to introduce evidence to sustain the defense after the motion is overruled, if it is not renewed.
3. A breach of contract which will justify the party not in default in abandoning performance and suing for damages on account of a breach by the other need not be of such a character as to render the further execution of the contract by him impossible, but if the other party refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is in legal effect a prevention of performance by the other party.

ages on account of a breach by the other need not be of such a character as to render the further execution of the contract by him impossible, but if the other party refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is in legal effect a prevention of performance by the other party.

4. It can make no difference whether a contract has been partially performed or the time for performance has not yet arrived, in determining the right of one party to regard it as abandoned by the other.

5. Upon election to treat the renunciation of the contract by the other party, whether by declaration or by acts or conduct, as a breach of the contract, the rights of the parties are to be then regarded as culminating; and the contractual relation ceases to exist, except for the purpose of maintaining an action for the recovery of damages.

(June 19, 1904.)

NOTE.—Right to rescind or abandon contract because of other party's default.

- I. Introduction.
- II. Condition precedent.
 - a. How far is right to rescind controlled by question of condition precedent.
 - b. Charter party.
 - c. Party excused by nonperformance of condition precedent.
 - d. Excuses for not performing condition precedent.
- III. Right to rescind contract without liability for nonperformance.
 - a. Necessity of mutual consent.
 - b. Contract may be rescinded.
 - c. Duty to place other party in statu quo.
 - d. Partial performance.
- IV. Party seeking to rescind must not be in default.
- V. Right of party rescinding to recover for what he has done.
- VI. Right to abandon performance and recover for breach.
 - a. Performance excused.
 - b. Recovery for breach.
 - c. Lost profits as damages.
- VII. What will warrant rescission.
- VIII. Application of above rules to various kinds of contracts.
 - a. Vendor and purchaser.
 - b. Constructive contracts.
 - c. Insurance contracts.
 - d. Continuing contracts.

as the law of contract itself. Where the contract is entire,—indivisible,—the right is unquestioned. The undertakings on the one side, and on the other, are dependent, and performance by one party cannot be enforced by the other without performance, or a tender of performance, on his own part." *Norrington v. Wright*, 5 Fed. Rep. 768.

That language presents merely the case of immunity from liability on the part of the one who chooses to regard the contract as rescinded, because the other party is not in a position to enforce performance by reason of his own default. Such cases are the most simple and at the same time perhaps the most common in which the right of rescission is exercised. In addition to this class there are several well-marked classes of cases in which the aggrieved party has sought, not only to relieve himself from his contract obligation on account of the other party's default, but has in addition sought to make such default the ground for affirmative relief. Thus, there are cases in which the aggrieved party has sought to recover back what he had delivered under the contract or its value; in which he has sought damages for the breach; and in which he has claimed the right to perform no more on his part but to recover the profits which he would have made had he done so.

In the early cases the right to rescind because of nonperformance by the other party is made to depend upon whether the covenant of the party seeking to rescind was dependent upon performance of that of the other party or independent of it. The courts held that in case it was independent it must be performed whether that of the other party was or not. There was much curious and technical discussion as to what covenants were dependent and what were independent. But since in

It was said in one case that "the right to rescind a contract for nonperformance is a remedy as old as the law."

APPPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover profits which plaintiff would have received from a contract with defendant which defendant was alleged to have wrongfully refused to carry out. *Affirmed.*

An opinion in this case was first handed down on October 31, 1892, and was delivered by BAILEY, Ch. J., in connection with which he made the following statement:

This was a suit in assumpsit, brought by Edward S. Richards, surviving partner of the firm of Richards, Maynard & Co., against the Lake Shore & Michigan Southern Railway Company, to recover damages for breaches of a contract, the material provisions of which will be stated presently. Prior to the execution of said contract, grain brought by western railroads to Chicago, and destined, either before or upon its arrival in that city, for transportation by rail to the east, was delivered by the western to the eastern railroads, and was by the latter weighed and transferred from western to eastern cars. At that time the transfer of such grain was accomplished by placing the loaded and empty cars side by side on parallel tracks, and by shoveling the grain from one car to the other by hand. The weighing was done on track scales, by first weighing the loaded car, and then weighing it after it was unloaded, the difference between such weights being the weight of the grain. This process was expensive, and the weights

thus obtained, as the evidence tends to show, were, owing to a variety of causes, liable to be inaccurate. Richards, the plaintiff, was the inventor and patentee of a new process for weighing and transferring grain in bulk, which was claimed to be cheaper than the old method, and which furnished more accurate weights than could be had by the existing mode of weighing. By this process, the loaded cars of grain were run on to an elevated track in a transfer house, and empty cars were placed alongside of them on a lower track. The grain was then shoveled by steam shovels from the loaded cars into hoppers, where it was weighed, and then allowed to run by force of gravity into the empty cars below. Negotiations were thereupon entered into between Richards and the defendant company with a view to the adoption by the latter of this new mode of weighing and transferring grain, and these negotiations resulted in a written contract between the company, of the first part, and Richards, of the second part, bearing date January 2, 1884, which contract was afterwards assigned by Richards to the firm of Richards, Maynard & Co., consisting of Richards and John W. Maynard.

Said contract recited, by way of preamble, that one of its objects was to provide a cheaper method of transferring grain, mill feed, and seed from one car to another than the one employed by said company, and for that purpose to use the device of Richards, secured to him by letters patent, etc.; and that Richards intended to erect and build a grain transfer house on the land thereafter described, for

those cases the question under discussion had reference to the proper form of pleading rather than to the right to rescind, and since the results of those decisions are fully shown by the cases directly discussing the right of rescission, such cases are omitted from this note, excepting where the question of rescission was directly discussed.

Dependent and independent covenants.

The question of dependent and independent covenants has been much discussed in reference to whether, in order to maintain an action for breach by the other party, plaintiff must allege that he has himself performed. *Barruso v. Madan*, 2 Johns. 145.

The result of this discussion is shown in decisions on the right to rescind, as will appear from the following cases:

The distinction is clearly settled between dependent and independent covenants or promises. In the first case the conveyance and payments are to be simultaneous acts, and there then must be an existing capacity in the one who is to convey to give a good title; in the other case, where the payments are to precede the conveyance, it is no excuse for nonpayment that there is not a present existing capacity to convey a good title, unless the one whose duty it is to pay, offers to do so on receiving a good title, and then it must be made to him or the contract may be rescinded. *Robb v. Montgomery*, 20 Johns. 15.

When concurrent acts are to be performed by the parties to a contract, the party seeking for damages for the nonperformance by the other party is required to aver only that he was ready and willing to perform on his part, and that defendant was requested to perform but refused or neglected to do so. *Tinney v. Ashley*, 15 Pick. 546, 25 Am. Dec. 620.

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Where by the terms of a contract concurrent acts are to be performed, as a delivery of property by one party and a payment of the price by the other, if either party should refuse to perform on his part the other party will be at liberty to treat it as an abandonment of the contract and justify a rescission of it. *Fletcher v. Cole*, 23 Vt. 114.

When one party has departed from the terms of a special contract for the delivery of specific articles from each to the other, the other party may treat it as rescinded; and if by the terms of the contract concurrent acts are to be performed, as of the delivery of property by one person and the payment of price by the other, if either party should refuse to perform his part of the contract the other may treat the contract as abandoned and justify his rescission of it. *Stahelin v. Sowle*, 37 Mich. 124.

In *Shirley v. Shirley*, 7 Blackf. 452, the court holds that because the obligations of the contract were concurrent neither party could compel specific performance by the other until he had performed or offered to perform his part of the contract, and then adds, it follows that neither party had a right to rescind the contract without the consent of the other until on an offer to perform on his part the other party had refused.

In *Iassink v. James*, 107 Cal. 348, where the contract on the one side was to furnish grass and hay to feed cattle and on the other to furnish cattle to eat the hay and pay for what was used, suit was brought for refusal to furnish the cattle and pay for the hay, and defendant claimed that plaintiff had so failed to carry out his contract as to justify defendant in repudiating it and withdrawing from its provisions. The court says: "Of course such withdrawal could only be justified upon the principle that the covenants to be performed by the respective parties were entirely mutual and de-

the purpose of so handling, weighing, and transferring in bulk such grain, mill feed, and seed as might be delivered to him for that purpose by the company. The company then agreed in consideration of the nominal rental of \$10 per year, and of the covenants in the contract to be kept and performed by Richards, to lease to him, for the term of ten years, certain land upon which to erect such transfer house and the necessary approaches thereto, and also agreed that as soon as such transfer house and approaches were constructed, it would build and maintain thereon and through such transfer house such track or tracks as might be necessary to transact the business contemplated by said agreement, and do all switching of loaded and empty cars to and from said transfer house at its own expense, and without cost to Richards, provided that the actual cost thereof should be taken into account in determining the fair amount to be paid Richards, as provided in the following covenant: "Third. Said first party further covenants and agrees that, in case there shall be any saving to it in switching, weighing, and transferring of products in this agreement referred to through the methods and devices adopted by said second party, over and above the actual cost of doing the same work under the ways and methods now in use by said first party, then, and in that event, it will pay to second party one half of said saving, the just and actual amount thereof to be ascertained and determined as provided in covenant 'first,' of 'Mutual Covenants,' said amounts, if found due, to be paid to said second party on or before the middle of each month for the month preceding."

pendent upon each other." But the court held that there was no need of discussing the question of dependence of the covenants because there was no such breach as justified the other in withdrawing.

If the covenants are mutually dependent one party cannot recover without averring performance or an offer to perform on his part. *Kane v. Hood*, 13 Pick. 281.

In *Robson v. Bohn*, 27 Minn. 333, where lumber was to be delivered by one to the other of the contracting parties, and the latter was to make certain payments during the time the contract continued, the court held that the covenants to pay and to deliver were dependent, and that a refusal to make a payment when it was due justified the other party in treating the contract as abandoned and suing for what he had delivered.

Where it was sought to justify the neglect to pay insurance premiums because of default on the part of the company, the court says failure of one party to a contract to perform some of its obligations when it consists of a number of independent provisions furnishes no excuse for nonperformance by the other party. It is only when the non-performance is a condition precedent, or where such party has wholly refused to perform or has wholly disabled himself from completing a substantial performance, that the other party is relieved from performance or a tender thereof. *Boyardus v. New York L. Ins. Co.* 101 N. Y. 335.

It will be noticed that the language and decision in each case must be limited to the class to which it belongs. For example, a decision that if the covenants are dependent one party cannot recover without averring performance or an offer to perform on his part, is applicable to a case where the rescinding party is sued for a breach and is

Richards, on his part, agreed at his own cost and expense to construct and maintain, for the full period of ten years, on said land, a transfer house and approaches, suitable and proper for carrying out the purpose in said contract expressed, and furnish and supply said house with hopper scales and every other device necessary to properly weigh and transfer said grain, etc. He also covenanted as follows: "Second. That he will receive, weigh, and transfer all products contemplated by this agreement which may be delivered to said transfer house by or under the direction of said first party with promptness and despatch, and within such time as to prevent any accumulation of cars or freight, whereby shippers might have just ground of complaint; and, if said second party shall fail to transfer as fast as required, the said first party may transfer by such other method as it deems proper, and said second party shall do all said work in transfer house at his own cost and expense, without cost to said first party; provided, that the actual cost of doing said work shall be taken into account in determining the saving, if any, between the Richards method of transferring grain and the methods in use by the first party at the date of this agreement, and also for the purpose of determining the just amount to be paid to said second party, as provided in covenant 'third' of first party; provided, also, that the cost of weighing such products shall not be considered in determining the actual cost of such transfer."

Said contract then contained various paragraphs denominated "Mutual Covenants," the first of which provided the mode for ascertain-

protected because the other party is in no position to maintain a suit. On the other hand, if the rescinding party is suing for what he has delivered under the contract, or for a breach, his action is founded on a claim that he has been released from performance by the other party's breach. A course of reasoning such as ruled the other case would defeat this. Therefore it becomes impossible to decide such case on the principles governing the other class, but it becomes necessary to ascertain what affirmative rights the other party's default has given him. The latter class of cases is the stronger, but the distinction between the two classes is not always maintained, and the same authorities are frequently cited in both classes.

Promise for promise.

Cases in which a promise was made in consideration of a promise were not regarded as capable of rescission because of the other party's nonperformance.

In case of a promise in consideration of a promise performance by plaintiff need not be alleged to sustain the action. *Bettisworth v. Campion*, Yelv. 124.

In *Gower v. Capper*, Cro. Eliz. 543, the declaration alleged that the defendant was indebted to plaintiff by bill in £20, and defendant, in consideration that plaintiff assumed unto him to deliver him the said bill, assumed to procure two sufficient sureties to be bound for the payment of the money, and alleged that the bill was delivered, but the sureties found were worthless, and defendant pleaded that the bill was not delivered, but the court held the allegation as to delivery of the bill was mere surplusage, for the consideration was the promise to deliver.

Where defendant promises to do certain work "in

ing and determining the cost of transferring grain, etc., by the new method, and the amount of money thereby saved. The only other provisions of the contract material to the present controversy are the 3d, 4th, and 6th of said "Mutual Covenants," which are as follows: "3d. And it is mutually covenanted and agreed that all shipments originating at points west of Chicago, and properly billed through to eastern points, and requiring transfer through said house, shall be classed 'through shipments,' and be transferred in the same manner as re-consigned property, and upon the same basis of cost to said first party; it being specially understood and agreed that under no circumstances is said first party to be charged for any weights upon any transfers made through this house, but nothing in this agreement contained shall be so construed as to prevent said second party from charging such fees as may be agreed upon between him and the owner of the property delivered for weights and transfer and for such other service as he may render in connection therewith, and from collecting his charges as provided in following mutual agreement. "4th. It is further mutually understood and agreed that said second party is to receive his compensation for his time, labor, and investments employed in building, operating, and maintaining said transfer house entirely from the weighing of property passing through it, and from the owners thereof, and not from said first party, except as provided in covenant 8 of said first party; and said first party shall not make use of the weights obtained from said second party in the conduct of its business for any other purpose than billing property to

destination, but, upon the request of said second party, said first party will collect such weighing charges as he may show are due to him, in the same manner as other advanced charges are collected, and pay the amount so collected to said second party on or before the middle of each and every month. . . . 6. If at any time differences should arise between the said parties thereto as to its spirit, meaning, or execution, such differences shall be settled by a reference of all matters in dispute to three disinterested arbitrators, each of the parties hereto to select one, and the two so chosen to select a third, and the decision of any two of the court so formed shall be binding between the parties hereto, final, and without appeal."

The declaration, after setting forth said contract *in hæc verba*, alleges that on the 23d of January, 1884, the plaintiff assigned all his interest in said contract to the firm of Richards, Maynard & Co., and that said assignment was ratified and confirmed by the defendant; that said firm thereupon erected on the land described in the contract a grain transfer house and hopper scales, and all machinery pertaining thereto, the same being completed June 24, 1884, when said firm entered upon the business of transferring grain, etc., from car to car, and weighing the same, as provided for in the agreement; that said firm could not conveniently transfer mill feed through their transfer house, and that the right to have such transfer of mill feed and the weighing thereof was waived by the defendant; that said firm continued to transfer and weigh all such grain and seed as were presented to them by the defendant at their transfer house to be transferred and

consideration of the promise made by defendant." He cannot claim that the payment of the first instalment of the contract price as arranged in the contract is a condition precedent, failure to perform which will entitle him to abandon performance of the contract. *Campbell v. McLeod*, 24 N. E. 68.

If there is a promise to transfer stock in consideration of the promise to pay for it, the transfer is not a condition precedent to the maintenance of an action on the promise to pay. *Blackwell v. Nash*, 18 *Strange*, 585.

Cases omitted.

Certain classes of cases, which might apparently be within the subject, will be omitted from this note because they form distinct classes by themselves and are governed by rules which would throw little or no light upon the questions here discussed. Of these are cases turning upon the construction of the particular contract, including those where the party against whom the rescission was claimed has been held to be not in default; cases where the contract itself provided for rescission, where rescission is not allowed because of the conduct of the party attempting it, and where performance has been expressly forbidden; also equitable actions for rescission as well as attempts to reclaim property for failure to pay and to return goods because they did not correspond with sample or warranty.

Attention is particularly called, however, to the fact that a party having otherwise a good right to rescind may have estopped himself or waived his right.

Thus, when an executory contract for the sale of chattels provides that title shall not pass until the agreed price is fully paid, which is payable in—
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instalments, and the vendor permits the vendee to retain possession and make other payments after the whole contract price is due, he cannot seize the property and terminate the contract for nonpayment until he has demanded payment of the vendee. *O'Rourke v. Hadcock*, 114 N. Y. 541.

II. Condition precedent.

a. How far is right to rescind controlled by question of condition precedent.

Closely allied with the doctrine of dependent and independent covenants was that of conditions precedent. And the courts seem to have reached the conclusion that to justify a rescission by one party for default of the other the duty of performance on his part must not only be dependent upon performance by the latter but the unperformed part of the latter's covenant must be so material that in case of its nonperformance the party seeking to rescind would receive practically no benefit from the contract.

Boone v. Eyre, 1 H. Bl. 273, note, was an action of covenant on a deed whereby a plantation together with a stock of negroes was conveyed by plaintiff in consideration of the payment of a certain amount in hand and an annuity for life. The breach assigned was the nonpayment of the annuity and there was a plea that the plaintiff did not have the title to the negroes and so was not entitled to convey. Lord Mansfield said: "The distinction is very clear. Where mutual covenants go to the whole of the consideration on both sides they are mutual conditions the one precedent to the other, but where they go only to a part, where the breach may be paid for in damages, there defendant has a remedy on the covenant and should not plead it as a condition precedent."

But the same result has in later times been

weighed until June 16, 1886, and kept and performed the contract on their part, yet the defendant, although often requested so to do, has not kept and performed said contract on its part; that on June 16, 1886, the defendant abandoned said contract, and neglected and refused to perform it, and, without reasonable or just cause, refused to be bound thereby; that after the abandonment of said contract by the defendant, and its refusal to perform the same, to wit, in December, 1887, said Maynard died; that said firm and the plaintiff have always been ready and willing and have offered the defendant to continue in the service and employment of the defendant in weighing and transferring grain and seed as provided by said contract; that the weight so obtained by said firm in weighing and transferring grain and seed were of the value of \$1.40 per car, and that the number of cars annually transferred on the track to the cars of the defendant company amounted to 18,000; that, to wit, 18,000 cars of grain and seed per annum will continue to be transferred on said track to the cars of the defendant company; that the saving to the defendant in the switching, weighing, and transfer of grain and seed by the plaintiff's method is \$5,000 per annum; that the plaintiff's firm was obliged to and did lay out and expend in building and equipping their transfer house a large sum of money, and that said transfer house is valuable only for the purposes contemplated by said agreement, and that in consequence of the refusal of the defendant to be bound by the terms of said contract, said transfer house has become of no value, whereby the plaintiff has suffered damage in the sum of \$25,000;

that there is due to the plaintiff from the defendant, on account of such nonperformance of said contract by it, a large sum of money, to wit, the sum of \$300,000, being the amount of damage to and amount due the plaintiff by reason of the breach of said contract, from the date the defendant wrongfully refused to perform said contract on its part. By an amendment to said count the plaintiff claimed special damages for loss of profits which said firm, or the plaintiff, as survivor, would have received from the various shippers of grain but for said breach of contract, and alleged that said firm, or the plaintiff, as its representative, had a contract with the receivers and shippers of grain and seed at Chicago, for the purchase by them of the weights of grain and seed which said firm, or the plaintiff, as survivor, obtained or would have obtained in transferring grain and seed from the cars of western railroads having their terminus at Chicago to the cars of the defendant company; that but for said breach of said contract, said firm, or the plaintiff, as survivor, would have received 70 cents per car from such receivers and shippers of grain and seed at Chicago for the weights of 15,000 cars of grain and seed per year for eight years,—the unexpired term of said contract.

The defendant pleaded non-assumpsit, and also a special plea, alleging, in substance, that at the July term, 1886, of the superior court of Cook county, the plaintiff and said Maynard exhibited their bill in chancery against the defendant in said court for the nonperformance of the same identical promises and undertaking, in the declaration mentioned; that at the March term, 1887, of said court the defendant

reached by denying the right of rescission to one who retains a substantial benefit under the contract (see *infra*, III. c.) and the question of condition precedent is now of little importance further than is shown, *infra*, II. c.

In fact, in *Bradford v. Williams*, L. R. 7 Exch. 232, Martin, B., said: "I think the words 'condition precedent' unfortunate. The real question, apart from all technical expressions, is, What in each instance is the substance of the contract?"

Therefore, such cases as *Pordage v. Cole*, 1 Wm. Sand. 319, in which it was held that in case of independent covenants in a contract, the performance of one was not a condition precedent to the enforcement of the other, and hence that performance was not a necessary allegation in an action to enforce the other, and the cases cited by Sergeant William's note thereto, upon the question of what covenants are dependent and what independent have very little bearing on the question, and rather tend to confuse than to throw light upon it.

b. Charter party.

This question of condition precedent as bearing upon the right to rescind, has been more discussed in cases involving charter parties than elsewhere, and those cases are therefore collected in this place.

In *Freeman v. Taylor*, 8 Bing. 124, a ship owner undertook to take a cargo to the Cape and then proceed with all convenient speed to Bombay and there put on a cargo of cotton for England, and upon arrival at the Cape he took a cargo on his own account to Mauritius, because of which he arrived at Bombay six weeks late, whereupon the cargo of cotton was refused him. In a suit for the breach it was argued that "defendant's remedy for the alleged deviation was by cross action, and that," 30 L. R. A.

he was not at liberty at his own discretion to put an end to the contract between him and plaintiff. The engagement to sail from the Cape with all reasonable speed was not a condition precedent but an independent covenant, for a breach of which defendant might be entitled to sue; it did not go to the whole consideration of defendant's contract. Unless it went to the whole consideration it was not a condition precedent the neglect of which would entitle the defendant to determine the contract." But the court left it to the jury to determine whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered with the instruction that if such was their opinion, defendant was excused from furnishing a cargo.

In *MacAndrew v. Chapple*, L. R. 1 C. P. 648, 13 Jur. N. S. 55, 14 L. T. N. S. 554, 14 Week. Rep. 591, where the freighter refused to load the vessel under the charter party because of an alleged deviation, the court says the case turns on the construction of the charter party and that a charter party may contain either a stipulation or a condition precedent, and the question whether any provision in the contract is one or the other is a matter of construction and depends on the judgment which the court may form of the intention of the parties.

Failure to proceed with a ship directly to the port where the cargo is to be taken on will not exonerate the shipper from performing his part of the contract and furnishing the cargo, unless it is shown that the delay has precluded him from making any use of the vessel. *Cliphams v. Vertue*, Dav. & M. 343, 5 Q. B. 265, 18 L. J. Q. B. 2, 8 Jur. 32.

In *Ollive v. Booker*, 1 Exch. 416, 17 L. J. Exch. 21, where a charter party stated that the vessel had been at sea three weeks, which was false, the court

was decreed to be indebted to said complainants for such nonperformance of said promises and undertakings; that said cause was referred to a master in chancery for an accounting, to ascertain the amount of such indebtedness; that the master found that the defendant was indebted to said complainants in the sum of \$9,686.68 damages; that the court confirmed such finding, and entered a decree ordering the defendant to pay the complainants that sum and costs; that while an appeal to the appellate court from said decree was pending, Maynard died; that said appeal, being prosecuted against the present plaintiff as survivor, was afterwards affirmed by the appellate court, and that thereupon the defendant paid and satisfied the same. To said special plea the plaintiff replied that the cause of action set out in the declaration was not for the nonperformance of the same promises and undertakings in said plea mentioned, and for which said decree was rendered, but for the nonperformance of other and different promises and undertakings from the defendant to the plaintiff. At the trial, which was had before the court and a jury, evidence was offered by the plaintiff tending to sustain the cause of action alleged in his declaration, and the jury thereupon returned their verdict finding the issues for the plaintiff, and assessing his damages at \$75,000. For this sum and costs the court, after denying the defendant's motion for a new trial, gave judgment for the plaintiff. On appeal to the appellate court said judgment was affirmed (40 Ill. App. 560), and this appeal is from said judgment of affirmance.

held that it was a warranty and not a representation and that therefore it was a condition precedent, and being a condition precedent and not performed, the defendant was not bound to load the vessel. And this rule was followed in *Oliver v. Fielden*, 4 Exch. 133, 13 L. J. Exch. 353.

Stipulations in a charter party that the vessel shall sail with all convenient speed are not conditions precedent, unless by a breach of the same the object of the voyage is wholly frustrated. *Tarra-bochia v. Hickie*, 1 Hurlst. & N. 123, 26 L. J. Exch. 26.

Under a charter party providing that the vessel shall sail with all convenient speed, the failure to comply with the stipulation entitles the other party only to a cross action whenever the consequence of the failure has been only partially injurious and has left the main object of the contract still attainable. *Dimech v. Corlett*, 12 Moore, P. C. C. 199.

In *Glabholm v. Hays*, 2 Mann. & G. 266, 2 Scott, N. R. 471, in which defendant was sued for repudiating a charter party because the voyage was not begun on the day named, the whole case was made to turn upon whether that stipulation was a condition precedent or not, the court saying, whether a particular clause in a charter party should be held to be a condition upon the nonperformance of which by the one party the other is at liberty to abandon the contract and consider it at an end, or whether it amounts to an agreement only, the breach whereof is to be recompensed by an action for damages, must depend upon the intention of the parties, to be collected from the terms of the agreement and from the subject-matter to which it relates. And in that case the stipulation was held to be a condition precedent.

In *Storer v. Gordon*, 8 Maule & S. 303, where a ship owner was to take a cargo to a certain place 30 L. R. A.

After that opinion was filed a petition for rehearing was granted and the rehearing resulted in a departure from the rulings of the former opinion and that opinion is therefore omitted, the rehearing opinion being substituted for it.

Mr. John N. Jewett, for appellant:

To justify one party to a contract in suspending its execution and at the same time entitle him to sue for and recover as damages the future profits which might have been realized by its complete execution, the other party must have been guilty of a breach, such as in effect prevented, or absolutely put an end to, the further execution of the contract by the complaining party.

There are two classes of cases which may arise between parties to an executory contract. The first consists of those cases which justify one of the parties in rescinding the contract by reason of some failure or default of the other party. In all such cases, the party availing himself of the breach or default puts an end to the contract absolutely, and is entitled to recover only the value of the service rendered up to the time of the rescission. The second class consists of those cases where one of the parties commits what is denominated a total breach, preventing the other from executing the contract on his part. In such cases the party prevented from executing the contract on his part may sue for and recover as damages the profits he would have made if he had been permitted to execute the contract.

Masterton v. Brooklyn, 7 Hill, 61, 43 Am.

and there deliver it and take on another one for the return voyage. It was held that the delivery was not a condition precedent to the obligation to furnish a return cargo, but that the fact that the outward cargo was seized by the government did not give the freighter the right to refuse to furnish the return cargo.

In *Davison v. Von Lingen*, 113 U. S. 40, 28 L. ed. 885, it was held that a stipulation in a charter party as to the position of the vessel was a condition precedent. "It is a substantive part of the contract, and not a mere representation, and is not an independent agreement, serving only as a foundation for compensation in damages. A breach of it by one party justifies a repudiation of the contract by the other party, if it has not been partially executed in his favor."

A distinction has been made which may perhaps be valid where the stipulation was that the ship should sail by a specified date.

A stipulation in a charter party that the vessel shall sail from a certain port before a specified date is a condition precedent, and unless she does so the charterer cannot be compelled to load her. *Crookewit v. Fletcher*, 1 Hurlst. & N. 383.

And a distinction must be made between the above cases and those in which liability for freight is sought to be evaded, although all or most of the benefits of the voyage have been received.

In *Havelock v. Geddes*, 10 East, 555, and *Cliphsham v. Vertue*, 5 Q. B. 265, Dav. & M. 343, 13 L. J. Q. B. 2, 8 Jur. 32, the defendant did not seek to rescind or abandon the contract, but to refuse payment under a charter party after he had received the benefit of it, because the vessel was not made staunch as the charter party required, but the court held that after he had received the benefit of the contract he could not insist that making the vessel staunch was a condition precedent.

Dec. 88; *United States v. Speed*, 75 U. S. 8 Wall. 77, 19 L. ed. 449; *United States v. Behan*, 110 U. S. 388, 28 L. ed. 168; *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 164, 80 L. ed. 967.

The acts and omissions of the appellant, complained of, were the result of a disagreement between the parties in respect to the mere incidents of the contract, and did not touch, even, the substance of its provisions or of its execution.

Even if the matter involved in the disputes of the parties were of substance in the execution of the contract, and the refusal of the appellant to comply with the demands of the appellee could be treated as a breach justifying a rescission of the contract by the appellee, still the refusal was not so treated, nor was the refusal or any of the matters of disagreement acted upon by the appellee as a total breach on the part of the appellant, either promptly or within reasonable time.

The settled law of this state is against the verdict and judgment appealed from.

Selby v. Hutchinson, 9 Ill. 319; *Palm v. Ohio & M. R. Co.* 18 Ill. 217; *Webster v. Enfield*, 10 Ill. 300; *Bond v. Bragg*, 17 Ill. 69; *Lucas v. Farrington*, 21 Ill. 81; *Doggett v. Brown*, 28 Ill. 495; *Graham v. Anderson*, 42 Ill. 517, 92 Am. Dec. 59; *Barrelett v. Bellgard*, 71 Ill. 281; *Weints v. Hafner*, 78 Ill. 29; *Wilson v. Bauman*, 80 Ill. 494; *Papineau v. Belgarde*, 81 Ill. 62; *Leopold v. Salkey*, 89 Ill. 421, 81 Am. Rep. 93; *Bonnet v. Glatfeldt*, 120 Ill. 175; *Christian County v. Overholt*, 18 Ill. 223.

No mere money demand, although not re-

sponded to, growing out of a contract, can do more than lay the foundation for an action for the recovery of the money, or a rescission of the contract, unless the contract itself provides for further consequences.

Palm v. Ohio & M. R. Co., Christian County v. Overholt, and *Selby v. Hutchinson*, *supra*; *Chapin v. Norton*, 6 McLean, 500; *Dobbins v. Higgins*, 78 Ill. 440; *Chicago v. Sexton*, 115 Ill. 230.

A partial breach of a contract by one party, which may be compensated for in damages, does not justify an abandonment of execution by the other party.

Keenan v. Brown, 21 Vt. 86; *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 366.

Richards, Maynard & Company availed themselves of all the advantages of their contract for a long time after the acts complained of as breaches on the part of the railway company were known to them.

Prompt action is required in order to justify even an act of rescission. And what is reasonable time is a question of law to be determined by the court.

Holbrook v. Burt, 22 Pick. 546; *Kingsley v. Wallis*, 14 Me. 57; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427; *Morgan v. McKee*, 77 Pa. 228; *Leaming v. Wise*, 78 Pa. 173.

An agreement to arbitrate creates no binding obligation. It is revocable by either of the parties to it at any time before award actually made and published.

Thompson v. Charnock, 8 T. R. 189; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Mitford*, Pl. *264; *Gourlay v. Duke of Somerset*, 19 Ves. Jr. 430.

Where a charter party requires the owner of a vessel to go to a certain port and get a complete cargo and deliver it in London after a partial cargo has been delivered and accepted, the delivery of a complete cargo cannot be set up as a condition precedent to recovery of freight. *Ritchie v. Atkinson*, 10 East, 226.

In case of a condition precedent the plaintiff must have performed before he can maintain an action to enforce the liability of the other party. In *Bornmann v. Tooke*, 1 Campb. 377, the contract was a charter party by which the ship owner undertook to sail by the first wind direct to the point of destination, and the shipper refused to pay freight because he did not do so, but the court held that such covenant was not a condition precedent which would exonerate the shipper from paying freight after he had received the cargo, saying that his only remedy was on his covenant; and in a note it is stated that where mutual covenants go only to part of the consideration on both sides, and a breach may be paid in damages, defendant, having a remedy on his covenant, should not plead it as a condition precedent.

If under a charter party the freighter refuses to load as agreed in the contract, the owner of the vessel has a right to regard the contract as abandoned without liability for a breach. *Bradford v. Williams*, L. R. 7 Exch. 253.

c. Party excused by nonperformance of condition precedent.

Of course if the contract provides a condition precedent the failure to perform it will exonerate the other party.

A party cannot be held in damages for failure to perform a contract a condition precedent to the performance of which plaintiff has not performed. *Goff v. Pacific Coast S. S. Co.* 9 Wash. 383.

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When the obligation of performance by one party presupposes the doing of some act by the other prior thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or, when rescission will not afford him an adequate remedy, to continue the work and recover such damages as the delinquency has occasioned against the defaulting party. *Mausfeld v. New York C. & H. R. Co.* 102 N. Y. 205.

A party seeking damages for breach of contract is not bound to prove performance on his part when the other party failed in something which was a necessary condition precedent to his own performance. *Aller v. Pennell*, 51 Iowa, 537.

If parties contract to exchange lands, each to exhibit to the other abstracts showing a good title by a day named, this is a condition precedent before either party can call upon the other to perform, and if either fails the other may regard the contract as at an end. *Howe v. Hutcheon*, 106 Ill. 501.

If a contract of sale requires the vendee to give security as a condition precedent, the vendor may rescind the contract upon his failure to perform in this respect. *Harrison Mach. Works v. Miller*, 23 Ill. App. 571.

If two persons agree with a third to furnish supplies to the latter as the same shall be required for discovering and locating lodes for the benefit of all, the latter may treat this as a condition precedent, and upon failure to furnish the supplies he may abandon the enterprise or proceed to discover and locate lodes in his own right without regard to the contract. *Murley v. Ennis*, 2 Colo. 300.

Where the contract provides that lumber should be delivered at a place to be designated by the other party, the designation of the place is a condition precedent to the delivery, and if there is a

The elemental conditions of the present case have been the subject of a prior adjudication conclusive upon the parties, and which bars the appellee from any recovery in this proceeding.

Rosenmueller v. Lampe, 89 Ill. 212, 31 Am. Rep. 74; *Clayes v. White*, 88 Ill. 540.

Mr. James I. Best, with *Mr. Pliny B. Smith*, also for appellant:

A refusal to arbitrate did not authorize plaintiffs to abandon their contract, and recover unearned profits as upon a total breach.

Tobey v. Bristol County, 3 Story, C. C. 800; *King v. Howard*, 27 Mo. 22.

A party who abandons his contract cannot maintain any action upon it.

Palm v. Ohio & M. R. Co. 18 Ill. 217; *Christian County v. Overholt*, 18 Ill. 228; *Dobbins v. Higgins*, 78 Ill. 440; *Chapin v. Norton*, 6 McLean, 100.

Since the appellee alleged that Richards, Maynard & Company performed the contract until the 16th day of June, 1886, and were then ready and willing to proceed with its performance, but that the appellee refused to carry out the contract on its own part and abandoned its performance, he must prove such breach as alleged.

Leopold v. Salkey, 89 Ill. 412, 31 Am. Rep. 93; *Badgley v. Heald*, 9 Ill. 64; *Swanzey v. Moore*, 22 Ill. 63, 74 Am. Dec. 184.

In the absence of a contract for the sale of these weights, the loss of such prospective sales is entirely too contingent, uncertain, and remote to constitute an element of damages.

Frazer v. Smith, 60 Ill. 145; *Horner v. Wood*,

16 Barb. 386; *Olmstead v. Burks*, 25 Ill. 86; *Hill v. Parsons*, 110 Ill. 107.

The appellant did not undertake to pay for the building, and the appellee cannot thus make it do it.

Toledo, W. & W. R. Co. v. Jacksonville Depot Bldg. Co. 68 Ill. 808.

The mere failure to pay money, though it is conceded to be due, will not, as a rule, authorize a party to abandon his contract and bring an action for future profits.

Palm v. Ohio & M. R. Co. 18 Ill. 217.

Mr. William A. Gardner, for appellee: When there is a contract which is to be performed in the future, if one of the parties has said in effect to the other: "If you go on and perform your part of the contract I will not perform mine," that, in effect, amounts to saying, "I will not perform the contract." In that case the other party may say: "You have given me distinct notice that you will not perform the contract. I will not wait till you have broken it, but I will treat you as having put an end to the contract, and if necessary I will sue you for damages, but at all events I will not go on with the contract."

Withers v. Reynolds, 2 Barn. & Ad. 863; *Mercy Steel & Iron Co. v. Naylor*, 9 App. Cas. 442; *Hochster v. De Latour*, 20 Eng. L. & Eq. 157; *Franklin v. Miller*, 4 Ad. & El. 599; *Honck v. Muller*, L. R. 7 Q. B. Div. 92.

The breaches that occurred in the case at bar, as far as their effect is concerned, would be the same in principle as where a person "willfully places the property of another in a situation where it cannot be recovered, or its true

refusal to designate the other party is absolved from all liability on the contract, although at the time he does not own lumber which could be tendered under it. *Warner v. Wilson*, 4 Cal. 310.

Where there is a mutual contract for the performance of successive acts, the refusal upon one side to perform will justify the other party in treating the contract as rescinded. *Ward v. Kadel*, 38 Ark. 174.

Where one party to a contract refuses to do something which is necessary to enable the other to perform his part of the contract, the latter may abandon the contract and recover his damages from the other, and is not liable for his own failure to perform. *Chapin v. Norton*, 6 McLean, 500.

The nonperformance by the vendor of a condition precedent gives the vendee the right to repudiate the whole contract,—as where the sale is of a certain quantity of iron to be shipped from Glasgow and the iron is actually shipped from Leith. *Filley v. Pope*, 115 U. S. 213, 29 L. ed. 272.

If a stipulation in a contract is a condition precedent, the obligee may repudiate the contract, if the obligor does not perform the condition. *Lowber v. Bangs*, 69 U. S. 2 Wall. 723, 17 L. ed. 768.

In *Bertini v. Gye*, L. R. 1 Q. B. Div. 133, 45 L. J. Q. B. 209, 34 L. T. N. S. 246, 24 Week. Rep. 551, in which the director of an opera claimed the right to refuse to carry out the engagement with a singer because of the latter's neglect to comply with his contract to attend rehearsals six days before the opening of the season, the court says: "If parties sufficiently express an intention to make the literal fulfillment of a matter of apparently very little importance a condition precedent it will be one; or if they think the performance of some matter apparently of essential importance not really vital, and sufficiently express such intent, it will not be a condition precedent;" and the court decides that

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in that case the attendance of rehearsals did not go to the root of the matter, and was not a condition precedent a breach of which gave the other party a right to rescind.

d. Excuse for not performing condition precedent.

No excuse will exonerate one from the performance of a condition precedent unless it be a positive interference and actual hindrance by the other party, or some distinct and tangible fraud. *Taylor v. Gallup*, 8 Vt. 240.

But a person may maintain an action for breach of the contract, without performing a condition precedent, if he were prevented from performing it by a breach on the part of the other party. *Jewell v. Blandford*, 7 Dana, 472.

III. Right to rescind contract without liability for nonperformance.

a. Necessity of mutual consent.

On principle one party can no more rescind a contract than he can make it. But in practice if one party refuses to perform he is regarded as consenting to a rescission so that upon the other party's acting on such consent the contract is at an end.

Where one party is in default and the other not, the party not in default may in most cases, though not in all, treat the contract as rescinded, and act accordingly; but this is a mode of rescission by consent. *Cromwell v. Wilkinson*, 18 Ind. 365.

One party may, by neglecting or refusing to perform the contract on his part, place it in the power of the other party, where he is not also derelict, to avoid it or not at his pleasure. The breach of one party may in such case be treated by the other as an abandonment of the contract authorizing him, if he chooses to do so, to disaffirm it; and thus the assent of both parties to the contract is sufficiently manifested,—that of the one by his neglect or re-

value ascertained, by mixing it with his own, or in any other manner will consequently be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, even to the extent of surrendering the whole, if his share cannot be distinguished, or responding in damages at the highest value at which the property in question can be reasonably estimated."

Armory v. Delamirie, 1 Smith, Lead. Cas. 637, note.

Absolute refusal is to be considered in the same light as respects the remedy, as an absolute physical prevention by the defendants.

Hosmer v. Wilson, 7 Mich. 304, 74 Am. Dec. 716; *Cort v. Ambergats R. Co.* 17 Q. B. 127; *Derby v. Johnson*, 31 Vt. 21; *Haines v. Tucker*, 50 N. H. 311; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 190; *Clement & Hawkes Mfg. Co. v. Meserole*, 107 Mass. 362; *Collins v. Delaportie*, 115 Mass. 162.

The true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.

Freeth v. Burr, L. R. 9 C. P. 208.

One of the parties to a contract cannot, by himself, rescind, but if his acts amounted to a rescission had he the power to rescind, can it be doubted that the other party would have a right to sue for damages if necessary?

Johnstone v. Milling, L. R. 16 Q. B. Div. 460; *Dingley v. Oler*, 117 U.S. 508, 29 L. ed. 984.

An absolute refusal to accept goods ordered, although the goods were not in readiness for delivery, should be considered in the same light, as respects the remedy, as an absolute

physical prevention by defendants, and the plaintiff might bring his action in such a case before completing the goods ordered and tendering performance on his part.

Hosmer v. Wilson, *Derby v. Johnson*, *Haines v. Tucker*, *Smith v. Lewis*, *Clement & Hawkes Mfg. Co. v. Meserole*, and *Collins v. Delaportie*, *supra*.

Mr. A. M. Pence also for appellee.

Shope, J., delivered the opinion of the court:

It is insisted in this court that the evidence is insufficient to sustain the verdict and judgment. The right and duty of this court to review the facts are placed upon two grounds: First, that under section 2, article 6, of the Constitution which provides: "The supreme court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases,"—the provision of section 90 of the practice act, restricting the powers of this court to the consideration of questions of law only, and prohibiting the assignment of errors calling in question the judgment of the appellate courts upon questions of fact, is unconstitutional and void. We have so frequently held the act valid that it would seem to be no longer an open question. But, if it was, the correctness of former holdings in this regard is clearly authorized by the provisions of section 11 of the same article of the Constitution. It is there provided that after the year 1874 inferior appellate courts,

refuse to perform his part of the contract, and of the other by his suing, not for the breach, but the value of any act done or payment made by him under the contract, as if it had never existed. *Bannister v. Read*, 3 Ill. 62.

The refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has a choice of remedies. He may stand upon his contract, refusing assent to an adversary's attempt to rescind it, and sue for a breach or in a proper case for a specific performance, or he may assent to its abandonment and so effect a dissolution of the contract by the mutual and concurring assent of both parties: in that event he is simply restored to his original position, and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved. *Graves v. White*, 37 N. Y. 463.

Where, after a note had been given for goods which were delivered to the maker, the seller forcibly retook possession of them, whereupon the maker of the note refused to pay it on the ground of failure of consideration, the court said: There is no total failure of consideration here, "unless the contract has been dissolved. It could be dissolved by mutual consent only. The retaking possession is a mere act of trespass which would give a right of action, but it did not give the maker of the note a right to treat it as a rescission or as a dissolution of the contract." *Stephens v. Wilkinson*, 2 Barn. & Ad. 320.

It is an established rule of law that where one of the contracting parties absolutely refuses to perform, such a refusal will be regarded as a consent on his part to a rescission of the contract, and the other contracting party may, if he chooses so to do, rescind the contract, and if he has done anything under it he may immediately sue for compensation on a quantum meruit. *Shaffner v. Killian*, 7 Ill. App. 620.

Where the question is whether one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract. *Freeth v. Burr*, L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. N. S. 773, 22 Week. Rep. 370.

More nonperformance is not rescission.

A rescission of a contract does not follow as a consequence of a nonperformance by either party. *Duncan v. Jeter*, 5 Ala. 604, 39 Am. Dec. 342; *Stone v. Grover*, 1 Ala. 239.

Renunciation must be acted on.

In *Avery v. Bowden*, 5 El. & Bl. 714, where the performance of the contract was prevented by the breaking out of war before the expiration of the time for performance, the plaintiff relied upon a renunciation before that, but the court held that such renunciation could not give a cause of action while the plaintiff was still insisting upon the performance of the contract. This case was affirmed in 5 El. & Bl. 938. And a similar ruling was made in *Reid v. Hoskins*, 5 El. & Bl. 720.

b. Contract may be rescinded.

When a contract is executory on both sides, upon nonperformance by one party the other may declare it rescinded. *School Dist. v. Hayne*, 46 Wis. 511.

The failure of one of the parties to fulfil the agreement authorizes the other party to refuse to perform without liability for a breach. *Carney v. Newberry*, 24 Ill. 203; *Graham v. Holloway*, 44 Ill. 385.

of uniform organization and jurisdiction, may be created by the legislature, to which such appeals and writs of error as the general assembly shall provide may be prosecuted, "and from which appeals and writs of error shall lie to the supreme court in all criminal cases, in cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law." Under this provision the legislature was authorized to vest such courts with appellate jurisdiction in all such cases as, in the legislative discretion, were deemed proper. In four classes of cases—that is, criminal cases, and those involving a franchise or freehold or the validity of a statute—the legislature is prohibited from making the determination of such appellate courts final. In such cases appeals and writs of error must be allowed to the supreme court. In all other cases in which such courts are given jurisdiction by statute it is left, by the Constitution, discretionary with the legislature to make the judgments of those courts final, or to provide for further appeal or writ of error, as in the legislative discretion shall be deemed proper. It necessarily follows that, since the creation and organization of the appellate courts, the jurisdiction of this court to review the final judgments of those courts, except in the four classes of cases enumerated in the Constitution, is subject to the restrictions created by the legislature; and it follows that we are precluded from the consideration of any assignment of error questioning the determination of the appellate court upon questions of fact.

At the close of plaintiff's evidence in chief,

the defendant moved the court to instruct the jury to return a verdict in its favor, upon the ground that the evidence was insufficient to maintain the cause of action set forth in the declaration, which was overruled. The motion was in the nature of a demurrer to the evidence, and, if defendant desired to avail itself thereof, it should have abided by it. Instead of doing this, it introduced evidence in its behalf, and submitted the cause to the jury without renewing its motion, thereby waiving the error, if error there was, in the decision of the court. *Joliet, A. & N. R. Co. v. Velie*, 140 Ill. 59.

The defendant, however, by its instructions 1, 2, and 8, refused by the court, sought to raise the same question. By these instructions the court was asked to instruct the jury: first, the evidence was not sufficient to sustain a verdict for plaintiff; second, there was a variance between the proof and cause of action stated in the declaration; and, third, that the evidence did not show an abandonment of the contract by the defendant, and the verdict should therefore be for the defendant. Instructions taking the case from the jury should only be given where the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient, if credited, to sustain a verdict for the plaintiff. *Simmons v. Chicago & T. R. Co.* 110 Ill. 346; *Purdy v. Hall*, 134 Ill. 298; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, and cases cited. Where there is evidence tending to sustain the issues in behalf of the plaintiff, the weight to be given thereto must be submitted to the jury; and, when their finding of fact

Where one party to a contract has refused to perform his part of the contract, or has rendered performance on the part of the other impossible, performance on the part of the other is excused. *Hawley v. Smith*, 45 Ind. 183.

If a man contracts to pay a certain sum of money in consideration that another has contracted to do certain things on his part, and it should turn out, before anything is done under it, that the latter is incapable of doing what he engaged to do, the contract is at an end. *Chanter v. Leese, & Mees. & W.* 205, 1 Horn & H. 224.

Where a contract provided that one party should bore a well and the other should furnish supplies, and the latter refused to furnish the supplies, whereupon the former abandoned the contract, the court held that he was justified in doing so and no recovery could be had against him therefor, but that, since according to his contract he was not to be paid until the well was completed, he could not recover any pay for what he had done. *Barrett v. Austin (Cal.)* 31 Pac. Rep. 2.

Where there was a violation of an agreement to extend the time for selling property under a decree of court which was made in consideration of the payment of additional interest, the court says that, "as a rule, if one of the parties violates his agreement, the other is thereby released;" and in that case it was held that the additional interest could not be recovered. *Etheredge v. Barkley*, 25 Fla. 314.

If one engaged to teach a school is assigned to a room on a certain floor, which it is afterwards found cannot be given her, and for that reason she neglects to present herself for employment, the school board is at liberty to treat the contract as at an end, and she can recover no damages for the

breach. *Illinois Female College v. Perry*, 8 Ill. App. 138.

In case of a conditional contract, upon failure by one of the parties to perform the other may retract. *Dodge v. Greeley*, 31 Me. 343.

Where one party to a contract refuses to be bound, the other party may avail himself of the refusal and rescind the contract. *Allen v. Webb*, 24 N. H. 273.

If one party refuses to be further bound by the contract, the other may cease performance on his part. *State v. Davis*, 53 N. J. L. 144.

When one party refuses to perform, the other may rescind. *Weeks v. Robie*, 42 N. H. 316.

The refusal of one who has engaged a special train to take it upon the company's refusal to guarantee that he will reach his destination at a certain time will exonerate the company from the performance of its obligation, and it cannot be sued for breach of its contract. *Wilcox v. Richmond & D. R. Co.* 52 Fed. Rep. 264, 17 L. R. A. 804, 8 U. S. App. 118.

Although insolvency on the part of the purchaser may give the seller a right to refuse to deliver any more goods under the contract, yet, if such refusal is made without due cause, the purchaser may then rescind and refuse to take any more of the goods without being liable for damages. *Re Phoenix Bessemer Steel Co. L. R. 4 Ch. Div. 108.*

Where defendant agreed to take a sublease from plaintiff and to purchase the furniture left by plaintiff upon the premises, the court held that he was not bound to fulfil his agreement where plaintiff left rent in arrear for which the furniture was liable to be distrained. *Partridge v. Souerby*, 3 Bos. & P. 172.

has been approved by the trial and appellate courts, no question of the sufficiency of the evidence to support the verdict can be raised in this court. It will be proper, therefore, to so far examine the evidence as to enable us to determine whether there was evidence tending to support the plaintiff's cause of action as alleged in his declaration. In the discussion which will follow, it will become apparent that we are of opinion that there was evidence tending to sustain plaintiff's cause of action, as alleged, and that, therefore, said instructions were properly refused. Whether the evidence, when considered together, is sufficient to maintain the plaintiff's case, is a question which does not fall within our province to determine.

The principal question to be determined in this case arises upon the second and third instructions given at the instance of the plaintiff, as follows: "(2) If the jury believe from the evidence that the defendant, by its acts and conduct, showed an intention not to be bound by said contract, then said Richards Maynard & Co. had the right to treat said contract as abandoned by said defendant, and to bring suit for the recovery of damages at any time thereafter, unless you believe from the evidence that the defendant company receded from such intention not to be bound, prior to the time when said plaintiff chose to treat said contract as abandoned by the defendant. An intention can only be known by acts, conduct, or declaration. Your inquiry in this connection is: First. Did defendant, by act and conduct, violate the substantial terms of the contract, and commit breaches in substantial provisions there-

of? Second. Did such acts and conduct, if you believe from the evidence they existed, warrant the conclusion that they would be continued, and that it was the intention of the defendant to continue such acts and conduct? (3) If the jury believe from the evidence that the defendant railway refused to, and did not, live up to its said contract, in its substantial provisions, and refused to perform it according to its terms, and abandoned the same without the fault of Richards, Maynard & Co., and that defendant prevented Richards, Maynard & Co. from performing the substantial provisions of said contract according to its terms, then the plaintiff is entitled to recover; and it is not necessary that Richards, Maynard & Co. should have been prevented from performing said contract by physical force, in order to give them the right to treat said contract as abandoned by the defendant railway, and to recover damages from said defendant company in this suit. If the jury believe from the evidence that said defendant railway refused to, and did not, live up to its said contract, and refused to perform it according to its terms, and if you believe from the evidence that defendant defeated the substantial object of the contract, or rendered it unattainable by proper performance on the part of the firm of Richards, Maynard & Co., and that defendant prevented Richards, Maynard & Co. from performing the said contract according to its terms, as above suggested, then the jury may find for the plaintiff, and assess the damages at such a sum as they believe from the evidence that the plaintiff has suffered by reason of such breach." Bearing upon the same

Where by the nondelivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. *Freeth v. Burr*, L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. N. S. 773, 22 Week. Rep. 370.

Hennessy v. Bacon, 137 U. S. 79, 34 L. ed. 606, recognizes the right to rescind for failure of the other party.

But an entire contract cannot be rescinded in part only. *Mansfield v. Trigg*, 113 Mass. 360.

Party in default cannot sue.

The same result is reached by the decisions which hold that a party in default cannot enforce the contract. If he cannot enforce the contract, of course the other party is given all the advantage which he could have derived from a simple rescission. The question of the right of a defaulting party to enforce the contract is not within the scope of this note, but a few of the cases are cited here by way of illustration.

In an action for the contract price against one who claims to have rescinded the contract, the plaintiff must show that he performed substantially on his part. *Robinson v. Brooks*, 40 Fed. Rep. 525.

One who is himself in default cannot recover damages from the other party who rescinds the contract. *Fancher v. Goodman*, 29 Barb. 315.

Or who is in default. *Chicago, B. & Q. R. Co. v. Cochran*, 42 Neb. 531.

If a contract is broken by one party he has no right while refusing or unable to perform its terms to complain of the rescission of the contract by the other. *McColl v. Frith*, 101 N. Y. 877.

One who refuses to comply with his contract at a time when the other party is not in default cannot L. R. A.

not afterwards enforce the contract against such other party, unless he has subsequently renewed his obligation thereon. *Adams v. Boston Iron Co.* 10 Gray. 495.

Plaintiff who fails to perform according to the terms of the contract cannot maintain an action on the contract. *Dermott v. Jones*, 64 U. S. 23 How. 220, 16 L. ed. 442.

If time is of the essence of the contract one who does not complete his performance in time cannot maintain a suit to compel the other to perform. *Slater v. Emerson*, 60 U. S. 19 How. 224, 15 L. ed. 623.

Under a contract reciting: "Bought fleeces and agreed to take cloth,"—the seller of the fleeces cannot sue for nondelivery of the cloth without averring a delivery of the fleeces. *Atkinson v. Smith*, 14 Mees. & W. 605, 15 L. J. Exch. 59.

In an action by a master for breach of articles of apprenticeship because the apprentice had run away, it appearing that the master had abandoned the trade which he had covenanted to teach, the court held that the duty to teach was a condition precedent and that the plaintiff could not maintain an action without showing that he had performed or was ready to do so. *Ellen v. Topp*, 6 Exch. 440, 20 L. J. Exch. 241, 15 Jur. 451.

Where a person contracts to do certain work for a colt and cow, if he refuses to perform the work the other party may treat the contract as at an end, and he loses all claim to the animals. *Schoonover v. Christy*, 20 Ill. 423.

The agreement in a contract for the sale of wool to deliver the names of the vessels on which it is shipped is a condition precedent, a breach of which will prevent the maintenance of an action against the purchaser for refusing to take the wool upon

proposition, more or less directly, the court gave to the jury, at the instance of the defendant, its 7th, 12th, 16th, and 17th instructions, as follows: "(7) You are instructed that, if the defendant committed breaches of the contract, still, if, from the evidence, you believe that such breaches did not defeat the substantial object of the contract, or render it unattainable by proper performance on the part of the firm of Richards, Maynard & Co., then the plaintiff cannot recover, and your verdict must be for the defendant." "(12) The jury are instructed, as a matter of law, that a mere failure or refusal of the defendant to pay to plaintiff, or the firm of Richards, Maynard & Co., any sum of money demanded by him or them, and claimed to be on account of services previously rendered by said firm under the contract in question, cannot be construed or treated as an abandonment of the said contract by the defendant, entitling the plaintiff or his said firm to maintain the present action, which is solely for the recovery of such profits as might have accrued to the plaintiff or his firm, if, on their part, said contract had been fully executed, continuously, for the period limited by said contract." "(16) The jury are further instructed, as a matter of law, that, in order to entitle the plaintiff to recover in this case, it is necessary for him to establish by a preponderance of evidence that he and the firm of Richards, Maynard & Co. were, by the acts of the defendant, prevented from the performance of said contract on their part, or that the execution of the said contract on their part was interrupted by, and as the legitimate con-

sequence of, the acts of the defendant in disregard of its obligations under said contract. (17) The failure of the defendant to pay, when demanded, any moneys due and owing to plaintiff under the contract, was not such an act or omission, in itself, on the part of defendant, as to prevent the plaintiff completing the contract."

Upon an examination of the evidence for the purpose of determining the propriety of the instructions, it will be found that it tends to prove that shortly after the plaintiff's firm had, in pursuance of the contract, constructed and equipped their transfer house, and commenced the weighing and transfer of grain therein, controversies arose between the parties as to the proper construction of the contract, the rights of the plaintiff, and the duties and obligations of the defendant, thereunder. It was claimed by the defendant that it was not required by the contract to deliver to the plaintiff's firm, to be by them weighed and transferred, all of the grain received by the defendant from western railroads for transportation to the east over its lines, but that it had the option to deliver, to be thus weighed and transferred, only such grain as it chose to deliver, and had the right to divert from plaintiff's transfer house, and was at liberty to transfer and weigh, all or such part of the grain received by it from western railroads as it thought proper, by other modes; and, acting on that interpretation of the contract, it did in fact withhold large amounts of grain from the transfer house, and had the same transferred by other methods, thereby depriving the plaintiff's

its arrival. *Graves v. Legg*, 9 Exch. 709, 23 L. J. Exch. 228.

Effect of providing penalty.

The mere fact that a penalty is provided for a breach of the contract will not prevent a party from rescinding because of breach by the other, on the ground that he could go on and perform his part and then recover the penalty. *Wilson v. Rootz*, 119 Ill. 379.

c. Duty to place other party *in statu quo*.

The rule has been thoroughly established, that before one party can rescind he must place the other *in statu quo*. *Blackburn v. Smith*, 2 Exch. 783, 18 L. J. Exch. 187; *Beed v. Blandford*, 2 Younge & J. 278; *Pharr v. Bachelor*, 3 Ala. 245; *State v. McCauley*, 15 Cal. 458; *Christy v. Arnold* (Ariz.), 38 Pac. Rep. 918; *Shively v. Semi-Tropic Land & W. Co.* 39 Cal. 259; *Cleary v. Folger*, 84 Cal. 318; *Moore v. Bare*, 11 Iowa, 198; *Murphy v. Lockwood*, 21 Ill. 611; *Gehr v. Hagerman*, 26 Ill. 441; *Wheeler v. Mather*, 56 Ill. 241, 8 Am. Rep. 653; *Wolf v. Dietzsch*, 75 Ill. 206; *Colson v. Smith*, 9 Ind. 12; *Chance v. Clay County Comrs.* 5 Blackf. 441, 35 Am. Dec. 181; *Hendrickson v. Hendrickson*, 61 Iowa, 68; *Johnson v. Jackson*, 27 Miss. 498, 61 Am. Dec. 522; *Randl v. Herren*, 20 N. H. 102; *Getchell v. Chase*, 87 N. H. 110; *Ayer v. Hawkes*, 11 N. H. 148; *Doughten v. Camden Bldg. & L. Asso.* 41 N. J. Eq. 556; *Pittsburgh & N. G. Turnp. Road Co. v. Com.* 2 Watts, 438.

Thus, a party seeking to recover back money paid for real estate because of failure of title must deliver possession before he can recover, although he has purchased the legal title from a third person. *Wright v. Wright*, 1 Pa. Dist. R. 204.

Where the vendor cannot give a good title the vendee has one of two remedies, he may enforce, 80 L. R. A.

or rescind, the contract. If he chooses to rescind, he must be able to restore the vendor all that he received and place him back in his original situation. *Brown v. Witter*, 10 Ohio, 142.

To rescind a contract for failure to pay the purchase money there must be a return of whatever has been received, so as to place the other party *in statu quo*. *Gay v. Alter*, 102 U. S. 79, 25 L. ed. 48.

In case of a rescission for mere failure to pay the purchase money, the other party must be put *in statu quo* by a return of what he has paid under the contract. *Frink v. Thomas*, 20 Or. 265, 12 L. R. A. 239.

A contract cannot be rescinded by one of the parties for the default of the other, unless both of them can be put in the same state as before the contract. It must be rescinded *in toto*. And if the party rescinding has received property of any value, however inconsiderable, under the contract, he must restore it to the other party. *Coolidge v. Brigham*, 1 Met. 547.

In case of failure to deliver what was bought, before the contract can be rescinded the buyer must return what he received, so as to place the seller *in statu quo*. *Conner v. Henderson*, 15 Mass. 313, 5 Am. Dec. 103.

There is no right to maintain an action for money had and received after a receipt of part of the consideration which cannot be returned, although the other party refuses to go on with the contract and deliver the remainder of the property. *Peters v. Gooch*, 4 Blackf. 515.

A contract cannot be rescinded without mutual consent when circumstances have been so altered by part execution that the parties cannot be put *in statu quo*. *Bellows v. Cheek*, 20 Ark. 488.

In order to justify a rescission both parties must be put *in statu quo*, as, where the agreement was

firm of a considerable portion of the business to which they were entitled by the terms of the contract. And also that soon after the transfer house was open, and during all the time it was in operation, the defendant claimed the right under the contract, and adopted and persisted in the practice, of using the weights obtained from the plaintiff's firm for other purposes than that of billing the property weighed to its destination,—that is to say, by giving away such weights to the western railroads over which the property had been brought to Chicago,—thus placing it out of the power of plaintiff's firm to make sales of such weights to western railroads and others, and thereby depriving the firm of practically the only source of profit secured to them by the contract. It will also appear that the evidence tends to show that other differences arose as to the amount to be paid by the defendant on account of the expense of transferring through the transfer house, and as to the basis upon which the cost thereof should be computed, etc. The construction placed upon this contract in respect of the matters of difference before mentioned, by this court, in *Lake Shore & M. S. R. Co. v. Richards*, 126 Ill. 448, relieves us of the necessity of again construing it. We there held that both the giving away of weights to the western railroads, and the refusal of appellant company to deliver to plaintiffs' firm, for weighing and transfer, all grain received by it for transportation from western railroads, were violations of its contract. It was there found that the market value of the weights was 70 cents per car, and that

the appellant had given away to western railroads the weights of 12,857 cars transferred and weighed by plaintiffs, in violation of the contract. It was also found that many other cars had been transferred and weighed by other methods than through the transfer house of plaintiffs; that 1,267 of such cars were transferred on track by appellant in January, February, and March, 1885, alone, in violation of the contract. That bill was filed on June 5, 1886, and asked, among other things, a reformation of the contract. The court, by its final decree, refused to reform the contract, but held it to be valid and binding between the parties, in the form in which it was executed. There can be no question that on June 5, 1886, and prior thereto, the evidence tended to show that the defendant was then guilty of breaches of the contract, as it was then held to be subsisting and binding between the parties. Aside from the large amount of business diverted by appellant from the transfer house of the plaintiffs, which it was bound to furnish them under the contract, as there construed, of the 24,700 car loads of grain and seed which appellant delivered to and permitted to be weighed and transferred through the transfer house, the weights of 12,857 cars, or 50 per cent of the entire business done, was given away by the defendant, in violation of its covenants.

We need not pursue this branch of the case farther. But to these may be added other breaches of the contract by the defendant, which the evidence tends to show, namely, its refusal to pay the transfer charges or expenses, and its refusal to be bound by the

to make repairs and execute a lease in consideration of the payment of the rent, the tenant cannot, after taking and holding possession for ten days, rescind for failure to make the repairs, since his possession prevents his placing the other party *in statu quo*. Hunt v. Silk, 5 East, 449, 2 Smith, 15.

Party cannot rescind while retaining benefit.

As part of the rule requiring the placing of the other party *in statu quo*, it is held that a party cannot rescind and at the same time retain a benefit under the contract. This rule is just and will equitably settle most cases to which the rule as to condition precedent has been applied. Lord Mansfield's rule in *Boone v. Byrne*, 1 H. Bl. 273, note, that if the covenant goes to the whole consideration it is a condition precedent, but if it goes only to part of the consideration it is not, is difficult to understand and apply, while practically the same result is obtained by the simple rule that one cannot rescind and also retain a benefit. Therefore the rule as to condition precedent has not been generally applied in modern cases, while the other rule has been.

A person cannot rescind a contract and at the same time retain the consideration, in whole or in part, which he has received under it. Jennings v. Gage, 13 Ill. 610, 56 Am. Dec. 478.

If a party has received a substantial part of the consideration he cannot rescind. Carter v. Seagrill, L. R. 10 Q. B. 564, 38 L. T. N. S. 604.

A party who has had some benefit from the contract cannot, as against one who has contributed labor under it for a year or more, rescind it for the latter's breach, but the remedy is an action for damages for nonfulfilment. Rogers v. Garland, 8 Mackey, 24.

It is in general true that a party who has derived 30 L. R. A.

some benefit from the partial performance of a contract cannot rescind it entirely and resort to an action for money had and received for money which he may have paid upon it; and the reason is that by rescinding after such partial benefit to one party both parties cannot be placed in the same situation in which they stood before the contract. But if the other party is placed in the same situation which he occupied before the contract was made, then the dissatisfied one may rescind the special contract and sue for what he paid out under it. Barber v. Lyon, 8 Blackf. 215.

One who has undertaken to deliver a portion of the ore taken from a mine to another, who is to construct a level to drain the mine, is not absolved from his covenant by the fact that the level is permitted to get out of repair, if he is not at all prejudiced thereby, the level remaining sufficient for all practical purposes. Crawford v. Witherbee, 77 Wis. 419, 9 L. R. A. 661.

Payment cannot be avoided while the property is retained. Gale v. Nixon, 6 Cow. 445.

Where one person was to furnish wool, attend to sales, and pay over a portion of the advance money to the other, who was to manufacture cloth from the wool, the court held that after the contract had been partly executed the conversion of a part of the cloth by the manufacturer to his own use would not give the other party a right to repudiate the contract and refuse to pay over the required portion of the advance payments, since the other party could not be put *in statu quo*. Hammond v. Buckmaster, 22 Vt. 375.

One who has conveyed property to his surety to be disposed of in satisfaction of the surety's liability cannot, after the surety has been engaged in the work for several weeks, rescind the contract so as to revert title in himself, at least not without

stipulations of the contract providing for a submission to arbitration of all differences between the parties in respect of the spirit, meaning, or execution of the contract. It admits of no argument that the principal consideration upon which plaintiff's firm undertook to build, equip, and operate their transfer house was the privilege given them of weighing and transferring all grain and seed delivered by western roads to the defendant for transportation eastward over its lines, and the right secured to them to control the weights of the grain thus transferred, and make sale of them to whomsoever might desire to purchase. It was clearly contemplated that the sale of such weights should be the source of profit to plaintiffs, and, as the result shows, was practically their only source of profit from the business. During the time the transfer house was in operation, there is no complaint that they did not keep and perform their agreements. By the wrongful act of the defendant in giving away the weights, more than one half of the legitimate profits of the business actually done was taken from them, and by the wrongful diversion of business they were deprived of large profits to which they were entitled under their contract. By the wrongful act of the defendant, they were deprived of a very large proportion of the substantial consideration upon which the contract was entered into by plaintiffs.

The evidence tends to show that the defendant, after the 5th of June, 1886,—the date of filing the bill in the case referred to,—manifested and declared its intention to persist in the future in the same course of conduct, and to insist upon the same construction of the

contract. May 13, 1886, the attorney to whom the matter had been referred by the defendant, in reply to a note inclosing an itemized statement of account, refused to allow, under the contract, for weights given away by defendant, and expressly said, "under the contract, the company is not bound to deliver grain to Richards, except at its option." On June 9, 1886, the defendant's western division superintendent wrote to plaintiffs, acknowledging receipt of statement of May, 1886, of cost of grain and seed transferred, and disallowing the account, but restating the same in accordance with the interpretation of the contract previously insisted upon by the defendant. On June 11, 1886, plaintiffs' firm replied, noting the refusal contained in the letter of June 9, restating the balance due, and notifying the defendant that unless the same was paid by 12 o'clock M., June 16, plaintiffs would be compelled to suspend operations, etc. On the same day the attorney of the company, to whom the matter had been referred, wrote the plaintiffs' firm that the company could not change the position taken in the letter of the superintendent and the letter of May 13, 1886, before mentioned. It thus appears that as late as June 11 the company was insisting that under the contract it was not bound to deliver grain to the transfer house of plaintiffs' firm, except as it chose to do so; and was likewise denying its liability under the contract for the weights it had given away, and for transfer charges, etc. No change occurring in the attitude of the parties, plaintiffs' firm closed their house on June 16, and notified the defendant accordingly. As early as September 11, 1886,

placing the surety *in statu quo*. *Allen v. Edgerton*, 3 Vt. 442.

Although the lessor of a slave takes him out of the possession of the lessee before the lease has expired, the lessee cannot refuse to pay for him if he regains possession of him in trover and enjoys the benefit of the contract to the end of the term. *Odum v. Bryan*, 8 Jones, L. 211.

If the contract is executed in part, a failure by one party to continue to perform will not give the other party the right to rescind, but the remedy is an action on the contract to recover damages for the nonperformance. *Stevens v. Cushing*, 1 N. H. 17, 8 Am. Dec. 27.

A party who has required payment of sums of money which by a rescission of the contract will be rendered useless to the contracting party cannot rescind such contract for mere nonperformance of some condition thereof. *Swobe v. New Omaha, Thomson-Houston Electric Light Co.* 39 Neb. 586.

One accepting services under a special contract cannot refuse to pay for them, although the terms of the contract are not wholly carried out. *Bee Printing Co. v. Hiehorn*, 4 Allen, 68.

Upon refusal to deliver part of the articles brought for a gross sum, the purchaser cannot, while retaining what was delivered, rescind the contract and recover back any of the money paid, but his action is for breach of his special contract. *Miner v. Bradley*, 22 Pick. 459.

In *Ellen v. Topp*, 6 Exch. 440, 20 L. J. Exch. 241, 15 Jur. 451, the court adopts the rule that, where a person has received part of the consideration for which he entered into an agreement it would be unjust, because he had not received the whole, that he should therefore be permitted to enjoy that

part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not receiving the whole consideration.

In case of a covenant by the owner of a vessel to go to fishing grounds and procure as full a cargo of oil, etc., as possible, and deliver it to defendant in consideration that defendant would give him a certain portion of the proceeds, after the latter has received a partial cargo he cannot set up full performance of the owner's covenant as a condition precedent to his right to recover anything on the contract. *Stavers v. Curling*, 3 Bing. N. C. 355, 3 Scott, 740, 2 Hodges, 237.

But, although it is laid down as a general rule that the neglect or refusal of one party to fulfil a contract will not entitle the other to rescind it, unless they can be placed *in statu quo*, yet the rule to this extent is understood to be applicable only to such entire rescission of the contract *ab initio* as shall revert in each party the rights he possessed antecedently by the contract. Even then it may be doubted whether the rule is without exceptions. *Tyson v. Doe*, 15 Vt. 571.

So the fact that a party has received part of the consideration for his contract will not prevent his rescinding and recovering back what he paid, if the other party makes default in the material matter which furnished the real ground for entering into the contract; as, where a person paid money for stock of a corporation in consideration that he should be made a director and superintendent and be paid a salary; the mere fact that he is made a director will not prevent his rescinding and recovering back the money paid for the stock, if the corporation refuses to make him superintendent and

the plaintiffs' firm addressed a communication to the president of the defendant company, asking for an arbitration of the differences between them, under the contract, and naming a person to represent the plaintiffs' firm, and again, on March 29, 1886, made a like demand, and named an arbitrator to act for and on behalf of the plaintiffs' firm. The defendant company declined to submit the matters in difference to arbitration. The correspondence before referred to, as well as other facts shown, may be fairly said to show a fixed determination on the part of the defendant company, after June 5, 1886, to persist in and continue the same breaches of its contract in the future of which it had theretofore been guilty,—that is, to persistently pursue a course of conduct which would deprive plaintiffs' firm of much the larger portion, if not all, of the substantial benefits of the contract. If it might, at its option and will, give away one half of the weights of cars actually transferred, as it claimed the right to do, it might give them all away. If it was optional with the defendant to deliver for weighing and transfer only such cars of grain received by it from western roads for transportation east over its lines as it might choose, and divert the business from the transfer house at will, the contract ceased to be operative and binding on the defendant. Such construction, in effect, was a repudiation of that part of the contract to be kept and performed by the defendant, and was a denial of the right of the plaintiffs to have and demand the substantial benefits of the contract as it existed between the parties.

That the breaches of the contract which the evidence tends to establish were such as would justify a rescission thereof by Richards, Maynard & Co. and enable them to recover upon *quantum meruit* or *quantum valebant*, so far as they had actually performed, does not admit of question. The relief sought is not upon that principle. The law is familiar that upon rescission of the contract the recovery is confined to the value of the services, etc., rendered, and that damages for the breach, for the loss of expenditures or of profits, would not be allowable. *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168. It is well settled that where one party repudiates the contract, and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon *quantum meruit* so far as he has performed: or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and, at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose. Where, however, the injured party elects to keep the contract in force for the purpose of recovering future profits, treating the contract as repudiated by the other party, in order to such recovery the plaintiff must allege and prove performance upon his part, or a legal excuse

pay him a salary. *Seymour v. Detroit Copper & B. Rolling Mills*, 56 Mich. 117.

And where a defendant has refused to perform an essential part of an entire contract the plaintiff may treat the contract as rescinded, notwithstanding a partial performance by defendant, if he can be placed in as good a situation as before. *Luey v. Bundy*, 9 N. H. 298, 32 Am. Dec. 350.

There is a class of cases of which *Dula v. Cowles*, 2 Jones, L. 454, and *White v. Brown*, Id. 408, are examples, in which one who has undertaken to perform an entire contract after finishing part of it abandons it, and the courts have not permitted him to recover for what he has done, in which there is an appearance of giving the other party the right to retain what he has received without paying for it; but in these cases there is really no question of rescission on the part of the defendant. He in fact only remains in a passive position and is given the advantage because the party in default is not permitted to maintain an action.

d. Partial performance.

Closely allied to the cases set out in the last subdivision, and yet for the most part decided on a different ground, are those which have been partially performed and in which rescission is denied for that reason.

It is not every partial failure or refusal to comply with the terms of a contract by one party which will entitle the other party to abandon the contract at once. In order to justify an abandonment of it and of the proper remedy growing out of it, the failure of the opposite party must be a total one,—the object of the contract must have been defeated or rendered unattainable by his misconduct or default. For partial derelictions and nonperform-

ance in matters not necessarily of first importance to the accomplishment of the object of the contract the party injured must seek his remedy upon the stipulations of the contract itself. *Selby v. Hutchinson*, 9 Ill. 319; *Bloomington Electric Light Co. v. Radbourn*, 56 Ill. App. 165.

The contract cannot be put an end to if the refusal to perform is but partial for which there may be compensation in damages. *Desha v. Robinson*, 17 Ark. 228; *Gatlin v. Wilcox*, 26 Ark. 309.

A party cannot rescind if the failure of the other party be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also the other party his action for damages for the part not performed. Generally no contract can be rescinded by one of the parties, unless both can be restored to the condition in which they were when the contract was made; if, therefore, one of the parties has derived an advantage from a partial performance he cannot hold this and consider the contract rescinded because of the nonperformance of the residue, but must do all the contract obliges him to do and seek his remedy in damages. *Burge v. Cedar Rapids & M. R. R. Co.* 32 Iowa, 101.

If the failure of one party to the contract be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also the other party his action for damages for the part not performed, such failure will not warrant the party having the right to complain in refusing afterwards to proceed with the performance of the agreement, unless a failure to complete performance on the part of one party shall have been made a condition for the subsequent performance of the obligations resting on the party entitled to receive the benefit of the precedent performance. *Ebling v. Bauer*, 17 N. Y. Week. Dig. 467.

for nonperformance. As said by Lord Coleridge in *Frost v. Burr*, L. R. 9 C. P. 208: "In cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether refuse performance of the contract." His lordship then adds: "I say this in order to explain the ground upon which I think the decision in these cases must rest. There has been some conflict among them. But I think it may be taken that the fair result of them is as I have stated, viz., that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

It is insisted by appellant that, to authorize one party to treat the contract as renounced and abandoned by the other, the breach must have been such, in effect, as to prevent performance by the injured party, or render the further execution of the contract by him impossible. It appears to be the theory of counsel for appellant that, in order to entitle the plaintiff to recover future profits under the contract, the breach by the defendant must have been of a condition precedent to be performed on its part, and which rendered the contract incapable of execution by the other, or some act or conduct on the part of the defendant amounting to a physical obstruction or prevention of performance by the plaintiff. This contention does not commend itself either upon considerations of good conscience or con-

venience, and it will be found not to be sustained by the weight of authority. It would seem to be inequitable, and promotive of no good purpose, to require a party to continue in the performance of a contract, notwithstanding the refusal of the other party to be longer bound by it. The effect in many cases must be great loss to the plaintiff, without any corresponding benefit to the defendant. Or if it be ultimately held that the plaintiff is entitled to recover his expenditures, and for his labor in performing, the amount to be paid by the defendant will be greatly enhanced, while the plaintiff would, of necessity, take the hazard of increased loss in the event of the defendant's insolvency. It would seem to be reasonable and just, upon the repudiation of the contract by one party, that the other be held justified in ceasing performance, stopping expenditure, and thus curtailing the damages which the other party would be ultimately liable to pay, and to permit recovery once for all of the damages that the injured party will sustain by the non-performance of the other party; the *locus penitentis* being kept open until the injured party elects to treat the contract as abandoned by the other, and brings suit as for nonperformance. While the decision should not be made to rest upon grounds of convenience to the parties, however just and equitable, (which, in view of the decided cases, need not be done), yet the defendant should not be heard to complain, if, after acts and declarations evincing a clear determination to be no longer bound by or to perform the contract on his part, the other party treats it as

In *Phillips v. Bruce*, Anthon, N. P. 59, in which the contract was for the sale of fish which defendant refused to pay for because not of the quality bought, the court says: "The defendants could only have rescinded the contract in the event of a total departure from it on the part of the plaintiff."

A contract for the purchase of forty-five lots in different parts of the city is not dissolved by failure of title to part of them which are not essential to the enjoyment of the others. *Stoddart v. Smith*, 8 Binn. 265.

Where the contract was to take by boat two loads of wood from one place to another, and in case a full load could not be taken out of the creek upon the banks of which the wood was piled, the owner was to complete the load at a certain wharf, the court held that the owner's refusal to complete the first load did not absolve the boatman from going back after the second, but that his remedy was by action for breach of the contract. The court says: "The owner's engagement did not go to the whole of the consideration or matter to be done by the boatman; he could transport the principal portion of the wood if the owner failed to perform on his side." *Keenan v. Brown*, 21 Vt. 38.

In *Filleul v. Armstrong*, 7 Ad. & El. 557, W. W. & D. 616, 2 Nev. & P. 406, 1 Jur. 821, in which one who had undertaken to teach French in defendant's school did not return immediately at the close of a vacation, because of which the employer assumed the right to rescind the contract, it is stated that it is not shown that the business of the school was interfered with by the absence, and that, even as between master and servant, the facts did not entitle the defendant to put an end to the contract. No material misconduct is shown nor any failure "amounting to a dissolution of the engagement."

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The rule that where there is only a partial failure of performance by one party, for which there may be a compensation in damages, the contract cannot be rescinded by the other, was applied to a case where one of the parties agreed, in consideration that the other should pay certain of his debts, to repay him a certain amount each quarter, with the further agreement that of the sum paid a small part should be applied in a certain way; and it was held that payment cannot be refused because from one payment the application was not made as agreed. *Franklin v. Miller*, 4 Ad. & El. 599.

In *Brandt v. Lawrence*, L. R. 1 Q. B. Div. 344, 46 L. J. Q. B. 237, 24 Week Rep. 749, where there was a contract for oats to be shipped by steamer or steamers within a certain time, the court held that the purchaser was bound to accept all that was shipped in time, although a part of the entire amount was late.

But if the part of the contract that has failed to be so essential to the residue that it cannot be reasonably supposed the purchaser would have made the contract without it, the contract is dissolved *in toto*. *Graver v. Scott*, 80 Pa. 88.

IV. Party seeking to rescind must not be in default.

The party who claims to rescind a contract must show that he has done all that he is required to do in order to entitle himself to a performance of it by the other party. *Webb v. Stone*, 24 N. H. 238.

As a general thing a contract cannot be rescinded by a party to it unless he is in a position to demand specific performance. *Hale v. Cravener*, 128 Ill. 409.

A person in default cannot complain of the other party's default. *Stewart v. Many*, 7 Ill. App. 508.

If a vendee wishes by a rescission to put an end to the contract he must himself be active to perform, or at least offer to perform, the contract on

abandoned by him. As said in *Frost v. Knight*, L. R. 7 Exch. 111: "It is obvious that such a course must lead to the convenience of both parties, and, though we should be unwilling to found our opinion upon ground of convenience alone, yet the latter tends strongly to support the view that such an action ought to be admitted and upheld. By acting upon such notice of the intention of the promisor, and taking timely measures, the promisee may in many cases avert, or at all events materially lessen, the injurious effects which would otherwise flow from the nonfulfilment of the contract." See also *Hoemer v. Wilson*, 7 Mich. 804, 74 Am. Dec. 716, cases *infra*. The right of the plaintiff to have kept his transfer house in operation, and to have been ready at all times to perform on his part, and, under the construction of the contract given in *Lake Shore & M. S. R. Co. v. Richards*, *supra*, to have recovered from time to time his damages for breaches thereof, or, at the end of the time, sued to recover damages for all breaches, is not questioned in this proceeding. The plaintiff, however, in good conscience, while seeking to recover what he is entitled to under the contract, should do that which would be of least injury to the defendant. And if the defendant had repudiated the contract, so as to deprive the plaintiff of the substantial benefits arising from performance, it ought not to complain that a course was pursued least prejudicial to it.

The question here presented has not been directly involved in any of the cases heretofore considered by the court. In the cases of

Fox v. Kitton, 19 Ill. 519; *McPherson v. Walker*, 40 Ill. 871; *Chamber of Commerce of Chicago v. Solitt*, 43 Ill. 528; *Follanabes v. Adams*, 86 Ill. 14; and *Kadish v. Young*, 108 Ill. 170; 43 Am. Rep. 548,—the questions involved were determined upon principles analogous, in some respects, to those which must control in this case. In *Kadish v. Young*, *supra*, a contract was made for the future delivery of grain. On the day succeeding the making of the contract the purchasers gave notice to the seller that they would not be bound by it, and the question was whether such notice created a breach of the contract, and imposed on the seller the obligation to resell the barley on the market, or make a forward contract for the purchase of other grain of like amount and time of delivery, within reasonable time after the notice, and, if he sold, to credit the purchaser with the amount of the sale, or give him the benefit of such forward contract; or whether, notwithstanding the notice, the seller had the legal right to wait until the day of delivery under the contract, and then resell and charge the purchaser with the difference. And it was held that the seller was not bound to act upon the notice, but was entitled, notwithstanding, to tender, etc., on the day for delivery fixed by the contract. In the opinion, by the late Mr Justice Scholfield, the authorities were reviewed, and the cases of *Cort v. Ambergate, N. B. & E. Junction R. Co.* 6 Eng. L. & Eq. 230; *Hochster v. De Latour*, 20 Eng. L. & Eq. 157; *Frost v. Knight*, *supra*; *Roper v. Johnson*, L. R. 8 C. P. 167, 4 Moak, Eng. Rep. 397,—and other English and American

his part. *Duncan v. Jeter*, 5 Ala. 604, 39 Am. Dec. 342.

One in default cannot rescind for the default of the other party. *Grat v. Self*, 109 N. Y. 368; *Ellis v. Hoskins*, 14 Johns. 368; *Hatton v. Johnson*, 88 Pa. 219.

One who has contracted to procure for another in possession of land the patent title cannot rescind and recover possession of the land when he has never been in a position to perform on his part, while the other party has always been ready and willing to perform when he could get what he bargained for. *Johnson v. Pollock*, 58 Ill. 181.

A person first in default cannot declare the contract at an end by reason of nonperformance by the other party. *Myers v. Gross*, 59 Ill. 436.

A person who by his own default has prevented compliance by the other party cannot take advantage of the other's default and put an end to the contract. *People v. Holden*, 82 Ill. 98.

The breach of a contract will not warrant the rescission thereof by a party by whose fault it was caused. *Burris v. Shrewsbury Park, Land & Imp. Co.* 55 Mo. App. 381.

A party in default cannot terminate the contract. *Wright v. Reusens*, 128 N. Y. 298.

The party who wishes to take advantage of the default of the other party must not have been in default himself at the time. *Grandy v. McCleese*, 3 Jones, L. 142, 64 Am. Dec. 574.

One who claims to rescind a contract for the non-performance of the other party must have been ready and offered to perform on his own part. *Seymour v. Bennet*, 14 Mass. 268.

The mere fact that the seller takes the property out of the possession of the purchaser, and resells it because of the purchaser's default, will not authorize the purchaser to consider the contract rescinded so as to recover back any deposit of the

price or to resist paying any balance that may be due. *Page v. Cowasjee Eduljee*, L. R. 1 C. P. 127, 19 Jur. N. S. 381, 14 L. T. N. S. 178.

A contract for the purchase or exchange of lands may be rescinded, and the purchase money paid in advance may be recovered back, on the failure of one party to perform, even though the other party could not have performed. In an action to rescind and recover back payments, it is enough to show a breach by the party who has received the money. But not so when the action is to enforce the contract or recover damages; however positively a vendee may have refused to perform his contract, and however insufficiently the reason assigned for his refusal, he cannot be subjected to damages without showing that he would have received what he contracted for had he performed. *Bigler v. Morgan*, 77 N. Y. 813.

It is no defense to a party sued for breach of contract to transport a specified number of articles, with which he did not offer to comply, that the plaintiff did not have so large a number as specified ready for transportation. *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254.

V. Right of party rescinding to recover for what he has done.

General rules.

Every breach of a special contract by one party does not authorize the other to treat it as rescinded. But there are some breaches that do amount to an abandonment of it. There is not, perhaps, any precise rule which, when applied to the breach of a contract, certainly settles the question whether it is thereby abandoned or not, but if the act of one party be such as necessarily to prevent the other from performing on his part according to the terms of the agreement, the contract may be considered

cases, are commented upon, approved, and are held not to be in conflict with *Leigh v. Paterson*, 8 Taunt. 540; *Phillipotts v. Evans*, 5 Mees. & W. 475; *Ripley v. McClure*, 4 Exch. 344,—and other cases in which it is held that a party to a contract to be performed in the future cannot create a breach by merely giving notice that he will not perform. It will be found, upon examination of *Kadish v. Young*, that the learned writer clearly recognized the doctrine that the party receiving the notice might have acted upon it, and accepted and treated the contract as broken. In *Fox v. Kitton*, *supra*, the question was whether, when a party agrees to do an act at a future time, and, before the time for performance arrives, declares he will not keep his contract, but repudiates it, the other party may act on such declaration, and treat the contract as at an end. And on the authority of *Phillipotts v. Evans*, and *Hochster v. De Latour*, it was held that he might do so. It will be found, also, in *McPherson v. Walker* and *Chamber of Commerce of Chicago v. Sollitt*, that *Cort v. Ambergate*, *N. B. & E. Junction R. Co.*, *Hochster v. De Latour*, and other English and American cases holding the same doctrine, are cited with approval, and relied upon as sustaining the decision in those cases.

Before proceeding to an examination of the cases referred to, it is proper to notice other Illinois cases supposed to have some bearing upon the question under consideration. *Selby v. Hutchinson*, 9 Ill. 319, was a case of rescission merely. It was there said: "In order to justify an abandonment of the contract, and of the proper remedy growing

out of it, the failure of the opposite party must be a total one,—the object of the contract must have been defeated, or rendered unattainable, by" the misconduct or default of the other party. In the subsequent case of *Leopold v. Salkley*, 89 Ill. 412, 31 Am. Rep. 93, also a case of rescission, the language of *Selby v. Hutchinson* is commented upon, and it is said that case "is not understood as laying down the rule that, to justify an abandonment of a contract, the opposite party must have failed to discharge every obligation imposed on him, but simply that matters which do not go to the substance of the contract, and the failure to perform which would not render the performance of the rest a thing different in substance from what was contracted for, do not authorize an abandonment of the contract; for when the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised, the authorities all agree the party not in default may abandon the contract." It may be true that there are cases where the party would be justified in rescinding the contract, thereby putting an end to it for all purposes, where he would not be justified in treating it as renounced by the other party, which we are not called upon to decide. Yet it will be found that, under the rule as stated in these cases, as explained in the later case, the party will be entitled to recover future profits. The court, in these cases, was called upon simply to determine whether the facts there presented warranted rescission, and laid down

as rescinded by the other. His remedy in such case is on the common counts. *Wright v. Haskell*, 45 Me. 490; *Dubois v. Delaware & H. Canal Co.* 4 Wend. 285.

A refusal or neglect by one party to perform his part of a contract justifies the other in treating it as rescinded and authorizes him to sue in general *indebitatus assumpsit*. *Miller v. Thompson*, 22 Ark. 258.

A party may recover on the general counts for the partial performance of an executory contract when the other party refuses to comply with his contract. *Draper v. Randolph*, 4 Harr. (Del.) 454.

In *Planché v. Colburn*, 8 Bing. 14, 1 Moore & S. 51, 5 Car. & P. 58, it does not appear that the plaintiff expressly rescinded or abandoned the contract, except from the fact that he sued on a *quantum meruit* after the abandonment of the contract by the other party, but the court upheld his right to sue without tendering performance after abandonment by the other party.

The form of action, whether on the contract or upon the common counts, treating the contract as rescinded, may have an important effect upon the measure of damages. *Clark v. New York*, 4 N. Y. 343. But the court in that case said the question will not be gone into in this case.

If the contract has been partially executed, the plaintiff having received some substantial benefit therefrom, and if upon a verdict in his favor the parties cannot be put *in statu quo*, the count for money had and received is not in general maintainable. *American L. Ins. Co. v. McAden*, 109 Pa. 399.

There is a class of cases which allows a party to sue in general assumpsit for the part performance of a special contract, and absolves him from a further execution of it, because the other party has violated the contract or refused further to act un-

der it. These cases do not always proceed upon the notion of a strict and absolute rescission of the contract, since they often permit the partial execution of it to stand *pro tanto*. *Tyson v. Doe*, 15 Vt. 571.

Recovery of money paid.

When one party to a contract under seal refuses without right to perform his part, the other party may elect, either to sue on the contract to recover damages for the breach, or to rescind the contract and sue in assumpsit to recover back money paid under the contract for which he received no substantial benefit. *American L. Ins. Co. v. McAden*, 109 Pa. 399.

Under a contract requiring vendors to deliver oil in certain quantities on the platform of a railroad company, in case they were not ready to deliver at the times required the purchaser could refuse to accept a delivery afterwards, and recover back the money paid under a contract. *Cleveland v. Sterrett*, 70 Pa. 204.

If one who has contracted to sell property conveys it to a third person, it excuses the other contracting party from the necessity of making a tender of the purchase price and demanding a deed before bringing action to recover what he had paid. *Richards v. Allen*, 17 Me. 299.

If a party who has contracted to sell goods or chattels and received a portion of the purchase money refuses to perform, the vendee may either sue him upon the contract for damages or elect to treat it as rescinded and recover the sum advanced. *Lawrence v. Taylor*, 5 Hill, 114.

If the alleged breach be not such as to amount to a rescission by the defaulting party, and the seller takes advantage of it and disposes of the subject of the contract without any demand or offer to proceed on his part and without notice to the other

the rule applicable to such facts, without, as a matter of course, intimating a distinction between the case there being considered and cases like that under consideration here. In the case of *Palm v. Ohio & M. R. Co.* 18 Ill. 217, the question presented to the court was whether the failure to pay the consideration for the work agreed to be done, according to the terms of the contract, was such an act as would authorize the other party to treat the contract as renounced, and bring suit for future profits. And the court held that it was not. The court says: "In this case we have a contract for the manufacture and delivery of sixteen engines, each to be paid for on delivery, without any expression or intimation that the parties expected or intended that any extraordinary consequences were to follow if the money was not paid when due. All that the contract provides is that so much in money and so much in bonds shall become due upon the delivery of each engine. By its terms it simply gives the party a cause of action for that amount. . . . The contract provides for no other penalty or liability, and the law imposes no other, except, perhaps, that this violation of the contract by the defendant in failing to make the payment may justify the plaintiffs in treating the contract as rescinded." Or they could go on and complete the contract, and, at the end, recover the amount due thereunder. There was in that case no refusal to receive locomotives under the contract, nor were plaintiffs forbidden to complete it, nor was it in any way put out of their power to do so. Very many of the cases before referred to have been decided since the *Palm Case*,

which, it must be remarked, cites no authority sustaining the view of that case contended for by appellant in this case. The learned judge who wrote in the *Palm Case* says: "I have examined all the authorities referred to by counsel, and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglected to do some act without which the plaintiff could not, in the nature of things, go on with his contract. . . ." After giving instances of conditions precedent, the learned judge holds, as before said, that the failure to pay would not authorize the plaintiff to treat the contract as abandoned by the defendant, unless payment in a specified time and manner was by the contract made a condition precedent to performance by the plaintiff. The case of *Christian County v. Overholt*, 18 Ill. 223, is similar in its facts to the *Palm Case*, and is decided upon the same principle. In that case it is said: "The plaintiffs could only recover for prospective profits where they have been prevented from going on, either by some affirmative act of the defendant, as by being ordered to desist from further work, or by the omission to perform some condition precedent to the further prosecution, as to furnish or do something necessary to its further progress." The breach there alleged was a failure to pay an instalment as it fell due under the contract, and the case was disposed of upon the authority of the

party, he may be treated as wrongfully rescinding the contract on his part; and the law will then give the other party a right of action to recover back what has been paid in part performance. *Monroe v. Reynolds*, 47 Barb. 574.

Money paid in advance on a special contract may, in case of the other party's refusal to perform, be recovered back in an action for money had and received. *Wheeler v. Board*, 12 Johns. 333; *Raymond v. Beardsall*, 12 Johns. 574, 7 Am. Dec. 317.

If the vendor refuses to receive any more of the purchase money, and regains possession of the property, which he refuses to convey, the purchaser may regard the contract as rescinded and maintain an action to recover back the purchase money which he has paid. *Gillet v. Maynard*, 5 Johns. 85, 4 Am. Dec. 329.

One who has paid money in consideration of a covenant which the other party refuses to perform may disaffirm the contract and bring assumpsit to recover back the money which he has paid under the contract. *Weaver v. Bentley*, 1 Cal. 47.

If one having received money in payment of his undertaking to perform an act refuses to perform it, the other party may treat such refusal as a rescission of the contract and recover back the price he has paid. *King v. Hutchins*, 23 N. H. 561.

An absolute refusal by a party to a contract under seal at the time when the other party is not in default, to be bound by the contract, gives the latter the right to treat the contract as rescinded, and sue to recover back the money paid by him under the contract. *Ballou v. Billings*, 136 Mass. 307.

One to whom the owner of a vessel has bargained and sold, but not conveyed, a part of it, under an agreement that he shall be employed as its master and pay the balance out of his wages, may rescind

the contract and recover back the money paid upon the owner's wrongfully discharging him from his employment and taking possession of the vessel. *Moore v. Curry*, 112 Mass. 13.

Passage money paid in advance may be recovered back in case the voyage is broken up by a peril of the sea and the owner of the ship neglects to send the passenger to his destination. *Brown v. Harris*, 2 Gray. 350.

Where money is paid on an executory contract to deliver goods or transfer stock or the like in the future, and the contracting party fails to perform, it is in the election of the other party to treat the contract as rescinded and recover back the money, or to affirm the contract and recover damages for the nonperformance. And if the contract falls in part, if it is a precise and definite part capable of being ascertained by computation, a corresponding part of the purchase money may be recovered back, although the contract is in form entire. *Hill v. Rewee*, 11 Met. 263.

If there has been a rescission the parties stand to each other as though no contract had been made, and either may recover from the other advancements made. *Cromwell v. Wilkinson*, 1 Ind. 365.

If stock brokers refuse to complete their contract to carry stock for a customer, he can recover back money which he has paid on the contract. *Brewster v. Van Liew*, 20 Ill. App. 43.

If the circumstances are such that by rescinding the contract the rights of neither party are injured; if one of the contracting parties will not fulfil his part of the contract the other may rescind the contract and maintain his action for money had and received to recover back what he has paid on the faith of it. *Bellows v. Cheek*, 30 Ark. 433.

In *Ehrensperger v. Anderson*, 3 Exch. 153, 18 I. J.

Palm Case. Stress is laid by counsel upon the words, "prevented from going on." It is apparent from the language of the court, especially in the *Overholt Case*, that physical prevention was not contemplated, for the illustration given shows that at least an order to desist from the work would be a prevention, within the meaning of the term as used. While, in those cases, there was no failure to perform a condition precedent, or a legal prevention from going on with the work under the contract, which would authorize the plaintiffs to treat the contract as repudiated by the other party, and sue for prospective damages, and the court so held, still the cases clearly recognize that where there is a failure to perform a precedent condition, or there is a legal prevention of performance, by one party, the other may treat the contract as abandoned by him, and bring suit for future profits or prospective damages. The same language—*i. e.*, that the party suing must be "prevented" from performance—has been used in numerous cases, but, wherever the attention of the court has been directly called to the sense in which the word has been used, it has been held not to mean that there must be physical prevention, but that any acts, conduct, or declarations of the party evincing a clear intention to repudiate the contract, and to treat it as no longer binding, are a legal prevention of performance by the other party. Thus, in *Hosmer v. Wilson*, *supra*, it was held that an absolute refusal of the defendant to accept the manufactured article when it should be completed was to be considered

in the same light, as respects the plaintiff's remedy, as an absolute physical prevention by the defendant,—citing, in support, *Cort v. Ambergate, N. B. & E. Junction R. Co. supra*; *Derby v. Johnson*, 21 Vt. 21; *Clark v. Marsiglia*, 1 Denio, 317, 43 Am. Dec. 670; *Hochster v. De Latour*, *supra*.

In *Cort v. Ambergate, N. B. & E. Junction R. Co. supra*, the plaintiffs contracted to supply the defendants with 3,900 tons of iron chairs to be used in railway construction. They manufactured and delivered various quantities of chairs from May, 1847, until December, 1849, when the defendants informed plaintiffs that they did not want any more, and not to send any more, leaving 2,118 tons undelivered. Whereupon, plaintiffs brought suit to recover damages, including loss of profits. It was objected that, to entitle the plaintiffs to recover, they should have proved that the chairs had been made and had been tendered in the manner provided by the contract, or at least before the bringing of the suit, etc. In delivering the opinion of the court, Lord Campbell, Ch. J., said: "We are of opinion that the jury were fully justified, from the evidence, in finding that the plaintiffs were ready and willing to perform the contract although they never made and tendered the residue of the chairs. In common sense the meaning of . . . 'readiness and willingness' must be that the noncompletion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendants. What more can reasonably be required by the par-

Exch. 132, in which the question was as to the right to maintain an action for money had and received, the court says by way of argument that if a man puts money into the hands of another to purchase goods it can only be where defendant, who has received the money, has altogether refused to perform the contract or his part,—not merely delayed, but altogether refused,—so as to entitle the plaintiff to be put in the same situation as if he had altogether rescinded the contract, that the plaintiff can have a right to rescind the contract and bring an action for money had and received.

Where, upon the purchase of plows, their value is allowed to the seller in a settlement of accounts between him and the purchaser, if he refuses to deliver them the purchaser may treat the contract as rescinded, and recover back the price he has allowed for them. *Danforth v. Dewey*, 3 N. H. 79.

A distinction as to the right of plaintiff to recover back advance payments seems to be made between those cases in which the defendant rescinds for plaintiff's mere default, and those in which the contract fails because of plaintiff's absolute refusal to go on with it. In the latter case, the court in *Ketchum v. Everton*, 13 Johns. 365, 7 Am. Dec. 384, says: "It may be asserted with confidence that a party who has advanced money or done an act in part performance of an agreement, and stops short and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, has never been suffered to recover for what he has thus advanced or done. The plaintiffs are seeking to recover the money advanced on the contract, every part of which defendant has performed, as far as he could, by his own acts, when they have voluntarily and causlessly refused to proceed, and

thus have themselves rescinded the contract. It would be an alarming doctrine to hold that the plaintiffs might violate the contract and, because they chose to do so, make their own infraction of the agreement the basis of an action for money had and received."

Right to recover for services rendered.

In the note to *Cutter v. Powell*, 3 Smith, Lead. Cas. 85, it is said the next exception to the rule that no action of *indebitatus assumpsit* will lie while the special contract remains unperformed is to be found in a class of cases which establish the proposition that when one party has absolutely refused to perform the other party may rescind the contract and sue for what he has already done under it upon a *quantum meruit*.

Under a contract to clear a certain piece of land, if the owner takes away without just cause the oxen with which the work is to be done, and so puts it out of the plaintiff's power to proceed with the contract, plaintiff can recover for the labor he has performed. *Blood v. Enos*, 12 Vt. 623, 36 Am. Dec. 383.

If after a partial performance by one party, the other denies the existence of the contract, the former may consider the contract as at an end and recover for what he has done. *Moorhead v. Fry*, 24 Pa. 37.

Under a contract to publish advertisements for a price to be paid at a certain time, if the payment is not made the advertiser may discontinue the advertisements and sue for what he has published. *Ferree v. Wilson*, 46 N. Y. S. R. 672.

In *Merrill v. Ithaca & O. R. Co.* 16 Wend. 566, 30 Am. Dec. 130, where contractors for building a railroad were hindered in the performance of the work by the owners of the road, the court said

ties for whom the goods are to be manufactured?" And after showing that if, after having accepted a part, the defendants resolved not to accept the balance, the effect of compelling the plaintiffs to proceed with the manufacture and tender of them would be the enhancement of the damages the defendants would be required to pay, his lordship proceeds: "Upon the last issue, was there not evidence that the defendants refused to accept the residue of the chairs? If they had said: 'Make no more for us, for we will have nothing to do with them,'—was not that refusing to accept or receive them according to the contract? But the learned counsel for the defendants laid peculiar stress upon the words (of the plea): 'Nor did they prevent or discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract.' We consider the material part of the allegation which the last plea traverses to be that the defendants refused to receive the residue of the chairs. But, assuming that the whole must be proved, we think there is evidence to show that the defendants did prevent and discharge the plaintiffs from supplying the residue of the chairs, and from the further execution of the contract. It is contended that 'prevent,' here, must mean obstruction by physical force; and, in answer to a question from the court, we were told it would not be a preventing of delivery of goods if the purchaser were to write, in a letter to the person who ought to supply them, 'Should you come to my house to deliver

them, I will blow your brains out.' But may I not reasonably say that I was prevented from completing a contract by being desired not to complete it? Are there no means of preventing an act from being done, except by physical force or brute violence?" After reviewing and commenting upon cases cited, it is then held that the plaintiffs were entitled to a verdict "on pleas traversing allegations that they were ready and willing to perform the contract, that the defendants refused to accept the residue of the goods, and prevented and discharged the plaintiffs from manufacturing and delivering them."

Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party. And it can make no difference whether the contract has been partially performed, or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an effectual

they might have stopped and sued for a breach of covenant, but that, since they went on at largely increased expenses, they were not bound by the terms of their contract, but were entitled to recover what the work was worth.

If a contract to work a farm until the decease of the owner in consideration of a deed of the farm at that time is broken by the owner selling the farm, the other party may treat the contract as rescinded and sue for the value of his services. *Canada v. Canada*, 6 Cush. 15.

If the failure of one prevents performance by the other the latter may abandon and bring assumpsit for what he has done. *Wilson v. Bauman*, 80 Ill. 494.

Although one party is not guilty of such a failure to perform as prevents the other party from performing, the latter may abandon the contract and sue in assumpsit for what he has done under it. *Webster v. Enfield*, 10 Ill. 298.

If one who has contracted to dig and stone a well, after having partially completed it, is prevented from further work by the action of the other party in filling up the hole, he may abandon the contract and sue for the work which he has done. *Connelly v. Devos*, 87 Conn. 570.

In *Festing v. Hunt*, 6 Manitoba L. Rep. 381, the statement in the note to *Cutter v. Powell*, 28 Smith, Lead. Cas. 35, is quoted with approval that, "it is an invariably true proposition that wherever one of the parties to a special contract not under seal, has in an unqualified manner refused to perform his side of the contract, . . . the other party has thereupon a right to elect to rescind it, and may in doing so immediately sue on a *quantum meruit* for any portion thereof which he had done under it previously to the rescission."

If, in consideration of services to be rendered, a person agrees to give 240 acres of land, and while

the services are being performed he states that he will only give 100 acres, the other party may repudiate the contract and sue upon a *quantum meruit* for work and labor. *Festing v. Hunt*, *supra*.

Where an agent employed for an agreed commission to sell land finds a purchaser, after which the seller refuses to convey to him, the agent may abandon the contract and resort to an action founded on the special promise which the law would infer from such a state of facts, for his compensation. *Prickett v. Badger*, 1 C. B. N. S. 298, 28 L. J. C. P. 33, 3 Jur. N. S. 66.

There is one case which appears to be at variance with the rule followed in the preceding cases. In it the ruling was that, "under a contract to do the county printing at certain rates the printer cannot, upon the county's refusing to furnish all the printing to him, repudiate the contract and recover for what he has done upon a *quantum meruit*. But his remedy is to recover at contract rates and to sue for the damages caused by the breach of the contract." *Quigley v. Sumner County Comrs.* 24 Kan. 233.

But that ruling is placed more upon the ground that the county was not guilty of a breach of contract than on a denial to recover on a *quantum meruit* in case of a breach.

Recovery of value of property delivered.

If property has been delivered or money paid under an executory contract which the other party refuses to perform either wholly or in an essential part, the injured party may either sue for a breach of the contract or treat it as rescinded and sue for the value of the property delivered. *Drew v. Claggett*, 30 N. H. 431; *Brown v. Mahurin*, Id. 161; *Pierce v. Duncan*, 22 N. H. 18; *Fuller v. Little*, 7 N. H. 535; *Randlet v. Herren*, 30 N. H. 102.

Upon the sale of property for notes which were

renunciation of the contract; for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract. *Kadish v. Young, supra*. As said by Bowen, L. J., in *Johnstone v. Milling*, L. R. 16 Q. B. Div. 460: "Its real operation appears to be to give the promisee the right of electing either to treat the declaration as *brutum fulmen*, and holding fast to the contract to wait till the time for its performance has arrived, or to act upon it, and treat it as a final assertion by the promisor that he is no longer bound by the contract, and a wrongful renunciation of the contractual relation into which he has entered. . . . If he does so elect, it becomes a breach of contract, and he can recover upon it as such." Upon the election to treat the renunciation, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be regarded as then culminating, and the contractual relation ceases to exist, except for the purpose of maintaining the action for the recovery of damages.

These views are amply sustained by numerous decided cases. In *Hochster v. De Latour*, 20 Eng. L. & Eq. 157, the plaintiff contracted to enter into the service of the defendant, as a courier, and in such capacity attend him in travels about the continent of Europe, the service to begin on June 1, and continue for at least three months, at fixed monthly wages. But before the 1st of June, although the plaintiff was ready and willing to perform, the defendant renounced the contract, and signified his determination to the

plaintiff no longer to be bound by it; and the plaintiff, before the time for performance had arrived, brought assumpsit to recover his damages for the breach. It is there said that "it is surely much more rational, and more for the benefit of both parties, that after the renunciation of the agreement by the defendant the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. . . . The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of the option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer." And it was then held that, after the defendant had signified his determination not to be bound by the contract, the plaintiff was entitled to bring his action immediately, and was not obliged to wait until after the day for the performance to begin had arrived. In *Frost v. Knight, supra*, the defendant had promised to marry the plaintiff upon the death of his father. While his father was still living, he repudiated the engagement, and announced his intention not to fulfil his promise. The plaintiff, without waiting for the death of the father, at once

to be indorsed by the purchaser, the seller, after having delivered a part of the property, may rescind the contract and recover the value of the property delivered upon the purchaser's refusing to indorse the notes. *Hayden v. Reynolds*, 54 Iowa, 157.

If one who has performed a part of his contract is prevented from completing it by the failure of the other party, he may abandon it and recover for what he has done. *Hoagland v. Moore*, 2 Blackf. 167.

In that case it appears that certain hogs and corn were to be sold for a certain amount cash and notes, and after some were delivered and a demand was made for the cash, it was refused and the court held that the seller was justified in considering the special contract at an end and that he might recover the value of what he had delivered under it.

If articles are delivered in satisfaction of a debt, and the creditor afterwards recovers judgment for the whole debt, the debtor may treat the contract as rescinded and recover the value of the articles delivered. *Snow v. Prescott*, 12 N. H. 535, overruling *Tilton v. Gordon*, 1 N. H. 83.

Under a contract for lumber for a raft, if after a part has been delivered the purchaser declines any more, the seller is excused from further delivery and may recover for what he has delivered. *Stewart v. Short*, 130 Pa. 385.

V L. Right to abandon performance and recover for breach.

a. Performance excused.

In *Skinner v. Tinker*, 34 Barb. 333, in which the action was for refusal to enter into a partnership, where it appeared that plaintiff was notified that defendant would not enter into the agreement, whereupon he did not go to the stipulated place, but began his action for damages, the court said performance by plaintiff was unnecessary because

defendant had given notice of his determination not to complete the partnership. The plaintiff was then entitled to damages, if any were sustained, up to that time, but not to prospective damages.

If a contract is wrongfully terminated by one party, the other is entitled to recover for a breach thereof without showing that he continued to be ready and willing to perform his part after such termination; as, where plaintiff was to make boxes for defendant out of material to be furnished by the latter, and before the time limited by the contract expired defendant refused to furnish any more material and said there was no more work, plaintiff to recover for breach need not show that he continued ready to perform on his part. *Bond v. Carpenter*, 15 R. I. 440.

The refusal by one party will dispense with a tender by the other. *Grandy v. Small*, 5 Jones, L. 51; *Abrams v. Suttles*, *Busbee*, L. 99; *Shaw v. Grandy*, 5 Jones, L. 57.

Where the contract was for the production of an opera the court held that the writer was entitled to a judgment for the amount fixed by the contract in lieu of royalties in case the opera was not produced by a given time, although he did not tender the complete score, where before his default the defendant had announced positively that he would not produce the opera. *Thorne v. French*, 4 Misc. 426.

Where the contract obligated plaintiff to deliver to defendant 400,000 bricks, and when a cargo containing part of them was delivered defendant refused without adequate cause to receive them, the court held that the plaintiff was not required to tender the whole 400,000 in order to put defendant in default, but that he was entitled to treat the contract as broken and bring the action immediately. *Canda v. Wick*, 100 N. Y. 127.

Under a contract to purchase malt at the rate of

brought her action to recover damage for the breach. And the court there says: "The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance. But in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." The case of *Freeth v. Burr*, *supra*, already quoted from, is an instructive case, and fully sustains *Hochster v. De Latour*, and other cases of like tenor before cited. It is there said that the test of whether there is a renunciation or not is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract." In *Mercy Steel & Iron Co. v. Naylor*, L. R. 9 Q. B. Div. 648, Jessel, M. R., reaffirms and

approves the doctrine of *Freeth v. Burr*, and holds that the question of whether there has been a renunciation of the contract by the defendant is a question of fact, to be determined by the consideration of the nature of the breach, and the circumstances under which it occurred. The case, however, went off upon the holding that the circumstances were not sufficient to evince a determination on the part of the defendant to put an end to the contract, and to be no longer bound by it. The decision was affirmed by the House of Lords on appeal, Lord Selbourne there saying: "You must look at the actual circumstances of the case, in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation,—to an absolute refusal to perform the contract,—such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary, in the present case, than to look at the conduct of the parties, and see whether anything of that kind has taken place here." *Mercy Steel & Iron Co. v. Naylor*, 9 App. Cas. 438. See also *Roper v. Johnson*, L. R. 8 C. P. 167; *Es parte Stapleton*, L. R. 10 Ch. Div. 586; *Planché v. Colburn*, 8 Bing. 14; *Danube & B. S. Railway & Kusterje Harbour Co. v. Xenos*, 13 C. B. N. S. 825.

The principle seems to have found general recognition by the courts of this country, a few only of which need be noticed. In *Mas-*

1,000 bushels per month, if the purchaser after accepting some of the deliveries absolutely refuses to accept any more, the sellers are not required to set apart the necessary quantity each month to entitle themselves to maintain an action for the damages caused by the breach. *Haines v. Tucker*, 50 N. H. 308.

If one of the parties to a contract absents himself from the place of performance under such circumstances that it is evident he does not intend to complete his agreement, the other party may sue for a breach without completing all preparations for the performance on his part, if he was at the time ready and willing to perform. *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180, 26 Conn. 110.

Upon refusal of the defendant to accept articles to be manufactured for it by plaintiff, plaintiff need not complete the manufacture and tender them before suing for the damages. *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967.

In *Jones v. Barkley*, 2 Dougl. 689, where the contract was to assign certain bank stock, plaintiff pleaded that he was ready and willing to execute and deliver a general release and tendered a draft, but defendant absolutely discharged him from executing it. Defendant pleaded that the assignment was not executed, and the court said: "The party must show that he is ready; but if the other stops him on the ground of an intention not to perform on his part, it is not necessary for the first to go further and do a negatory act."

If one of the parties to the contract seeks to recover without having performed his obligation, he must show that he was ready and willing to perform, and that defendant had notice of it, notwithstanding which defendant refused to carry out his part of the agreement. *Doogood v. Rose*, 9 C. B. 132, 30 L. R. A.

The vendee must tender the unpaid purchase money as a general thing, whether he wishes to rescind or enforce the agreement. *Irvin v. Bleakley*, 67 Pa. 24.

If the covenants are independent plaintiff need not allege performance on his part in order to recover for defendant's breach; but in case plaintiff's covenants were all to be performed prior to the performance by defendant, he must allege performance in order to recover. *Gallup v. Burnell*, *Brayton* (Vt.) 191.

b. Recovery for breach.

There are cases, of which *Rawson v. Johnson*, 1 East, 203, is an example, in which the question has been discussed as to the duty of averring performance or readiness to perform in order to maintain an action for breach by the other party. Such cases can throw no light upon the question here under discussion because the court was not considering the right of rescission or abandonment and not having such question in mind of course its ruling could not be made authority upon the question.

Where a party to a mining lease disables himself from performing his covenants the owner of the land may treat the contract as rescinded and claim damages for the entire breach. *Keek v. Heber*, 1 Pa. Adv. R. 671.

There are numerous cases in which the party performing on his part may terminate the contract as to the future and still hold the delinquent party for its performance up to the time of its termination. *Hurst v. Trow Printing & R. Co.* 2 Misc. 381. Refusal to accept goods sold is a breach which gives an action for damages. *Cahen v. Platt*, 69 N. Y. 848, 25 Am. Rep. 206.

Where, during the process of constructing an en-

terton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 88, the plaintiffs undertook and partially performed their contract with defendants to furnish material, etc., for the construction of the city hall. By order of the defendants, the work was indefinitely suspended, and the plaintiffs brought suit to recover damages, including future profits. The principle announced in the English cases before noted is approved. Beardsley, J., there said: "The party who is ready to perform is entitled to full indemnity for the loss of his contract. He should not be made to suffer by the delinquency of the other party, but ought to recover precisely what he would have made by performance. This is as sound in morals as it is in law. . . . The plaintiffs were not bound to wait till the period had elapsed for the complete performance of the agreement, nor to make successive offers of performance, in order to recover all their damages. They might regard the contract as broken up, so far as to absolve them from making further efforts to perform, and give them a right to recover full damages as for a total breach." The case of *Hoemer v. Wilson* has been already cited. In *Derby v. Johnson*, *supra*, after holding that, by the order of the defendants to discontinue the work, the plaintiffs were prevented from further performance, it is said: "The plaintiffs might, in addition, in another form of action, have recovered their damages for being prevented from completing the whole work. In making these claims the plaintiffs would be acting upon the contract as still subsisting and binding, and they might well do so, for it

doubtless continued binding on the defendants." In *Hinckley v. Pittsburgh Bessemer Steel Co.* 121 U. S. 264, 30 L. ed. 967, the defendant agreed to purchase from the plaintiff steel rails, to be drilled as the defendant might direct. The defendant refused to give the directions, and at his instance the rolling of the rails was postponed until after the time of delivery, when the defendant refused to accept any rails under the contract. It was there said: "The defendant contends that the plaintiff should have manufactured the rails and tendered them to the defendant, and, upon his refusal to accept and pay for them, should have sold them in the market at Chicago, and held the defendant responsible for the difference between what they would have brought on such sale and the contract price. But we think no such rule is applicable to this case. This was a contract for the manufacture of an article, and not for the sale of an existing article. By reason of the facts found as to the conduct and action of the defendant, the plaintiff was excused from actually manufacturing the rails and the rule of damages applicable to the case of the refusal of a purchaser to take an existing article is not applicable to a case like the present." In *Haines v. Trucker*, 50 N. H. 307, the defendants agreed to purchase of the plaintiffs 5,000 bushels of malt, and to receive and pay for the same at the rate of 1,000 bushels per month. Although plaintiffs were prepared to deliver the 1,000 bushels per month, the defendants called for and received less than 1,000 bushels during the first three months. The plaintiffs informed de-

fine which has been ordered, the order is countermanded, the manufacturer may treat the countermand as a breach of the contract, stop work on the engine, and bring an immediate action for damages caused to him by defendant's breach. *Hoemer v. Wilson*, 7 Mich. 304, 74 Am. Dec. 718.

Under a contract to furnish oats to the government, the court says: "This testimony clearly shows that the government rejected oats for its own convenience, and that the claimant was not in fault for nondelivery. The refusal of the government to receive merchantable oats within the life of the contract when offered . . . at different times and in such quantities that they might have been disposed of conveniently if there had been any disposition to do so, will excuse the claimant from any obligation under the contract on his part. . . . The claimant was ready but could not perform because the government would not permit him; he was not bound under continuing obligation to, and any reasonable offer and improper refusal put an end to the contract." *Gibbon v. United States*, 2 Ct. Cl. 421.

A case which has some bearing on this question, although the discussion did not turn directly on the right to rescind or abandon, is *Cort v. Ambergate*, N. B. & E. J. R. Co. 17 Q. B. 127, 20 L. J. Q. B. N. S. 460, 6 Eng. L. & Eq. 230, 15 Jur. 877. In that case plaintiff had contracted to manufacture some chairs for defendant. Before they were all completed defendant notified plaintiff not to make any more as defendant would not accept them if they were tendered. Plaintiff then brought suit for breach of the contract without completing the chairs, but alleging its readiness and willingness to complete them. The contention was that there could be no readiness or willingness unless they were actually completed and tendered. The court

held that where there is an executory contract for the manufacture and supply of goods from time to time to be paid for after delivery, if the purchaser having accepted and paid for a portion of the goods contracted for gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract may, without manufacturing or tendering the rest of the goods, maintain an action against the purchaser for breach of the contract.

Under an agreement to give certain property in consideration of the cultivation of certain other property for a certain time, if the one making the agreement gives written notice that he will not be bound by the agreement while the other party is not in default, and thereupon the other surrenders possession of the property, a suit may be immediately brought for the breach without waiting for the time to arrive when the performance was to be consummated. *Remy v. Olds*, 88 Cal. 537.

A distinction must here be made between a rescission and an abandonment of the contract. It is held that in case the contract is rescinded no action can be maintained on it. But the injured party may abandon performance on his part and recover his damages so that the contract is the same as rescinded so far as his obligation is concerned, and at the same time his remedy is preserved.

A party cannot rescind a contract and then insist on damages for failure by the other party to perform. *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158.

In *United States v. Behan*, 110 U. S. 338, 28 L. ed. 163, the court, in discussing the question of measure of damages in case of a breach of contract by the other party, assumes that there is a right to rescind on the part of the injured party, saying:

defendants that they were prepared to furnish the malt according to the terms of the contract, and requested them to receive the same at the rate of 1,000 bushels per month, which the defendants refused to do. The undelivered malt not utilized by plaintiffs themselves was sold on the market, and plaintiffs brought assumpsit against the defendants to recover damages for a breach of the contract. And it was there held, following *Cort v. Ambergate, N. B. & E. Junction R. Co.*, *supra*, and other cases, that the conduct of the defendants amounted to an unqualified renunciation of the contract, and that after such renunciation it was no longer necessary that the plaintiffs should hold themselves in readiness to perform, or to go to the trouble and expense of offering what had already been refused. In *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180, the doctrine as announced in *Cort v. Ambergate N. B. & E. Junction R. Co.*, was approved and followed, and again reaffirmed in the same case. 26 Conn. 110. In these cases the holding was that, under a contract containing mutual and dependent covenants, a refusal on the part of the defendant to perform obviated the necessity of performance, or tender of performance, on the part of the plaintiff, after such refusal. See also, *United States v. Behan*, *supra*; *Crabtree v. Messersmith*, 19 Iowa, 179; *Holloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 208; *Dugan v. Anderson*, 36 Md. 567, 11 Am. Rep. 509; *Burtis v. Thompson*, 42 N. Y. 246, 1 Am. Rep. 516; *Howard v. Daly*, 61 N. Y. 362, 19 Am. Rep. 285; *Smoot's Case*, 82 U. S. 15 Wall. 86, 21 L. ed. 107; *Dingley v.*

Oler, 117 U. S. 508, 29 L. ed. 988; *Mountjoy v. Metzger* (Pa.) 12 Am. L. Reg. N. S. 442.

It follows that, upon principle and authority, we are of opinion that instructions 2 and 3, when considered together, as they must be, announced the law to the jury correctly. The objection that the jury were thereby left to determine what were the "substantial provisions of the contract" is, in view of the course of the trial and facts proved, obviated by the instructions 7, 12, 13, 16, and 17, given for appellant. By the 7th, as will be observed, the jury were told that, if the defendant committed breaches still, if they did not defeat the substantial objects of the contract, or render it unattainable by proper performance on the part of Richards, Maynard & Co., then the plaintiff could not recover. By the 12th they were told that the mere failure or refusal of the defendant to pay the plaintiff or his firm any sum of money demanded and claimed to be due on account of services rendered under the contract could not be construed as an abandonment of the contract by the defendant, such as would entitle the plaintiff or his firm to maintain the present action. By the 16th the jury were told, as a matter of law, that, to entitle the plaintiff to recover in this case, it was necessary for him to establish, by a preponderance of the evidence, that he and Richards, Maynard & Co. were, by the acts of the defendant, prevented from performance of said contract on their part, etc. By the 17th they are again told that a failure to pay money due and owing to the plaintiff under the contract was not such an act or omission, in itself, on the

"When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of it, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*." Further it is said: "It is to be observed that when it is said in some of the books, that where one party puts an end to the contract the other cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*, this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But surely, the wilful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged."

c. Lost profits as damages.

There may be cases where the action of one party to a contract will be such as to constitute a defense to the other party, when sued, for a failure to perform, and yet not sufficient to authorize the latter to abandon the contract himself, and as plaintiff to entitle him to receive profits which he would have made if it had been fully performed. 30 L. R. A.

Armstrong v. St. Paul & P. Coal & I. Co. 45 Minn. 113, 118.

If corn is to be delivered in quantities from time to time within forty-five days, and a quantity to be delivered is not taken, the seller need not bring all the corn to the point of delivery, but may abandon the contract and sue for the loss of profits. *Hughes v. United States*, 4 Ct. Cl. 64.

Where plaintiff contracted to paint ten houses and defendant only furnished four, and then plaintiff sued for the value of the work put upon the four, the court said: If the contract was terminated against the will of the plaintiff he could have sued for a breach thereof, and recovered as damages the profits he would have made if allowed to complete the work; or he could at his election have waived the contract, treated it as rescinded, and brought an action on the common count for work and labor generally, and recovered whatever the work done was actually worth. As he has treated the contract as rescinded, and brought this action for work and labor generally, he could recover what such work was actually worth, provided the contract was entire. If, on the other hand, it was separable, or divisible, for the houses finished, he would be entitled to the contract price, and for those not finished damages to the amount of the profits he would have made if allowed to complete them. *Dibol v. Minott*, 9 Iowa, 403.

If one who has contracted to get out logs is prevented by the fault of the other party from completing his contract, he is entitled to recover the contract price for the logs actually delivered and profits on what he was prevented from delivering, as well as the extra expense to which he was put by defendant's default. *Salvo v. Duncan*, 40 Wis. 151; *Wood v. Schettler*, 23 Wis. 501.

One who has contracted to haul logs out of the

part of the defendant, as would prevent the plaintiff from completing the contract. And by the 13th instruction given on behalf of the defendant the jury were told that if they believe from the evidence that the plaintiffs' firm closed their transfer house for the reasons stated in their letter of June 11, 1886, to Mr. Amsden, namely, for refusal to pay their claim of \$2,592.95, and their account for the month of May, 1886, "and for no other reason," then the plaintiff could not recover, and the verdict must be for defendant. So, by the 11th instruction given on behalf of defendant, the jury were told that, in determining whether the damages arising from any breach of the contract by the defendant can be ascertained and compensated for, they were not to take into consideration any refusal of the defendant to submit any differences between it and Richards, Maynard & Co. to arbitration; that the refusal to submit matters in dispute to arbitration was not such a breach of the terms of the contract as to warrant a recovery for such breach. It seems clear, therefore, under the facts proved, that the question submitted to the jury was whether the acts and conduct of the defendant showed a fixed determination to be no longer bound by the substantial provisions of the contract upon its part. As already seen, the consideration moving to Richards, Maynard & Co. for entering into the contract was the stipulation, on defendant's behalf, to deliver, to be weighed and transferred through their house, all grain received by it from western roads, to be transported east over its lines, that it could control; and that

practically the only benefit to be derived by Richards, Maynard & Co. from the contract was by the sale of weights of grain thus transferred. The evidence tended to show that the railroad company had repudiated its liability to perform this part of its contract, and its duty, under the contract, to use the weights derived from the plaintiffs' firm only in billing the grain to destination, but gave the same away, so as to deprive plaintiffs' firm of the profits it would derive by the sale of such weights.

From what has preceded, no extended discussion will be necessary of the point made, that there was a variance between the special count of the declaration and proof. It was alleged "that on the 16th day of June, 1886, the defendant abandoned the contract on its part, neglected and refused to perform the same, and refused, without any reasonable or just cause, to be bound by the same," etc. As already shown, the effect of the position taken by, and the conduct of, appellant, was a denial of its obligation to perform the substantial parts of the contract on its part.

In connection with this point, it will be proper to notice the contention that in the suit brought June 5, 1886, before referred to, the plaintiff recovered damages for all the breaches of the contract up to the bringing of that suit, and that therefore such breaches, being merged in the judgment in that cause, could not subsequently be made the occasion, by Richards, Maynard & Co., for treating the contract as abandoned by appellant. In bringing that suit the plaintiff undoubtedly

timber is justified in abandoning the contract and suing for loss of profits if the owner does not comply with his contract to furnish a road until the season has so far advanced that the contract cannot be completed during it. *Corbett v. Anderson*, 85 Wis. 218.

If a boarder leaves his boarding house in violation of the terms of his contract, the landlord need not make a subsequent tender of performance, but may treat the contract as abandoned, and sue for loss of profits occasioned by the breach. *Crane v. Powell*, 46 N. Y. R. 668.

If one who has undertaken to manufacture machines absolutely refuses to continue with his contract the other party is absolved from the duty of giving further notice of readiness to deliver, but may recover pay for the machines not taken. *Robinson v. Frank*, 107 N. Y. 655.

A party who has contracted to furnish marble for a building, but who is prevented from furnishing it by the refusal of the other party to complete his contract, may recover the profits which he lost by the latter's refusal. *Masterton v. Brooklyn*, 7 Hill, 61, 42 Am. Dec. 38.

In *Wolcott v. Mount*, 36 N. J. L. 263, 13 Am. Rep. 438, the court says in argument that if an executory contract is put an end to by the refusal of the one party to complete it, for such breach the other party may recover such profits as would have accrued to him as the direct and immediate result of the performance of the contract.

Repeated defaults on the part of the owner of property to make payments to one who has contracted to do work on it will authorize the latter to abandon the work and recover the profits he would have made had he been permitted to finish it. *Grand Rapids & B. C. R. Co. v. Van Dusen*, 29 Mich. 431.

30 L. R. A.

Upon the absolute refusal of the purchaser to take any more of the goods to be furnished, the seller may treat the contract as broken and sue for the damages he has then sustained, but he cannot hold the purchaser for the price of the goods unless he keeps himself ready to deliver them according to the terms of the contract. *Collins v. Delaporte*, 115 Mass. 162.

One who has contracted to take down the trusses and spars of a building may abandon the work and sue for lost profits if the owner by reason of changes in the building makes it unsafe to work there, so that the contract cannot be fulfilled. *Lynch v. Seilers*, 41 La. Ann. 375, 5 L. R. A. 682.

The distinction appears to be this, that in order to justify a recovery of lost profits the conduct of the defaulting party must have been such as to amount to a prevention of further performance.

Failure to pay an instalment of the contract price when it is due will give a right to sue for what has been done, but will not give a right to abandon the contract and sue for a loss of profits. Loss of profits can only be sued for in case the default of the other party operates as a denial of the right to proceed and complete the work contracted for. *Moore v. Taylor*, 42 Hun. 45.

If payments by a city to its contractor are stopped because the funds applicable to work are exhausted, the contractor cannot suspend work and recover lost profits, although he might sue for what was then due. *Drhew v. Altoona*, 121 Pa. 401.

In *Lake Shore & M. S. R. Co. v. Richards*, 40 Ill. App. 580, the appellate court said: "We have no doubt that the conduct which will justify a party in abandoning a contract and entitle him to recover, not only for the work he has done, but for the profits he can prove he would have made had the contract gone on, must be such as in effect prevents

treated the contract as subsisting, and had not then elected to treat it as abandoned by the defendant, and to sue for prospective damages. The suit was brought, and recovery had for actual breaches to the time of bringing it. We are not required to determine the question thus presented. If it should be conceded that the plaintiff's claim in bringing that action is inconsistent with his right to show such breaches in this proceeding, it could not affect the result. Subsequently to the bringing of that action, as already shown, the railroad company refused to recede from its previous position, both in respect of its obligation under the contract to deliver cars to Richards, Maynard & Co., and to observe its contract in respect of the use to be made of the weights. And the evidence tends to show that at the time Richards, Maynard & Co. closed their transfer house, appellant was denying its liability under the contract, and evinced a clear intention not to be bound by its provisions.

It is urged, however, that there was here only a partial breach, arising from a difference in the construction of the contract, and that there was at no time a repudiation or renunciation of the contract by appellant,—that it was at all times desirous of keeping it in force, and performing it. These are, as a matter of course, questions of fact, which are conclusively settled by the judgment of the appellate court. But in view of the instructions asked and refused, which sought to take the case from the jury, it may be remarked that the evidence tended to show a repudiation by the railway company of the

substantial provisions of the contract, which formed the consideration for the execution of it by plaintiffs' firm. It was not enough, to show that there was no repudiation of the contract obligation by the appellant, to prove that appellant was furnishing some cars to be transferred through plaintiffs' transfer house, whereby plaintiff was partially receiving the benefits he claimed under the contract. The correspondence between the parties before and after the 5th of June, 1886, shows that appellant was not delivering cars of grain to be transferred through the transfer house because it recognized any obligation on its part to do so, but claimed, and acted on such claim, that it was only bound to deliver such cars as it saw proper. In other words, it refused to be bound by the provision of the contract requiring it to deliver cars to plaintiffs' firm. Under the construction of the contract upon which it had acted, and was proposing to continue to act, it was under no obligation to deliver any cars to be transferred by plaintiffs' firm, thus absolutely repudiating its contract liability to do so. True, it had not altogether ceased to deliver some cars to be thus transferred, but they were not delivered because of any contract liability to do it, but at their convenience and option. Its persistence in this course of conduct had been shown by its repeated refusal to submit the matters in dispute to arbitration under the contract. The president of the company wrote, in reply to the demand of plaintiffs' firm for arbitration, "I have to say that this company having at all times faithfully performed its obligations

the performance of the contract; the acts for which the abandonment is made must be such as indicate an intention not to fulfil, and such as affect the very substance of the contract; moreover we think it should appear that such acts are deliberately done, and are not the result of something inadvertently overlooked."

Under a contract to construct sixteen locomotives to be paid for as delivered, the court held that the failure to pay for one when it was delivered did not authorize the abandonment of the contract and a suit for the loss of profits on the entire contract. The judge delivering the opinion says: "I have found no case where the plaintiff has been allowed to recover for the losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, but where the other party has neglected to do some act without which the plaintiff could not in the nature of things go on with his contract, as where he refused to furnish a place whereon to erect a building or to furnish material which by the contract was to be put in the work and which was to be provided by him,—in such case the act to be done is clearly a condition precedent and indispensable to enable the other party to go on. Where the act which defendant was bound to do is by the terms of the contract made a condition precedent to the performance, either in the nature of things or evidently in the contemplation of the parties at the time the contract was entered into, then the failure to do the act has of itself prevented the other party from performing as much as if he had been forbidden to perform." *Palm v. Ohio & M. R. Co.* 18 Ill. 217. And the reasoning of that case was followed in *Christian County v. Overholt*, Id. 222.

VII. *What will warrant rescission.*

General rules.

Not every breach of a special contract authorizes the other party to treat it as rescinded. *Dubois v. Delaware & H. Canal Co.* 4 Wend. 285.

If a person who has undertaken to perform a piece of work does an act which shows conclusively that he does not intend to perform his undertaking, the law will authorize the other party to put an end to the contract, and in case he exercises his option the defense to any action brought upon the contract will be full. *Drake v. Gorce*, 22 Ala. 409.

The right of rescission depends, not on whether the conduct of one party was inconsistent with the contract, but whether the conduct of one party to the contract was really inconsistent with an intention to be bound any longer by the contract. *Midland R. Co. v. Ontario Rolling Mills*, 10 Ont. App. 677.

A positive and absolute refusal—a deliberate repudiation of the stipulations of the contract—gives to the other party as an alternative remedy the right to assent to such an abandonment and treat the contract as dissolved. *Graves v. White*, 87 N. Y. 463.

A party may have a right to rescind, although he could not enforce the contract. Thus, if at the time for performance he goes to the place and makes a tender for the express purpose of putting the other party in default and not in good faith, although this will not give him a right to enforce the contract yet it will permit him to treat it as rescinded. *Lewis v. White*, 16 Ohio St. 444.

A party may rescind a contract for the refusal to execute a substantial part of it. *Sumner v. Parker*, 36 N. H. 449.

under said contract, I do not consider there are any matters calling for arbitration," and declining the request for arbitration. While it is undoubtedly true that refusal to arbitrate would not, under the provisions of this contract, justify the plaintiff in treating the contract as renounced by appellant company, yet such refusal, and the correspondence in respect of the matter, tend to show the persistency with which appellant refused to be bound by the contract.

It is also objected that the court erred in the admission of testimony: First, that appellee was permitted to prove the cost of the transfer house, etc. It is a sufficient answer to say that it does not appear the evidence was objected to. It is, however, said that the court erred in refusing to give the 5th instruction for appellant, which was, in effect, that no recovery could be had for the cost or value of the transfer house and its equipments in this action. This instruction might with propriety have been given, but its refusal was not error. At the beginning of the hearing before the jury, counsel for the plaintiff stated that he did not attempt to show the breaches for the purpose of recovering for them, but proved them for the purpose of showing simply a breach of the contract, which entitled the plaintiff to abandon the further performance of it, and sue for damages for loss of future profits, when the following colloquy occurred: Mr. Jewett (for defendant): "In other words, there is nothing but the claim for future profits in this case." Mr. Pence (for plaintiff): "That is all there is in this case." Later, and at the close of plaintiff's testimony, the plaintiff sought to show what the transfer house was worth, "standing there useless for the

purpose for which it had been erected," to which an objection by the defendant was sustained. This all took place in the presence of the jury, and would leave no question in the mind of any intelligent person as to the damages sought and allowed to be recovered. It seems clear that the jury could not have understood that they were to take anything into consideration other than the profits to be derived from the transfer of grain under the contract, and they were in effect so told by the 4th instruction given at the instance of plaintiff.

On the trial of the cause, certain letters written, one by Mr. Blodgett and one by Mr. Clark, commendatory of plaintiffs' method of transferring grain, etc., were offered and read in evidence over the objection of defendant. That these letters were incompetent scarcely admits of question, and it is difficult to perceive upon what principle they were admitted. That the error was a harmless one is equally apparent. It was not controverted that the "Richards method," so called, accomplished the purpose, nor was there any pretense that it was a failure, so that the plaintiffs did not perform their contract.

Other points are made in argument, which, in view of the length of this opinion, seemingly made necessary by the very ingenious and able argument of the learned counsel, it must suffice to say, have been carefully considered, and are not deemed of such gravity as to warrant further discussion. Finding no prejudicial error in this record, the judgment of the appellate court will be affirmed.

Affirmed.

Second rehearing denied October 26, 1894.

It is not only an absolute refusal in words to perform the contract, but also any claim manifested by words or acts of an intention not to perform it according to its terms that will authorize the other party to treat it as a repudiation and bring his action. *Armstrong v. St. Paul & P. Coal & I. Co.* 48 Minn. 118, 119.

In *Lines v. Rees* (1837), in the note to *Cutter v. Powell*, 2 Smith, Lead. Cas. 35, where one who had contracted to build a house called on the other to pay for what had been done and the other said that "he would not—perhaps never," it was contended that the buyer was entitled to treat this as a rescission of the special contract and recover on the *quantum meruit*; and the court admitted that this would be so had the refusal been absolute and unqualified, but that the refusal to pay must be considered with reference to the demand, which was made too soon.

Under a contract to execute a bond and mortgage on property to a certain amount in consideration of a conveyance of it, the refusal to accept a deed and give the mortgage on the ground of a modification of the contract the terms of which had not been complied with does not of itself give a right to rescind the contract, but before it can be done an absolute demand must be made on the obligor and opportunity given him to comply with the demand after notice,—that a failure to do so will be treated as a rescission. *Davison v. Associates of Jersey Co.* 71 N. Y. 333.

A refusal to make a certain payment under the contract because of a dispute as to whether or not it was due will not authorize the other party to rescind. *Winchester v. Newton*, 2 Allen, 492.

There is a class of cases which hold that when

the breach by a party to the contract is attended merely with loss that can be compensated in damages, it will not authorize an abandonment by the other party, but that he may bring his action for the particular breach. *Geary v. Bangs*, 37 Ill. App. 301.

Where contract is not broken.

In *Smoot's Case*, 32 U. S. 15 Wall. 38, 21 L. ed. 107, the court held that the mere adoption of new rules for the inspection of horses to be furnished was not sufficient to warrant a refusal to comply with the contract to furnish them, and the court cites with approval the rule that to put an end to the contract there must be an absolute refusal by one party, which must be treated as such by the party to whom the promise was made.

Where, after an agreement was entered into with the government to furnish horses to it, it promulgated rules for their inspection which the court held to be no breach of the contract, there was no right to rescind. *United States v. Wormer*, 30 U. S. 13 Wall. 26, 20 L. ed. 530.

In case of contract for personal services.

Illness of a person engaged to take the leading part in a new opera to be brought out during the opera season, upon the opening and several succeeding nights, so that another person has to be engaged to take the part, goes to the root of the consideration so as to justify the manager in considering the contract as at an end. *Poussard v. Spiers*, L. R. 1 Q. B. Div. 410, 45 L. J. Q. B. 621, 34 L. T. N. S. 672, 24 Week. Rep. 819.

If a person employed to superintend a hotel be-

NEW JERSEY COURT OF ERRORS AND APPEALS.

Paul GERLI

v.

POIDEBARD SILK MANUFACTURING
COMPANY.

(.....N.J.....)

*1. A chose in action accruing to a partnership from a transaction in the ordinary course of its business may be transferred by a single member of the firm.

2. A written memorandum of the terms of an order for the purchase of goods, signed by an agent of the buyer, and a written acceptance of the order, signed by an agent of the seller, constitute a valid contract within the statute of frauds.

*Headnotes by DIXON, J.

3. When the seller of goods has agreed to deliver them in instalments, and the buyer has agreed to pay the price in instalments which are proportioned to and payable on the delivery of each instalment of goods, default by either party with reference to any one instalment will not ordinarily entitle the other party to abrogate the contract.

4. If the buyer of goods to be delivered on a subsequent day gives notice to the seller before the day of delivery that he will not accept them, and in an action by the seller for the breach of contract it appears that, even if the notice had not been given, it would have been a physical impossibility for the seller to tender the goods at the proper time, the seller will not be entitled to more than nominal damages.

(March 4, 1895.)

comes by reason of the use of opiates of unsound mental condition and incapable to perform her part of the contract, the other party may terminate the contract. *Lyon v. Pollard*, 87 U. S. 20 Wall. 403, 23 L. ed. 361.

When the contract contemplates personal services of one of the parties, if he refuses to perform them or attempts to assign the right to perform them to a third person, the other party to the contract may rescind and refuse to be further bound by his obligation. *Robson v. Drummond*, 2 Barn. & Ad. 303.

As to the right of an employer generally to rescind for default of an employee, see note to *Timberlake v. Thayer* (Miss.) 24 L. R. A. 231.

Between buyer and seller.

The refusal on the part of the vendors that will excuse the vendee from complying with the terms of his contract must be a distinct and unqualified refusal to be further bound by the contract or to accept any tender that might be made under it. *Way v. Johnson* (S. D.) 58 N. W. Rep. 552.

The absolute refusal of the seller of cattle to deliver them according to the terms of the contract will entitle the purchaser to rescind the contract and recover back the money which he has paid thereon. *Dakota Stock & G. Co. v. Price*, 23 Neb. 93.

If a seller of goods becomes unable to complete his agreement the purchaser may refuse to pay for what he has received in full, and may recoup his damages against the amount then due by him. *Robertson v. Davenport*, 27 Ala. 574.

A person is not bound to accept and pay for goods not delivered in time. *Jones v. United States*, 98 U. S. 24, 24 L. ed. 644.

Under a contract for the sale of a certain quantity of rice to be put on board the ship during certain months, the purchaser is not bound to accept it if it is put on board during an earlier month. *Bowes v. Shand*, L. R. 2 App. Cas. 455, 45 L. J. Q. B. 561, 38 L. T. N. 8, 387, 25 Week. Rep. 730, and a similar ruling was made upon a contract for sale of pepper in *Reuter v. Sala*, L. R. 4 C. P. Div. 239, 45 L. J. C. P. 492, 40 L. T. N. 8, 476, 27 Week. Rep. 631.

In *Coddington v. Paleologo*, L. R. 2 Exch. 193, 38 L. J. Exch. 73, 15 L. T. N. 8, 581, 15 Week. Rep. 931, a contract to deliver goods on "April 17, complete on 8th May," was construed, the court holding that it bound the seller to commence to deliver on the 17th the purchaser had a right to rescind for failure to deliver on that day, but the court was divided as to the true construction of the contract, and so no definite judgment was given on that point.

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If the quantity of lumber delivered under a contract is essentially deficient, the purchaser is not bound to accept or pay for it. *Greenbrier Lumber Co. v. Ward*, 36 W. Va. 573.

Where the seller of a farm agreed to build a barn thereon and deliver possession by a given day, his mere failure to have the barn completed when the second payment becomes due and before time of delivery of possession is not such breach as justifies the purchaser to abandon the contract and maintain an action to recover back what he had paid. *Weints v. Hafner*, 78 Ill. 27.

A seller has a right to act upon a countermand of an order and treat it as a rescission of the contract. *Clement & H. Mfg. Co. v. Meserole*, 107 Mass. 382.

A telegram from a buyer to sellers of oranges which are ripe and must be sold immediately, to hold shipment a few days because of a strike on the railroad, will justify the seller in rescinding the sale and disposing of the fruit elsewhere. *Rigelow v. Chapmau*, 43 Ill. App. 551.

Under a contract to sell cotton at a specified time and price the purchaser is bound to demand the cotton and tender the price at the time specified for delivery, and if he does not do so the seller may rescind. *Pickett v. Cloud*, 1 Bail. L. 332; *Neill v. Cheves*, Id. 639.

A seller of cotton may reclaim it upon the purchaser's refusal to pay for it. *Shines v. Steiner*, 76 Ala. 458.

If a party fails to pay for property delivered as required by the contract, the seller may abandon the contract and recover the property delivered. *Evans v. Chicago & R. I. R. Co.* 26 Ill. 189.

Refusal of the purchaser to make payment as required by the contract gives the seller the right to rescind the contract and refuse to make further deliveries. *Bradley v. King*, 44 Ill. 339.

If goods are sold for cash on delivery, in case payment is not made the seller may rescind the contract and resume possession of the goods. *Stoutenborough v. Konkle*, 15 N. J. Eq. 33.

The seller in a cash sale of goods may, in case the purchaser gets possession and refuses to pay, rescind the sale and retake possession of the property. *Morris v. Bexford*, 18 N. Y. 553.

In case of a contract for the sale of chairs for notes, if a part of the chairs are delivered and the manufacturer demands the notes when earned, which are refused, this is a breach of the contract which releases the manufacturer from the obligation to deliver any more property, and enables him to sue immediately for what has been delivered. *Patridge v. Gildermeister*, 1 Keyes, 93.

CROSS writs of error to the Circuit Court for Hudson County to review a judgment in an action brought to recover damages for failure to accept certain silk which plaintiff's assignor had sold defendant, the plaintiff assigning error to rulings which refused to award him damages for defendant's failure to accept certain instalments of silk, and defendant assigning error to rulings which recognized the right of plaintiff to recover any damages. *Affirmed*.

The facts are stated in the opinions.

Messrs. Charles L. Carrick and Charles E. Hughes, for plaintiff:

The absolute refusal of the vendee to take any of the goods contracted for absolved the vendor from the obligation to tender.

Parker v. Pettit, 43 N. J. L. 517; *Cort v. Ambergate R. Co.*, 17 Q. B. 127; *Windmuller v. Pope*, 107 N. Y. 674; 2 Benjamin, Sales, Corbin's ed. 1889, § 859, p. 743.

The vendee was not discharged from the ob-

ligation to take later instalments because of the nondelivery of the first, unless the vendor had shown an intention to abandon the contract.

The contract belongs to a class sometimes called "instalment" or "continuing" contracts.

Withers v. Reynolds, 2 Barn. & Ad. 882; *State v. Davis*, 53 N. J. L. 144; *Spicer v. Cooper*, 1 Q. B. 424.

In this class of cases the fundamental question is, whether the failure of one party to deliver or to pay for one instalment discharges the other from his duty to accept or pay for later instalments.

Any breach may give the injured party a cause of action for damages, but every breach does not justify rescission.

It is clear that one party cannot be considered as discharged from his duty to perform without the express or implied consent of the other. And if such consent is implied from a breach, it must be by reason of the fact that

If at the time fixed for the completion of a sale of cattle the purchaser does not have the money, the seller may rescind the contract and refuse to deliver the cattle, although the money is actually tendered a few days later. *Beauchamp v. Aroher*, 58 Cal. 431, 41 Am. Rep. 293.

Where a purchase is made of a commodity to be received at a future time at a fixed price payable at a specified time, the seller may rescind the contract after a failure by the purchaser to pay the stipulated price at the specified time. *Dwinnel v. Howard*, 30 Me. 253.

Where the purchaser of flour notifies the seller that he is not going to pay any more drafts unless security is given that the flour will be of the required standard, the seller has a right to treat the contract as rescinded. *King v. Faist*, 161 Mass. 449.

In case of an executory contract for the sale of goods to be paid for after delivery, if during the time of delivery the buyer, because of an erroneous construction of the contract, notifies the seller that he will not pay the contract price, but a less one, for the goods, the seller may stop delivery and maintain an action for the breach of the contract. *Armstrong v. St. Paul & P. Coal & I. Co.* 48 Minn. 113, 118.

Insolvency on the part of the purchaser may give the seller a right to refuse further delivery under the contract. *Ex parte Chalmers*, L. R. 8 Ch. App. 289, 21 Week. Rep. 849, 42 L. J. Bankr. 37, 28 L. T. N. S. 325; *Morgan v. Bain*, L. R. 10 C. P. 15, 44 L. J. C. P. 47, 51 L. T. N. S. 616, 23 Week. Rep. 236; *Ex parte Stapleton*, L. R. 10 Ch. Div. 584, 40 L. T. N. S. 14, 27 Week. Rep. 327.

A plaintiff who has undertaken to deliver 200 bales of cotton cannot recover for defendant's refusal to accept, if he tendered 206 bales. *Dixon v. Fletcher*, 3 Mees. & W. 143.

If at the time appointed for the payment for, and delivery of, goods under a purchase contract the vendor refuses to deliver, the purchaser may rescind the contract and recover back the deposit he may have previously made. *Barr v. Logan*, 5 Harr. (Del.) 52.

Failure to furnish the folder under a single contract for a press and folder for a printing establishment will justify a rescinding of the contract and a return of the press. *Campbell Printing-Press & Mfg. Co. v. Marsh*, 20 Colo. 22.

If the vendee of oil agrees to advance the freight, the seller is at liberty to rescind in case he neglects or refuses to do so. *Hartje v. Collins*, 46 Pa. 268.

Refusal of a seller to comply with his contract
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to pay storage charges so as to release the property from the possession of a bailee will give the purchaser a right to treat the contract as at an end. *Malone v. Minnesota Stone Co.* 36 Minn. 325.

A positive notice by a purchaser of refusal to accept the property bought will give the seller a right to treat the contract as rescinded and sell the property to a third person. *Terwilliger v. Knapp*, 2 E. D. Smith, 86.

If a vendor, reserving a right in his contract of sale to rescind, uses the power so given for the purpose of delay while he carries on negotiations with a third person, the vendee is entitled to treat the contract as rescinded. *Smith v. Wallace* [1895] 1 Ch. 385, 64 L. J. Ch. N. S. 240.

If a person sells property which he is neither able to convey himself nor to compel a third person to convey, the purchaser when he finds out the true state of facts may repudiate the contract. *Brewer v. Broadwood*, L. R. 22 Ch. Div. 105, 53 L. J. Ch. 123, 47 L. T. N. S. 503, 31 Week. Rep. 115; *Forrer v. Nash*, 35 Beav. 169.

Where one contracts to sell real estate to which at the time he has no title, but lets the purchaser into possession, he cannot forfeit the contract for non-payment while he is not in a position to perform his part so as to enable him to oust the purchaser from possession. *Getty v. Peters*, 32 Mich. 651, 10 L. R. A. 465.

If a person sells an article to which he has no title the purchaser may rescind and recover back what he paid for it. *Wilkinson v. Ferree*, 24 Pa. 190; *Reynolds v. Harris*, 9 Cal. 388.

It was at first held in England that if a vendee does not take away the goods upon request, although he has paid earnest money, the agreement is dissolved and the vendor is at liberty to sell them to another person. *Lankfort v. Tiler*, 1 Saik. 113.

But in a later *visu prius* case it was held that the neglect of the purchaser to take away the goods purchased after receiving notice from the seller to do so does not entitle the latter to annul the contract and resell the goods. *Greaves v. Ashlin*, 3 Campb. 426.

The American cases seem to have followed the earlier English case.

Where the contract fixes a time within which the property bought is to be paid for and taken away, if it is not taken away within such time the vendor may rescind the contract and refuse to deliver. *Kitchen v. Stokes*, 9 W. N. C. 48.

If the buyer of chattels agrees to take them out of possession of the seller by a specified time, and does not do so, the seller may treat the contract as

the performance in question was conditioned upon the performance of that term of the contract which has been broken.

A breach which, in itself, may be regarded as an invitation to an abandonment of the contract, or a consent to a discharge of the other party from his obligations under it, must be one going to the essence of the contract, and not merely to some part of it, so that it may appear that the performance insisted upon was conditioned upon the performance which has failed.

Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration.

Portage v. Cole, 1 Wm. Saund. 819.

The inquiry is: Is the value to the injured party of the residue of the contract, if per-

formed, dependent upon the performance of that part which has been broken?

If not, clearly such performance of the residue, plus damages for the particular breach, gives the injured party the equivalent of full performance.

A failure to make one delivery or one payment is not a breach which goes to the essence of the contract, and, consequently, is not such a breach as may be considered an invitation to the injured party to abandon the entire engagement or to treat himself as discharged from all its obligations. Damages are a sufficient compensation.

Blackburn v. Reilly, 47 N. J. L. 290, 54 Am. Dec. 159; *Simpson v. Crippin*, L. R. 8 Q. B. 17; *Jonasohn v. Young*, 4 Best & S. 800; *Brandt v. Lawrence*, L. R. 1 Q. B. Div. 344; *Freeth v. Burr*, L. R. 9 C. P. 208; *Moracy Steel & I. Co. v. Naylor*, L. R. 9 Q. B. Div. 648, L. R. 9 App. Cas. 434; Benjamin, Sales, Bennett's ed. 1892, § 598a, p. 547.

rescinded. *Warren v. Buckminster*, 24 N. H. 336.

If the purchaser of goods which by the terms of the contract are to be delivered and paid for at a specified time does not tender the price and take the goods within the time agreed upon, the vendor may request him to take and pay for them, and in case of a refusal he may abandon and rescind the contract and dispose of the goods as if no contract had been made. *McEachron v. Randles*, 34 Barb. 301.

Miscellaneous cases.

Under a contract to superintend servants for a share of the crop, if the overseer takes hands from the work during crop time without the consent and contrary to the remonstrance of the defendant, it will be such a violation of the contract as will authorize defendant to abandon the contract and sue for the injury he has sustained. *Martin v. Chapman*, 6 Port. (Ala.) 344.

Under a contract to carry mail and to be liable for any mismail, frequent omissions on the part of the carrier give the employer the right to annul the contract and resume performance himself. *Davis v. Wade*, 4 Ala. 208.

If the assignee of a bill of lading refuses to receive the cargo except upon conditions which he has no right to make, the assignee may rescind the assignment and sell to a third person. *The Schooner Treasurer*, 1 Sprague, 473.

Under a contract to deliver railroad ties at a certain place into cars to be furnished by the other party a failure to furnish the cars will not exonerate the other party from delivering the ties convenient to the place of shipment so that they can be loaded. *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104.

Upon the failure of a broker to remit to his principal the money which he received for a consignment of property, the principal is not bound to make any further consignment to him. *Curtis v. Gibney*, 59 Md. 131.

In case of a contract to furnish materials for the manufacture of iron, the refusal or neglect to furnish the materials will warrant the manufacturer in refusing to go on with his contract as to iron to be manufactured from the materials not furnished, but will not authorize him to stop work on materials previously furnished. And a mere neglect for a short time will not have that effect, but it must be a refusal or continued delay after a reasonable requisition for such length of time as to warrant the inference that there was no intention to furnish them. *Proprietors of Mill Dam Foundry Co. v. Hovey*, 21 Pick. 417.

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Refusing to pay the amount due on one contract unless the seller will give security for the performance of other contracts of sale will justify the seller in treating the contract as abandoned and himself as released from making any further deliveries. *Stephenson v. Cady*, 117 Mass. 6.

In *Reynolds v. Reynolds*, 48 Hun, 142, there was a contract for the working of a farm on shares, and the owner by his language and manner justified the laborer in removing from the premises. The owner sought to establish his title to the crop and asked the court to charge that, even if plaintiff was justified in removing from the farm his redress, if any, would be for damages for breach of the contract. The court held that the request was properly refused for the reason that plaintiff by his action justified defendant in treating the contract as broken on the part of plaintiff and he could refuse a further performance on his part and abandon the premises without abandoning the contract. Since the contract remained in force as far as the defendant was concerned, he could maintain an action thereon by reason of plaintiff's breach of the same. But he did not thereby lose his title to the crop.

In *Hulle v. Heighman*, 2 East, 145, 4 Esp. 75, which was *indebitatus assumpsit* for wages earned by a seaman, who alleged that he had been wrongfully sent on shore at a foreign port, it was contended that the wrongful act of discharge put an end to the special contract and gave a right of action in general assumpsit, but the court held that the wrongful act did not rescind the special contract, and that until the contract was rescinded by defendant the plaintiff could not recover on the general counts, and that the action was on the special contract for the wrongful act of the defendant.

Under a contract by a traveling salesman to have a certain assistant, the employers may terminate the contract upon his failure to retain such assistant. *Hochstadter Bros. v. Sam*, 83 Tex. 464.

One who advances money to an insurance corporation under a contract by which it is to accept risks and use the money to pay the premiums may treat the contract as rescinded and recover the money advanced, upon the company's selling its business and announcing that it is going out of business, although it reserves in the contract of sale the right to issue insurance to all existing contracts. *Seipel v. International L. Ins. & T. Co.* 84 Pa. 47.

If a party to a contract is delinquent in the advancement of funds, the other party may take advantage of the omission by declaring the contract at an end. *Shaw v. Lewistown & K. Turnp.*

By the deliberate adoption in *Blackburn v. Reilly*, *supra*, of the doctrine thus established by the English courts, this court did for New Jersey what they had done for England, and the principle applicable to this class of cases is no longer open to debate.

Trotter v. Heckscher, 40 N. J. Eq. 656, 42 N. J. Eq. 268; *Lehigh Zinc & I. Co. v. Trotter*, 43 N. J. Eq. 193; *Otis v. Adams*, 56 N. J. L. 38. See also *Luccaso Oil Co. v. Brewer*, 66 Pa. 351; *Morgan v. McKee*, 77 Pa. 228; *Scott v. Kittanning Coal Co.* 89 Pa. 281, 33 Am. Rep. 758; *Winchester v. Newton*, 2 Allen, 492; Note of Mr. Landreth, 21 Am. L. Reg. N. S. 398. *Messrs. Collins & Corbin* for defendant.

Dixon, J., delivered the opinion of the court:

On March 28, 1893, C. & E. Gerli, Fratelli & Co. entered into a contract to sell and deliver in New York to the Poldebard Silk Manufacturing Company thirty bales of ex-

tra Piva new silk, deliverable, ten bales July 20th to 25th, ten bales August 15th, and ten bales September 1st to 10th, each instalment to be paid for sixty days after delivery, at \$5.90 per pound. In consequence of the lateness of the new crop, it was impossible for the sellers to make delivery of the first ten bales within the time specified, and on July 27 the buyer extended the time for such delivery until August 1. On that date, the impossibility still continuing, the buyer notified the sellers that it canceled the contract because of the default, and would decline to receive any of the merchandise ordered. On August 15 the new crop of silk had not yet arrived in New York, but it arrived before September 10. Under these circumstances, one of the members of the selling firm assigned the firm's rights in the contract to Paul Gerli, the plaintiff, and thereupon he brought this suit against the buyer to recover damages arising from the refusal to accept

Road Co. 3 Penr. & W. 445; *Preston v. Finney*, 2 Watts & S. 53.

If a person who is to come within a few days with a note and sureties for the hire of a slave neglects to do so for several weeks, the owner of the slave is not bound to hold it for him, but may treat the contract as annulled and hire it to another. *Warters v. Herring*, 2 Jones, L. 46.

Neglecting to give a singer of an opera company equal advertisement with another singer in the same company, according to the contract, and billing the other singer on nights on which the contractee is to perform, so that the former receives commendations of the press for the performance, is a breach of contract which justifies the contractee in leaving the company and seeking employment elsewhere. *Pratt v. Montegriffo*, 25 Abb. N. C. 384.

The omission to ship a cargo of commodities at the time when the contract calls for it will give the other party the right to rescind. *Welsh v. Gossler*, 69 N. Y. 540; *Hill v. Blake*, 97 N. Y. 216.

If a contract for the sale of real estate is to be reduced to writing, one party may abandon the contract upon the failure of the other to execute the writing. *Gullich v. Alford*, 61 Miss. 224.

When no time is fixed for the performance of a verbal contract to execute a written lease, and one party refuses to complete by executing a lease in a reasonable time thereafter, the other will have a legal right to rescind the agreement. *Griffin v. Kutsely*, 75 Ill. 411.

The breach by a creditor of his agreement to give his debtor work to enable him to discharge his obligation will not release the debtor from the debt. *Beach v. Curle*, 15 Mo. 106.

Where one party to a contract is bound to furnish the money for the enterprise his default in so doing amounts to a prevention of performance, and the presumption will be that had the other party not been prevented he would have complied with his contract. *McCreery v. Green*, 38 Mich. 172.

One who has agreed to purchase a milk route is justified in rescinding the contract if the seller contracts for the purchase of a rival route before the sale of his own route is consummated. *Munsey v. Butterfield*, 133 Mass. 492.

If one who has contracted to support another during his life neglects to furnish any support for a period of two years, the latter may consider the contract as wholly broken and sue for damages for the breach of the contract as a whole. *Parker v. Russell*, 133 Mass. 74.

Where a person contracts to do a certain amount of labor for a parcel of land, he cannot rescind the contract and sue for the value of his labor without 30 L. R. A.

demanding a deed; since the object of the contract cannot be said to be defeated until a demand is made for the deed followed by a refusal to execute it. *Doggett v. Brown*, 28 Ill. 498.

The breach of an agreement looking to the transfer of corporate stock in consideration of services in building up the corporate business justifies the other party in treating the contract as rescinded, and taking steps accordingly. *Wilson v. Roots*, 119 Ill. 379.

When, after a reasonable time has been given by a city to persons who have contracted to furnish it with a water supply, and they have wholly failed to furnish an adequate supply either in quantity or quality, the city may treat the contract as terminated. *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 38 L. ed. 573.

Presenting too soon a draft for a car load of produce to be paid for on arrival will not justify the buyer in repudiating the entire contract and refusing to accept the produce when it arrives. *McCord v. Laidley*, 87 Ga. 221.

Refusal to give preference to the other party's freight under a contract for hauling it, as provided in the contract, will give such other party the right to refuse to furnish any more freight to haul under the contract. *Dunn v. Daly*, 73 Cal. 640.

A breach of contract on the part of a plank-road company in obstructing or hindering the stages of a mail contractor while running on the road gives the contractor a right either to abandon the contract, or treat it as still subsisting, and claim damages for a breach. *Powell v. Sammons*, 31 Ala. 552.

Where, upon the purchase of lands, notes are given which the vendor undertakes to turn over to a railroad company in payment of stock, so that in turn they will be used by the railroad company to pay a debt it owes to the vendee, the breach of the collateral agreement to turn the notes over to the railroad company will be a ground for rescinding the principal contract by putting or offering to put the parties *in statu quo*. *McNair v. Cooper*, 4 Ala. 661.

One who buys wood under a contract which requires the seller to cord it may, in case the seller neglects to cord it, put an end to the whole contract, and recover back the money that he has paid under it. *Giles v. Edwards*, 7 T. R. 181.

VIII. Application of above rules to various kinds of contracts.

a. Vendor and purchaser.

Vendor's right to rescind.

If the purchaser of property, who agrees to cultivate the land and pay the taxes and purchase

the instalments of August 15 and September 1 to 10. At the trial the justice denied the right to damages for the instalment of August 15, and directed a recovery of the damages as to the instalment of September 1 to 10. On exceptions taken at the trial, each party has assigned error. The errors assigned by the purchaser will first be considered.

1. That the claim for damages was assignable, so as to authorize the assignee to sue thereon in his own name, is clear on the words of the supplement to the practice act, approved March 4, 1890 (Pub. Laws 1890, p. 24). It was "a chose in action arising on contract." Such a chose in action belonging to a partnership may be transferred by a single member of the firm. Story, Partn. § 101.

2. The contract was fully proved within the statute of frauds. Evidence introduced on behalf of the defendant showed that its general manager had written and signed a

memorandum of the order given for the goods, in which were stated all the terms of the proposed contract, and that thereupon the agent of the sellers had sent to the buyer a written acceptance of the order, duly signed. Such proof was sufficient. Browne, Stat. Fr. § 846.

3. The other exception pressed by the defendant below is that the trial justice denied the right of the buyer to rescind the contract on the nondelivery of the first instalment of silk. The general rule on this subject was thus laid down by this court in *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159: "In contracts for sale of goods, to be executed by a series of deliveries and payments, defaults of either party with reference to one or more of the stipulated acts will not ordinarily discharge the other party from his obligation, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a de-

money, abandons the property and fails to pay the taxes and purchase money, the vendor may rescind the contract and thereby defeat a suit for specific performance upon tendering back a fair proportion of the money already paid. *Dukes v. Baugh*, 91 Ga. 38.

The refusal of a vendee to accept and pay for the land when the title is tendered according to the contract will give the vendor the right to declare the contract rescinded and terminated. *Lane v. Lesser*, 135 Ill. 507.

A vendor of land may treat the contract as rescinded where the vendee refuses to pay the first instalment of purchase money after notice that in case he does not do so the contract will be rescinded, and an offer to return the money advanced on the execution of the contract. *Anderson v. Haskell*, 45 Iowa, 45.

If a purchaser is let into possession of real estate under an agreement that he shall pay the purchase price at stated intervals, in case he neglects to pay the vendor may treat the contract as rescinded, and maintain a writ of entry or trespass against the purchaser. *Williams v. Noeux*, 43 N. H. 388.

If a purchaser enters into possession of real estate and then refuses to pay the purchase price, trespass will lie against him. *Clough v. Hosford*, 6 N. H. 231.

Where payment is to be made when the property is delivered, failure to make the payment will authorize the vendor to rescind. *Meeker v. Johnson*, 5 Wash. 718.

Under an executory contract for the sale of real estate, upon a total failure of performance on the part of the vendee the vendor has a right to either sue for the purchase money and foreclose his mortgage, or he may rescind the contract and recover the land. Where there has been part performance by the vendee, he will be entitled to reasonable notice of the vendor's intention to rescind. If the vendee has actually abandoned the contract, or has so acted as to create the reasonable belief on the part of the vendor that he has abandoned it, the vendor may rescind without notice of his intention, notwithstanding the part performance by the vendee. *Kennedy v. Embry*, 72 Tex. 300; *Lanier v. Foust*, 81 Tex. 186; *Graham v. West* (Tex.) 26 S. W. Rep. 920; *Hood v. People's Bldg. & S. Assn.* (Tex.) 27 S. W. Rep. 1046; *Thompson v. Westbrook*, 56 Tex. 255; *Ransom v. Brown*, 68 Tex. 158; *Hamblen v. Folts*, 70 Tex. 132; *Nass v. Chadwick*, Id. 157.

In Texas, where a vendor retains in the deed an express lien for the purchase money, the superior title remains in the vendor, and he may rescind and 30 L. R. A.

reconvey upon the grantee's abandonment of the contract. *Dunlap v. Green*, 60 Fed. Rep. 242.

But in *Huffman v. Mulkey*, 78 Tex. 556, the court says: "These cases push the application of the rules growing out of the holding that such contracts are executory in character to the utmost verge of propriety or reason; and the writer doubts the correctness of the holding even in such cases that rescission can, in any case in which a deed has passed, be made otherwise than by a writing or some decree of the proper tribunal."

If the vendee is in possession, and time is not of the essence of the contract, the vendor cannot arbitrarily rescind the contract. *Lochhausen v. Laughter*, 4 Tex. Civ. App. 291.

Where time is not of the essence of the contract, the mere failure to pay will not authorize a repudiation of the contract so as to authorize a suit for the recovery of the land. *Gregg v. English*, 38 Tex. 139.

But it has been held that a vendor cannot rescind if the title has passed out of him, but must seek the aid of the court for that purpose. *McCardle v. Kennedy*, 32 Ga. 198; *Martindale v. Smith*, 1 Q. B. 395, 1 Gale & D. 1, 5 Jur. 362.

So, under a contract for the sale of a certain number of bushels of corn, if after a part is delivered the purchaser becomes insolvent and refuses to accept the balance, the seller may rescind the contract and refuse to deliver the remainder, but as to that delivered the title has passed and he cannot recover as against the attaching creditors of the purchaser. *Thompson v. Conover*, 32 N. J. L. 466.

If the title has passed, the seller cannot rescind. *McClure v. Williams*, 5 Sneed, 718.

Right of vendee.

In *Bank of Columbia v. Hagner*, 26 U. S. 1 Pet. 455, 7 L. ed. 219, which was an action by a vendor to recover the purchase money, the court said: "If the seller is not ready and able to perform his part of the agreement on the day fixed for performance, the purchaser may elect to consider the contract at an end."

If the vendor of real estate is not able to make out a good title on the day fixed, the vendee may repudiate the contract and recover back his deposit money. *Cornish v. Rowley*, 1 Wheat. Selwyn, 155; *Wilde v. Fort*, 4 Taunt. 334; *Glenn v. Roessler*, 38 Hun, 74.

If the vendor of land is confessedly unable to make title at the time named in the articles of agreement for delivery of the deed, no tender of the purchase money then due is necessary to en-

sign no longer to be bound by its terms." In the case cited this rule was enforced against the buyer. In *Trotter v. Heckscher*, 40 N. J. Eq. 612, this court, and in *Otis v. Adams*, 56 N. J. L. 88, the supreme court, enforced it against the seller. That the conduct of the vendors in the present case did not evince an intention to abandon the contract, or not to be bound by its terms, appears beyond dispute. They failed to deliver the July instalment because it was impossible to do so, offered to deliver other silk which they considered equally valuable, expressed their willingness to come to an equitable arrangement for their default, and, on the first intimation of a purpose on the part of the vendee to rescind the contract, they protested against the right of rescission, and insisted that they should be permitted to make the subsequent deliveries. They showed a design the very opposite of repudiation. Nor do we find anything in this contract or the

circumstances of the parties from which it can reasonably be inferred that the parties intended the delivery of each instalment of silk to be a condition precedent to the continuing obligation of the contract. So far as appears, the usefulness to the buyer of any instalment did not at all depend upon the prompt delivery of prior instalments, and full indemnity for every default could be secured by action based thereon. So that, under the rule before declared, it would seem that the attempt to rescind was illegal. The defendant, however, insists that the rule is not applicable to the present case, because the seller's fault consisted in failing to do the first thing required to be done in performance of the contract; and *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 866, is cited as an authority for this distinction. On principle, I do not see that, for such a purpose, the first act to be done stands upon a different footing from subsequent acts. A default in that does

able the vendee to rescind the contract and maintain covenant for the breach. *Kerst v. Ginder*, 1 Pittsb. 314.

A vendee of land may tender the purchase money according to his contract, and demand title, and if the vendor refuses to make title the vendee may abandon the possession and then rescind the contract if the day stipulated for making the title has arrived. *Reid v. Davis*, 4 Ala. 89; *Clemens v. Loggins*, 1 Ala. 622, 2 Ala. 514.

An admission by the vendor that he has no title will furnish ground for abandoning possession and rescinding the contract on the part of the vendee. *Gillespie v. Battle*, 15 Ala. 236.

If a purchaser has paid any part of the purchase money, and the seller refuses to complete his part of the contract, the purchaser may disaffirm the contract and bring an action for money had and received to his use. *Lyon v. Annable*, 4 Conn. 350.

Refusal by the seller of property to have a deed made right upon being informed that it is incorrect is equivalent to an abandonment on his part, and gives the other party the right to rescind and recover back the money paid, or to complete and recover damages from the other party for its breach. *Nothé v. Nomer*, 54 Conn. 528.

In case of a sale of property, where the vendor makes default because of inability to give a good title the vendee may elect to rescind and recover the advancements made without tendering the balance of the purchase money and demanding a deed, for the reason that a demand will be a useless act which the law does not require. *Wilhelm v. Fimple*, 31 Iowa, 131, 7 Am. Rep. 117.

An intending purchaser of real estate is entitled to rescind the contract if a merchantable title is not furnished at the time agreed upon. *Williams v. Daly*, 38 Ill. App. 464.

In *Morange v. Morris*, 84 Barb. 815, and *Zorn v. McParland*, 8 Misc. 128, it was decided that if the vendor could not give a good title at the time agreed on the vendee had a right to refuse to take the property and to rescind the contract. In the former case the court says: "Performance on the part of the plaintiff was not necessary if the defendant was not able to perform; except in case plaintiff sought . . . to recover damages without rescinding the contract."

Where the covenants in a contract for the sale of real estate are mutually dependent, and the vendee has advanced money on the contract, but at the time for performance it appears that the vendor has not a good title, the vendee may rescind the contract and recover back his deposit. *Morange v. Morris*, 8 Keyes, 50.

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The mere fact that after the purchaser, who has paid down a part of the purchase money, refuses to complete the purchase the seller disposes of the property to a third person, will not give the purchaser the right to treat the contract as rescinded so as to enable him to recover the amount of his deposit. *Ashbrook v. Hite*, 9 Ohio St. 357, 75 Am. Dec. 468.

If a vendor, after the contract is signed, but before the day of delivery, materially diminishes the value of the property, the vendee may rescind the contract. *Erie v. Vincent*, 8 Watts, 510.

While the vendee has the money in his possession to discharge encumbrances on the property, he cannot make those encumbrances a ground for rescission. *Irvin v. Bleakley*, 67 Pa. 24.

The vendor's not performing at the time agreed upon gives the vendee a right to rescind. *Stickter v. Guildin*, 30 Pa. 114.

But the mere intention on the part of the vendor to abandon the contract of sale, although accompanied by a suit against the vendee for rent, will not justify the vendee in treating the contract as abandoned. *Donaldson v. Waters*, 30 Ala. 182.

And it has been held that where there is no obstacle in the way of performing a contract to convey land, the vendee cannot rescind the contract because of the vendor's neglect to tender the deed, and sue for the money he has paid. *Fuller v. Hubbard*, 6 Cow. 12, 16 Am. Dec. 423.

Statu quo.

A vendee of land cannot rescind the sale if by reason of his own acts he cannot put the vendor *in statu quo*. *Casswell v. Black River Cotton & W. Mfg. Co.* 14 Johns. 468.

If a contract for the sale of real estate has been so far executed by letting one party into possession and giving him the benefit under it that the other cannot be placed *in statu quo*, neither party can rescind the contract. *Ray v. Oliver*, 20 Vt. 118, 49 Am. Dec. 764.

Upon rescission of a sale of real estate upon which a considerable portion of the purchase price has been paid, which has not been repaid in the use of the property, the vendor upon a rescission should account for the amount he has received, with interest. *Evans v. Bentley* (Tex.) 29 S. W. Rep. 457.

In a case where an attempt was made to rescind a sale of real estate, the court says it is necessary to keep in view the obvious difference between such contracts and those for sale of personal property, which are to be executed by deliveries in parcels extending through a period of time. In such cases it often happens that the portions delivered are

not make it more certain than do other defaults that the party aggrieved cannot get exactly what he contracted for; for that default, as well as for others, he may be compensated by suit; and by that default, as readily as by others, he may obtain an unconscionable advantage, if he is entitled to rescind or retain the bargain as self-interest may dictate. As evidence of repudiation or abandonment, nonperformance of the first thing required to be done may be more persuasive than if the promisor had partially carried out his contract, but, as a basis on which a right of rescission is to be supported, it cannot, merely because it is first in order of time, have any greater importance than later defaults. In *Norrington v. Wright, ubi supra*, the plaintiff had contracted to ship from Europe to the defendant in Philadelphia 1,000 tons of rails in each of the months February, March, April, May, and June; in February he had shipped 400 tons, which the defendant had received

and paid for, not knowing that less than the required quantity had been shipped; in March the plaintiff had shipped 885 tons; and the defendant, on learning of these deficiencies, declared the contract terminated. The court held that he was justified in doing so. I am not sure that I perceive definitely the principle on which this decision was rested. But the case seems now to be cited for the following paragraph in the opinion of the court: "The seller is bound to deliver the quantity stipulated, and has no right . . . to compel the buyer to accept a less quantity; . . . and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract, that he would have had if it had been agreed that all the goods should be delivered at once." I cannot but think that there is here some confusion of thought. If a contract of

soon consumed or disposed of, and cannot be restored. And hence many cases of this kind have occurred where for causes accruing during the progress of execution one party has been permitted to rescind the contract without any restoration of what has been delivered or received under it. By common law one of the parties could no more rescind the contract without the other's express or implied assent than he alone could have made it. While it is true in the first class of cases that if one party refuses to proceed such refusal is tantamount to an assent to a dissolution, and will authorize the other party to rescind it arbitrarily when the refusal has operated as a prevention of the other party, yet that a mere refusal has always this effect and without regard to the condition in which the parties are to be left, the court says, "I am by no means prepared to admit;" if, however, the rule could be received with universal application it should appear that the refusal was in no way qualified, but absolute. It should substantially amount to an avowed determination of the party not to abide by the contract. *Fry v. Oliver*, 20 Vt. 118, 40 Am. Dec. 764.

b. Construction contract.

Right of contractor.

A refusal to pay an instalment upon a building contract when it becomes due, in accordance with the terms of the agreement, is a breach which indicates that one who is guilty of it does not intend to be bound by the contract, and therefore the other party may rescind it and recover for what work he has done. *Geary v. Bangs*, 37 Ill. App. 301; *Preble v. Bottom*, 27 Vt. 249; *Strack v. Hurd*, 41 N. Y. S. R. 77; *Smith v. Cora*, 3 Misc. 545; *Thomas v. Stewart*, 122 N. Y. 580.

If a contract calls for monthly payments the contractor may, upon refusal of the other party to make the payment, abandon further performance of the contract, so as to save all his legal rights in the agreement. *Pigeon v. United States*, 27 Ct. Cl. 167.

But in case of a construction contract in which the work is to be paid for by instalments, mere failure to pay one of the instalments when it becomes due will not authorize the other party to abandon the work and bring an action for all the benefit he would have received had he fully performed. *Cox v. McLaughlin*, 52 Cal. 590.

Persons who have contracted to perform certain work in consideration of monthly payments may refuse to complete the work and sue for what they have done, if the payments are refused, by reason
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of which they are not able to go on with the work. *Dobbins v. Higgins*, 78 Ill. 440.

If a party who has undertaken to construct a building is prevented from completing it by the failure of the other party to make his payments as provided in the contract, he may recover the value of the labor expended in preparing material for the structure. *Shulte v. Hennessy*, 40 Iowa, 352.

Upon repeated refusals to pay instalments the contractor may quit the work and recover the value of his services. *Bean v. Miller*, 69 Mo. 384.

Where work is done under a contract providing for payment by instalments at stated periods, and the payments are not so made, the contractor may quit the work and then recover of the defaulting party for the amount done at the contract rates. *Mugan v. Regan*, 48 Mo. App. 461.

One contracting to do work for a corporation may abandon the work if the corporation has not money to make the payments as required by the contract, without losing his right to be paid for the work done. *Cunningham v. Massena Springs & Ft. C. R. Co.* 63 Hun, 439.

Contractors for building a canal upon which payments are to be made monthly are justified in abandoning the work if the owner of the canal is unable to make the payments when due, and may file a lien for the value of the work done. *South Fork Canal Co. v. Gordon*, 73 U. S. 6 Wall. 561, 18 L. ed. 804.

Where the owner of property directs the contractor to leave the work, the latter may do so and elect to treat the contract as still subsisting and recover for work performed at contract prices and damages for the discontinuance, or to treat it as rescinded and recover on a *quantum meruit* for the value of the work which he has done. *Derby v. Johnson*, 21 Vt. 17.

Under a contract to pay a certain amount of money upon the completion of each 100 feet of tunnel, upon failure to make a payment the contractor is entitled to stop the work and recover for what he has done. *Bennett v. Shaugbnessy (Utah)* 22 Pac. Rep. 156.

In case of a material variance between the plans on which a bid for work was made and those furnished for the work, the contractor may abandon the work and sue for the value of what he has done. *Williams v. Boehan*, 23 Jones & S. 319.

If performance of a contract is prevented by the failure of the owner to supply material according to his contract, the contractor may recover on a *quantum meruit* for what he has done. *Cargain v. Everett*, 42 N. Y. S. R. 618.

sale requires the delivery of all the goods at once, and the seller tenders only part at the time specified, certainly the buyer may refuse to accept the part; but it is scarcely accurate to say his refusal is based upon a rescission of the contract. He has simply refused to do what he never agreed to do. But if the goods are to be delivered in instalments at different times, and the seller tenders one instalment on the day specified, then, if the buyer refuses to accept it, plainly his refusal must rest upon a different foundation. He had agreed to accept such a tender, and his refusal can be justified only on the idea that he has become released from that agreement. That is to say, with reference to the point we are now considering, it must appear that his agreement to accept the instalment tendered was dependent on the due performance by the seller of another promise, which he had failed to perform. We are thus brought to the real question in all bargains of this nature,

whether, on the proper construction of the contract, the performance of any particular stipulation by one party is a condition precedent to the continuance of obligation upon the other party; and logically this must be the question as well with regard to the first stipulation as the subsequent ones. On this question this court adopted the general rule that when the seller has agreed to deliver the goods sold in instalments, and the buyer has agreed to pay the price in instalments which are proportioned to and payable on the delivery of each instalment of goods, then default by either party with reference to any one instalment will not ordinarily entitle the other party to abrogate the contract. We were led to the adoption of this rule because it seemed to be supported by the greater strength of judicial authority, and to be most likely to promote justice. We see no sufficient reason for abandoning it. The rule governs the case in hand, and maintains the

When the completion of a piece of work is arrested by the omission of the party for whom the work is done, the contractor has an election to treat the contract as rescinded and recover on a *quantum meruit* the value of his labor, or he may sue for the work completed at the stipulated price, and for the loss in profits or otherwise sustained by the interruptions. *Jones v. Judd*, 4 N. Y. 414.

If a contractor is prevented from completing his work by the unwarranted defaults of the other party, he may either sue upon the contract and claim damages for a breach of it, or treat it as abandoned and sue for the reasonable value of his work. *McCullough v. Baker*, 47 Mo. 401.

Where a person has contracted to do the carpenter work on a brick building, and the building falls before his work is completed, he may abandon the contract and sue for the value of his services, if the owner of the building requires him to gratuitously replace what was destroyed. *Schwartz v. Saunders*, 46 Ill. 18.

A mill-wright who contracts to construct a saw-mill for a person who undertakes to furnish the machinery may treat the contract as rescinded and recover the value of work done in case the owner of the property refuses to furnish the machinery according to his contract. *Butts v. Huntley*, 2 Ill. 412.

In case of a prevention by the owner of property of the completion thereon of work by a contractor, the latter may recover for the profits he would have made had he been allowed to complete. But mere refusal of a payment when it is due is not a prevention, but a mere breach, and, although for it the contractor may treat the contract as rescinded and sue for what he has done, yet he cannot abandon the contract and recover the lost profits. *Cox v. McLaughlin*, 54 Cal. 606.

In *Phillips & C. Constr. Co. v. Seymour*, 91 U. S. 646, 23 L. ed. 341, which was an action of covenant on the contract, it appeared that plaintiffs were to do work for defendant and were to be paid for it in instalments as it was completed. After a portion had been done defendant failed to make payment and the plaintiffs then stopped work and sued for what was already done. The court held that defendant having defaulted on a payment due, plaintiffs were not required to go on at the hazard of further loss, but could recover for what they had done. If a builder has done a large and valuable part of the work, but has failed to complete within the time limited by the covenant, the other party has the option, when that time arrives, of abandoning the contract for such failure, or of permitting 80 L. R. A.

the party in default to go on. If he abandons the contract and notifies the other party, the failing contractor cannot sue on the covenant and recover, because he cannot make or prove the necessary allegations of performance on his own part. But if the other party says to him: "I prefer you should finish the work," or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on the covenant for the contract price of the work when completed.

A person who contracts to lay a floor with boards to be furnished by another may leave the job on the latter's neglect or refusal to furnish them, and recover for what he has done. *Hill v. Hovey*, 26 Vt. 169.

If the owner of a building, who is to furnish material for its improvement, delivers the material to the contractor upon such conditions as to amount to a refusal to deliver, the latter may abandon the contract and sue for the value of the work which he has performed. *Greene v. Haley*, 5 R. I. 230.

Right of owner.

If one party who has contracted to erect a building for a certain price fails to comply with his obligations, the owner may rescind the contract, finish the building, and hold the contractor liable for the extra amount which it cost him. *Wardens of Ch. of St. Louis v. Kirwan*, 9 La. Ann. 31; *Allen v. Wills*, 4 La. Ann. 97.

A contract for the construction of a railroad may be annulled by the company if the contractors fail to perform their contract obligations until they are clearly in default. *Titus v. Cairo & F. R. Co.* 46 N. J. L. 393.

If a contractor refuses to go on with his work two courses are open to the other party, either to act upon the refusal, accept the abandonment, and refuse any further performance on his part, holding the other party liable for damages caused by the breach, or to refuse to accept the abandonment, and hold the other party to the performance of the contract. *Scofield v. McGregor*, 63 N. Y. 638.

If one who has contracted to construct a building refuses to go on with the work, the owner may regard the contract as rescinded and let the work to another without waiting for the time to elapse which had been allowed for the completion of the building. *Thompson v. Laing*, 8 Bosw. 482.

If a contractor for a piece of work fails to perform the work in a workmanlike manner, the owner may discharge him and terminate the contract. *Feinberg v. Weiher*, 46 N. Y. S. R. 390.

right of the plaintiff to recover damages for the defendant's refusal to accept the third instalment of silk. Therefore, as against the defendant, the judgment is not erroneous.

The plaintiff below assigns error upon the exclusion of his claim for damages because of the refusal to accept the instalment deliverable August 15. In this there was no substantial error. Conceding that the defendant's repudiation of the whole contract before August 15 absolved the sellers from the duty of tendering an instalment on that date, and gave them an immediate right of action against the defendant for a breach of contract, nevertheless, when it appeared, as it did on the trial, that by no possibility could the sellers have made tender of the silk due August 15, because the silk did not arrive in New York until a later day, it became evident that as to that instalment the sellers suffered no loss by the breach.

There are other assignments of error in the

record, but, as counsel did not notice them in argument, we assume that they are all involved in the matters above decided, or are waived.

The judgment should be affirmed.

Van Syckel, J., dissenting (Filed March 5, 1895):

In March, 1893, Gerli contracted to sell and deliver to the Poideboard Silk Company thirty bales of new silk; ten bales to be delivered between July 20 and 25, ten bales August 15, and ten bales between September 1 and 10, 1893. Gerli could not deliver the first instalment, and so informed the silk company, nor was Gerli able to deliver the second instalment. After the failure to deliver the first instalment, the silk company gave notice to Gerli that it rescinded the contract, and would refuse to accept the future deliveries. For the refusal of the silk company to accept the last instalment, deliverable in Septem-

If one who has contracted to do the brick work on a building does it in a manner that does not fill the contract, the owner cannot, unless the defect goes to the whole consideration, break the contract, retain the benefit of the work done, and refuse to pay for it. *Liggett v. Smith*, 3 Watts, 332, 27 Am. Dec. 358.

If a contractor stipulates to build and finish a house by a certain day, and at the expiration of the time he has not commenced the work, the other party may rescind the contract. *Miller v. Phillips*, 31 Pa. 218.

If one contracting to dig a well fails to complete it within the time agreed upon, the owner may refuse to let him complete it and not be liable on a *quantum meruit* for the work done if the well is not used. *Davis v. Hubbard*, 41 Wis. 408.

The Louisiana statute provides that the proprietor of a building has a right to cancel at pleasure the bargain he has made for its improvement, even in case the work has been already commenced, by paying the undertaker for the expenses and labor already incurred and such damages as the nature of the case may require. *St. Mary's Wholesale Fruit & V. Market Co. Limited v. New Orleans*, 47 La. Ann. 255.

c. Insurance contracts.

There is no intention of going into the subject of insurance here, since such contracts form a class by themselves; but attention is called to the following decisions as bearing upon the subject of the *note*.

If an insurer has violated its contract and voluntarily disabled itself from performance, the insured is excused from further performance or offer to perform on his part, and may recover such damages as he can show he has sustained. *People v. Empire Mut. L. Ins. Co.* 92 N. Y. 105.

If an insurance company wrongfully refuses to receive premiums due on a policy the assured may treat the policy as at an end and may recover back all the premiums paid under it. *McKee v. Phoenix Ins. Co.* 23 Mo. 333, 75 Am. Dec. 129.

If an insurance company wrongfully refuses to receive a premium when it becomes due, the insured may elect to treat the contract as at an end and recover the just value of the policy. *Day v. Connecticut Genersl L. Ins. Co.* 45 Conn. 496, 29 Am. Rep. 698.

d. Continuing contracts.

There is a class of contracts, of which **GERLI V. POIDEBOARD SILK MFG. CO.** is an example, which 30 L. R. A.

are usually denominated continuing contracts. They are usually contracts for the purchase and sale of chattels which are to be delivered in instalments so that the deliveries and payments shall extend over a considerable period of time. There is much conflict of opinion upon the question whether a breach as to delivery or payment for one instalment will justify the other party in rescinding or abandoning the contract. The attempt to decide this class of cases by the rules applicable to other contracts has not been very successful, and has met with some dissent.

In *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. 73, Pollock, C. B., says the principle of *Boone v. Eyre*, 1 H. Bl. 273, note, applies to the partial breach of a single contract, but surely not to a breach of a continuing contract, as the supply of goods from day to day or week to week, where, during the contract, one party becomes wholly incapable of performing his part.

In *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 442, aff'g L. R. 9 Q. B. Div. 645, 51 L. J. Q. B. 584, 47 L. T. N. S. 869, 81 Week. Rep. 83, where there was a contract to deliver a quantity of steel, a certain amount each month, payments to be made within three days after each delivery, the court says: "You must look at the actual circumstances of the case, in order to see whether the one party to the contract is relieved from the future performance by the conduct of the other." It is then said that "the payments according to the contract were not conditions precedent to future deliveries, but that, notwithstanding that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract." And the court held that the failure to pay in that case because of a mistake as to there being a right to pay as the seller was a corporation under process of winding up was not such a breach as entitled the seller to repudiate the contract and recover for what it had done under it.

Jonassohn v. Young, 4 Best & S. 230, 32 L. J. Q. B. 385, 11 Week. Rep. 922, illustrates a distinction which has been sought to be established by the English cases. In it the contract was that plaintiff should furnish to defendant certain coal of a quality equal to sample by a boat to be sent by defendant. The action was for breach of contract in failing to accept the coal, and the declaration averred that defendant had absolutely refused to accept any more coal whereby he had exonerated and discharged plain-

ber, Gerll brought this suit, and recovered damages in the trial court. The only question in the case is whether, under these circumstances, the purchaser had a right to rescind the contract.

Where goods are sold to be delivered at a specified time, the purchaser is not bound to accept them at a subsequent time. 2 Benjamin, Sales, p. 892; 2 Chitty, Cont. p. 443; *Behn v. Burness*, 8 Best & S. 757; *Boves v. Shand*, L. R. 2 App. Cas. 455; *Lowber v. Bangs*, 69 U. S. 2 Wall. 723, 17 L. ed. 768; *Davison v. Von Lingon*, 118 U. S. 40, 28 L. ed. 885. In *Clark v. Wright*, 5 Phila. 439, Hare, J., said that the buyer was not responsible unless tender was made at the time and place specified; that no case, he believed, could be found where an executory contract for the sale of chattels has been taken out of the strict rule of the common law by equity, on an equitable principle. In *Jones v. United States*, 96 U. S. 24, 24 L.

tiff from any further performance thereof on his part. Defendant pleaded that plaintiff first broke the contract in that on one occasion he did not send coal equal to the sample, and on another occasion he detained the boat an unreasonable time; but the court said that in neither plea does the matter alleged go to the root of the consideration, and the judgment was given for plaintiff on the pleas, although by a mistake in the report in 4 Best & Smith it is stated that judgment was for defendant.

The contract itself may be such as to settle its own interpretation.

Thus, if in a continuing contract the payments are to be by paper, which under the contract must become due before all the goods are delivered, the delivery of the instalments as they become due will not be a condition precedent to the further performance of the contract. *Maryland Fertilizing & Mfg. Co. v. Lorentz*, 44 Md. 218.

So the refusal of performance may be such as to show that it is intended as a breach of the entire contract, in which event the aggrieved party is held to be entitled to act accordingly.

Thus, an absolute refusal to deliver more oil under a continuing contract will authorize the purchaser to refrain from making further tenders of price, and give him a right to sue for breach of the contract. *Forsyth v. North American Oil Co.* 53 Pa. 168.

So, in case of a sale of a crop of peaches to be delivered from day to day and paid for at the end of each week, the seller may treat the contract as rescinded upon the refusal of a single payment. *Reybold v. Voorhees*, 30 Pa. 116.

So, in a case where a certain amount was to be paid for the transmission of news over a telegraph line, where the company refused to furnish statements of the amount collected or to pay over the excess collected, the court held that a single omission, if made on a ground that would apply to future omissions, is a breach that absolves the other party from the duty of considering the contract as continuing and of performing or continuing performance thereafter. *Goodsell v. Western U. Teleg. Co.* 26 Jones & S. 28.

So, under a continuing contract for the delivery of iron the purchaser will not be bound to acknowledge the continued existence of the contract after such repeated failures to make deliveries required by the contract as to defeat its objects. *Bollman v. Burt*, 61 Md. 418.

So, a seller of goods to be delivered and paid for in instalments may, upon receiving notice from the buyer that he will accept no more, treat the 30 L. R. A.

ed. 644, Mr. Justice Clifford pronounces this rule to be a rigid one, so that the vendee is not constrained to accept goods unless delivered or tendered at the time agreed upon. If, therefore, the contract had been to deliver the thirty bales at one time, the right of the buyer to rescind on failure of the vendor to deliver on the day named would be so clear that it would not be debatable. In what respect does the case under discussion differ in principle? It is an entire contract for the delivery of thirty bales, although to be in instalments. It cannot, even plausibly, be contended that the contract is severable or divisible. The bargain was a unit, embracing all of the thirty bales, and not three separate, independent contracts for ten bales each. It cannot be seriously asserted that the contract was for anything other than thirty bales, or that there was any implied term in it that the vendee would accept damages as a substitute for such deliveries as

contract as rescinded and sue for those already delivered. *Bartholomew v. Markwick*, 15 C. B. N. S. 711, 33 L. J. C. P. 145, 10 Jur. N. S. 616, 9 L. T. N. S. 651, 12 Week. Rep. 314.

So, if, in a continuing contract for the sale of goods the purchaser does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable or does not intend to go on with the contract, the seller is justified in repudiating it. *Bloomer v. Bernstein*, L. R. 9 C. P. 588, 43 L. J. C. P. 375, 31 L. T. N. S. 306.

So, where defendant agrees to deliver straw upon plaintiff's premises, to be paid for when delivered at so much per load, if the purchaser refuses to pay when the loads are delivered, but insists on the right to keep a load in advance, the seller may refuse to deliver more straw and resist an action brought against him for breach of his contract. *Withers v. Reynolds*, 2 Barn. & Ad. 882.

Where a contract provided for the manufacture of a certain quantity of lumber each month by one party and the acceptance of and payment for it by the other, and the latter during the time of performance notified the former that he would receive no more, the court held that the seller was entitled to treat the contract as wholly broken by the buyer and sue to recover, firstly, the contract price of lumber actually delivered and received under the contract; and secondly, upon the breach to recover the entire damages resulting from the breach on the part of the buyer in putting an end to and refusing to receive any more lumber under the contract. The court says: "There was not merely a neglect of payment, but they (plaintiffs) were notified by defendants that they should treat the contract as at an end and would receive no more lumber under it. Defendants thereby prevented plaintiffs from fulfilling their contract. The plaintiffs after this, even if they would be justified in so doing, could not be required as a condition precedent to obtaining adequate relief for the breach to go on manufacturing lumber at the risk of finding no market for it or of being unable to collect from the defendants the amount that might become due under the contract. There was a total breach of an entire contract and the plaintiffs were entitled to sue upon the breach immediately to recover the entire damages resulting from it without waiting for the time for full performance to elapse. *Hale v. Trout*, 35 Cal. 242.

As to the right to go on and complete after notice to desist, see *note to Davis v. Bronson* (N. D.) 16 L. R. A. 655.

But on the direct question as to the right to re

were not made by the vendor, and still be under obligation to receive such deliveries as the vendor elected to make. Damages are adjudged for breach of contract; they are not given as part performance of the contract. It is true that the failure to make the first delivery left in the purchaser the option to insist upon delivery of the subsequent instalments, which option he would exercise only in case the market value of the goods did not depreciate; and in that respect he would have the advantage of the other party to the contract. The same result would follow if the thirty bales were to have been delivered in bulk; for in that case, also, the vendee would not elect to rescind, but would insist upon the execution of the engagement, if there was a rise in the market price. The advantage in position which in such case the buyer occupies arises from the fact that he has performed, or is ready to perform, on his part, while the other party is in default; and such

advantage therefore has a just basis. No case has been brought to the attention of the court where the vendee has been held to the execution of the contract where he announced his election to rescind after the seller failed or refused to make the first delivery. *Hoare v. Rennie*, 5 Hurlst. & N. 19, is precisely in point, recognizing the right of rescission in a case as that before us. This case was criticised in *Simpson v. Crippin*, L. R. 8 Q. B. 17, but in *Honck v. Muller*, L. R. 7 Q. B. Div. 92, Lord Justice Bramhall says that *Hoare v. Rennie* has never been overruled; that in *Simpson v. Crippin* the court evidently did not understand it. He approved of the decision in *Simpson v. Crippin*, and distinguishes *Hoare v. Rennie* by the fact that in the former case there had been part performance of the contract, and it could not, therefore, be undone. Lord Bramhall further pertinently remarks that "it has never yet been held that a man

rescind for a breach in respect to one instalment, there seems to be a hopeless conflict. One line of decisions holds that a breach which only extends to a single instalment is not ground for rescission.

In case of a continuing contract of sale, which does not make payment a condition precedent to the continuing obligation to sell and deliver, default of payment will not release the other party, unless the conduct of the defaulting party evinces an intention on his part to abandon the contract and no longer to be bound thereby. *Otis v. Adams*, 56 N. J. L. 38.

In case of a continuing contract default by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. *Blackburn v. Bently*, 47 N. J. L. 290, 54 Am. Rep. 159; *Trotter v. Heckscher*, 40 N. J. Eq. 656; *Lehigh Line & I. Co. v. Trotter*, 43 N. J. Eq. 198; *Trotter v. Heckscher*, 42 N. J. Eq. 258.

In *Simpson v. Crippin*, L. R. 8 Q. B. 14, 42 L. J. Q. B. 23, 27 L. T. N. S. 546, 21 Week. Rep. 141, where the contract was to take away about 500 tons of coal each month, and the first month wagons were sent for only 158 tons, whereupon the seller refused to deliver any more under the contract, the court says: "No sufficient reason has been urged why damages will not be a compensation for the breach by the plaintiffs, and why the defendant should be at liberty to annul the contract." But the defendant, having relied on *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. 73, it was said: "It is difficult to understand on what principle that case was decided. If the principle was that wherever the plaintiff has broken his contract first, he cannot sue for a subsequent breach by the defendant, the decision would be opposed to the authority of many other cases."

To what cases the court had reference when making that remark is not apparent. It would seem from the authorities collected in this note that they were not cases upon the subject of rescission, and if not they could hardly be regarded as authority for the decision of the case then before them.

One who has undertaken to act as agent for the sale of coal is not justified in rescinding his agreement because of one failure to furnish merchantable coal according to the contract. In order to justify such action the failures must be of such frequency as to make it unjust to require a con-

tinuance of the agreement. *Cannon Coal Co. v. Taggart*, 1 Colo. App. 60.

If the payment for an instalment when delivered is not made expressly or impliedly a condition precedent to future delivery, the mere omission to make it will not authorize the other party to abandon the contract. *Tucker v. Billing*, 3 Utah, 82.

If the contract is to deliver all the coal which the other party shall need in his business for a certain time, payments to be made for the coal delivered in one month on the 10th of the next month, mere failure to pay according to the contract will not justify a rescission of the contract, since it is severable and the breach of the payment does not go to the whole of the consideration. *Hansen v. Consumers' Steam Heating Co.* 73 Iowa, 77; *Osgood v. Bauger*, 75 Iowa, 560, 1 L. R. A. 655.

Under a contract to sell ten car loads of produce with the right to draw for the price of each as delivered, the refusal of the purchaser to pay for the first car load when delivered claiming the right to hold the price to insure the compliance with the remainder of the contract will not entitle the seller to refuse to furnish the remainder of the produce. The court says: "Defendants were not in default as to the unexecuted portion of the contract. Nor did it appear that they ever would be in default as to them as they expressed a willingness to pay for the other nine car loads as they should be delivered, and there is no claim that they were not able to perform their undertaking in that regard. They did not refuse absolutely to pay for the car load which was delivered. It was not understood at the time the contract was made that plaintiffs were dependent for the means to purchase the subsequent car loads on the money which they were to obtain for those first delivered, nor is it shown that they were so dependent. Rescission of a divisible contract will not be allowed for a breach thereof, unless such breach goes to the whole contract. *Myer v. Wheeler*, 65 Iowa, 380.

Where the seller of iron deliverable in instalments neglected to deliver the first instalment until several months after it was due, because of which the purchasers refused to make payment for it claiming the right to set off the loss which they had sustained because of such failure, the court held such refusal did not show an intention to abandon the contract which would give the seller the right to refuse to make further delivery. *Freeth v. Burr*, L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. N. S. 773, 22 Week. Rep. 370.

In *Weaver v. Sessions*, 6 Taunt. 154, 1 Marsh. 605, which was an action of covenant for buying malt

may break his contract, render the performance of the whole impossible, and, though nothing has been done under it, insist on the performance of the remainder." In *Norington v. Wright*, 115 U. S. 188, 29 L. ed. 866, Mr. Justice Gray discusses the English cases very elaborately, and shows clearly that there is no support in the law for the doctrine that the vendor, after he himself is in default as to the first delivery, can enforce performance of the remaining part of the bargain by the vendee. He most confidently asserts that in mercantile transactions an agreement to deliver goods at a specified time is to be regarded as a warranty, upon failure or non-performance of which the party aggrieved may repudiate the whole contract; that "the seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or

to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once." This case was approved in *Cleveland Rolling Mill Co. v. Rhodes*, 121 U. S. 255, 30 L. ed. 920, and is unchallenged authority in the Federal courts. In *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, the buyer accepted five weekly deliveries, and paid for them without objection. He refused afterwards to accept the sixth delivery, not because it was not in time, but for the reason that he objected to the quality of the goods previously accepted and paid for. This court held that under these circumstances the buyer could not

of a third person after contracting to purchase of plaintiff, the defense was that defendant had delivered bad malt, and that therefore defendant procured his malt elsewhere; the court based its ruling mostly on the words of the contract, and held that under it a single breach by plaintiff did not destroy the contract. Dallas, J., says: "I think each of these parties has a complete remedy and must resort to the remedy by action on their respective covenants, and that the breach by plaintiff of his covenant is no discharge of the present action."

The numerical weight of authority is, however, on the other side.

In *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. 73, the contract was to furnish a large quantity of iron to be shipped in certain months a certain proportion each month, and the seller shipped in the first month only a small part of what the contract called for, whereupon the purchaser informed him that he would not be bound by the contract and the seller brought suit. The court says: "A man has no right to say that which is a breach of an agreement is a performance of it. On that ground this case is distinguished from almost every other case that has been cited. It does not turn upon the question of condition precedent. The only question is whether if a man who is bound to perform his part of a contract does not do so, he can enforce the contract against another party." And the court held that in case of a failure to comply with the contract in reference to the first shipment the purchaser might refuse to accept and rescind the contract; but this might not be so if the breach was in a subsequent shipment, since then the seller could not be put *in statu quo*.

Hoare v. Rennie, 5 Hurlst. & N. 19, 29 L. J. Exch. 73, was followed in 1881, by *Honck v. Muller*, L. R. 7 Q. B. Div. 92, 45 L. T. N. S. 202, 58 L. J. Q. B. 529, 29 Week. Rep. 880.

In *Norington v. Wright*, 115 U. S. 188, 29 L. ed. 866, the court after examining the authorities upon the question states that the rule laid down in the earlier cases of *Hoare v. Rennie*, *supra*, and *Coddington v. Paleologo*, L. R. 2 Exch. 193, 36 L. J. Exch. 73, 15 L. T. N. S. 561, 15 Week. Rep. 961, as well as the later cases of *Reuter v. Sala*, L. R. 4 C. P. Div. 239, 43 L. J. C. P. 492, 40 L. T. N. S. 776, 27 Week. Rep. 631, and *Honck v. Muller*, *supra*, appears to be supported by a greater weight of authority than the rule stated in the intermediate cases of *Simpson v. Crippin*, L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. N. S. 546, 21 Week. Rep. 141, and *Brandt v. Lawrence*, L. R. 12 Q. B. Div. 344, 46 L. J. Q. B. 237, 24 Week. Rep. 749, and to accord better with the 80 L. R. A.

general principles affirmed by the House of Lords in *Bowes v. Shand*, L. R. 2 App. Cas. 455, 46 L. J. Q. B. 561, 36 L. T. N. S. 887, 25 Week. Rep. 730, while it in no wise contravenes the decision of that tribunal in *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 442, affirming L. R. 9 Q. B. Div. 648, 51 L. J. Q. B. 584, 47 L. T. N. S. 839, 31 Week. Rep. 83.

In *Coddington v. Paleologo*, *supra*, the contract was to deliver goods on "April 17 complete on 8th of May," and the court held that if it bound the seller to commence delivery on April 17, the buyer could rescind if he did not do so. In *Brandt v. Lawrence*, *supra*, there was a contract for oats to be shipped within a certain time, and it was held that all shipped within that time must be received although the rest were late. In *Reuter v. Sala*, *supra*, there was a contract for the sale of a certain quantity of pepper to be shipped in certain months and when it appeared that only part of the quantity was placed on board the vessel during the designated month, the buyer was entitled to reject all as not complying with the contract. These cases, it will be observed, are not strictly on the point and can only be regarded as authority by analogy.

In case of a continuing contract for the sale of corn, in which payments are to be made when shipments are received, the refusal to make a payment will authorize the seller to rescind and refuse to deliver any more of the corn. *Rugg v. Moore*, 110 Pa. 238.

Failure to pay according to contract for commodities furnished under a continuing sale is a breach which gives the seller the right to treat the contract as terminated and bring an action for the value of what has been furnished. *Kokomo Strawboard Co. v. Inman*, 184 N. Y. 92.

Refusal to give a note for the balance due on several invoices of lumber, delivered under a contract for the sale of a large amount to be delivered a small portion at a time as the contract required, will give the seller the right to rescind the contract and sue for what has been delivered. *Stockdale v. Schuyler*, 29 N. Y. S. R. 380.

Under an agreement to furnish 40,000 yards of flannel each month, the furnishing of only 25,000 yards the first month is such a breach of the contract as will authorize the purchaser to rescind. *Elting Woolen Co. v. Martin*, 5 Daly, 417.

A breach by the vendor at the outset of a continuing contract of sale will justify the vendee in rescinding the contract *in toto*, and refusing to accept anything that may subsequently be delivered under it. *Pope v. Porter*, 102 N. Y. 366.

Under a contract which is indivisible and to be fulfilled by the delivery of a commodity in instal-

rescind, but must resort to his action for damages for the defects in the goods which had been furnished. That case was properly decided under the prevailing rule which applies to rescission. It is the admitted rule that rescission cannot be resorted to where part of the contract has been executed and the parties cannot be placed *in statu quo*. The entire contract must be rescinded, or there can be no rescission. Under the rule on which the judgment below is based, if there is a contract for twelve successive monthly deliveries, the vendor may refuse to make eleven of the deliveries as the due days arrive, and still hold the vendee to the acceptance of the twelfth delivery. Such a doctrine will be startling to the business community. It needs no discussion to show that in those pursuits where supplies are essential to the employment of labor no business enterprise can be conducted with safety or suc-

cess under such a rule. A contract for goods in instalments is thereby perverted into an agreement to engage in a succession of lawsuits, if the vendor so elects, for such damages as the purchaser may be able to recover, as a substitute for what he expressly bargains for, and during all this period the purchaser cannot safely secure his needed supplies elsewhere, because he cannot know, until the due days arrive, whether the vendor will make further default. The injustice of such an exposition of the law is even more conspicuous when we consider that in many cases the purchaser will be compelled to seek redress in the courts of another state, or in those of a foreign country. I cannot assent to a doctrine so subversive of certainty and success in commercial transactions. In my opinion, the judgment below should be reversed.

ments, the failure to deliver or receive an instalment in accordance with the contract releases the other party. *Smith v. Keith & P. Coal Co.* 36 Mo. App. 587.

One who has agreed to buy certain barrels and hogsheads, but who refuses to pay for a quantity which are delivered, cannot maintain an action against the seller because of his refusal to furnish any more until such payment is made. *Landeche v. Sarpy*, 37 La. Ann. 835.

In *John A. Roebbling's Sons Co. v. Lock Stitch Fence Co.* 23 Ill. App. 184. It is said the law appears to be well settled that where a certain commodity is sold to be delivered in instalments and received in that manner, the failure of the seller to fulfill the contract in the particular of not delivering the quantity required as to either of the instalments gives the purchaser the right to rescind the entire contract.

In *McGrath v. Gegner*, 77 Md. 381, a contract for the sale of oyster shells to be paid for on the first of each successive week for the shells delivered during the week preceding was considered to mean that payment was an essential part of the contract, and that failure to make it would entitle the seller to refuse to deliver any more shells under the contract.

In *Johnson v. Allen*, 78 Ala. 387, 56 Am. Rep. 34, there is implied recognition of the right to terminate a continuing contract for failure to deliver an instalment, for the court says a delivery of only part of the quantity ordered, or a failure to deliver any part of it, does not terminate the contract, unless the plaintiff saw proper so to treat and regard it.

In a case where there was a contract for rails to be delivered a certain amount each month, and the purchaser attempted to rescind because of a failure to deliver the required amounts during the first two months, the court held that the right to rescind existed, saying: "This equitable doctrine [of severance] should not be invoked by one who has failed to perform, for the purpose of defeating the other's right to rescind, and thus to protect himself against the consequences of his own wrong. As against such a party the contract should be treated and enforced as entire. . . . To render the defaulting party's claims of severance 'logical,' it is necessary to take a step forward, and hold that such a transaction constitutes several distinct, independent contracts. Then, of course, it follows that a failure as respects one of several successive deliveries affords no right to rescind in

regard to those yet to be made." The court then says this step has been taken by the English courts, and that the cases in this country are inharmonious, but in that case they refuse to take the step. *Norrington v. Wright*, 5 Fed. Rep. 768, 21 Am. L. Reg. N. S. 805.

If there is a contract for the sale of a certain quantity of iron rails to be shipped a certain number of pounds each month, and there is a material variation from such amounts in the monthly shipments, the buyer may rescind the contract. The court says: "The plaintiff, denying the defendant's right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action." *Norrington v. Wright*, 115 U. S. 188, 29 L. ed. 866.

In case of a contract to deliver certain castings to a certain amount on a credit of a year a refusal to receive a lot when sent puts an end to the contract as to the obligation to deliver the balance and give the stipulated credit for the amount delivered. *Tyson v. Doe*, 15 Vt. 571.

Where there was a contract for the products of certain looms to be delivered in lots of 1,000 each, and the first deliveries were not according to contract, and the purchaser claimed the right to rescind, the court says that "to hold that the purchaser must receive such lots as are of the right quality, and that for the periods when they are not so he must supply himself elsewhere, and sue for his damages, or claim to deduct them, would introduce confusion into business. It would in most cases entirely frustrate the object of the contract." The court then reviews the cases on the question, and says: "This conflict has arisen, partly, we think, from applying to this class of contracts, distinguished from all others by this marked peculiarity (of requiring successive deliveries), principles of decision which properly belonged only to other classes of contracts. In cases of contracts for successive deliveries the doctrine of condition precedent becomes more difficult of application. So also, when in such cases the articles already delivered have been used, it becomes impossible for the party rescinding to return them and put the other party *in statu quo*. Contracts of this sort should be carried out according to their spirit and object, without regard to the mere technicalities, and, we might well say, quibbles, of the older decisions." *King Philip Mills v. Slater*, 12 R. L. 82, 34 Am. Rep. 603.

H. P. F.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
Henry C. HENDERSON, *Respt.*,

v.

BOARD OF SUPERVISORS of West-
chester County, *Appt.*

PEOPLE of the State of New York *ex rel.*
Augustus M. FIELD, *Appt.*,

v.

BOARD OF ALDERMEN of the City of
New York, *Respts.*

Town of WESTCHESTER, *Appt.*,

v.

Louis F. HAFFEN *et al.*, *Respts.*

Village of WILLIAMSBRIDGE, *Appt.*,

v.

Louis F. HAFFEN *et al.*, *Respts.*

(147 N. Y. 1.)

1. The duty and burden of showing that an act of legislation within the ordinary scope of legislative power is unconstitutional rest upon those who assert its unconstitutionality.

2. The power to divide counties or towns and erect new counties and towns, or to change their boundaries, is conferred by the general grant of legislative power, the time and mode of exercising which are in the discretion of the legislature, unless restrained by other provisions or arrangement of the Constitution.

3. The constitutional declaration that a Senate district shall consist of certain specified counties, when construed with other provisions making population the basis of apportionment and prohibiting the division of a county between Senate districts, establishes an organic relation between the boundaries of the counties as they existed at that time and the Senate districts thereby established, so that no change of county boundaries can be effectual to change the boundaries of the Senate district.

4. The provision in Const., art. 3, § 5, that nothing in that section shall prevent the division at any time of counties and towns by the legislature, although that section relates to the apportionment of members of assembly and the manner of constituting assembly districts, gives the legislature power to change such boundaries in its discretion, although the county boundaries which are changed may be the boundaries of a Senate district.

5. The annexation of a portion of Westchester county to the city and county of New York by Laws 1895, chap. 934, which is valid so far as it affects municipal burdens and municipal rights, leaves the annexed territory still a part of the 22d Senate district, which by the Constitution consisted of Westchester county, and within the jurisdiction of the board of supervisors of that county for the purpose of including it within one of the three

assembly districts allotted to that county by the Constitution.

(September 27, 1895.)

A PPEAL by defendant from an order of the General Term of the Supreme Court, Second Department, affirming an order of a Special Term for Westchester County granting a peremptory writ of mandamus requiring the Board of Supervisors of Westchester County to reassemble and divide the County into assembly districts. *Affirmed.*

A PPEAL by relator from an order of the General Term of the Supreme Court, First Department, affirming an order of a Special Term for New York County refusing a writ of mandamus to compel the Board of Aldermen of the City of New York to reconvene and re-apportion the assembly districts of New York County. *Affirmed.*

A PPEALS by the town of Westchester and the Village of Williamsbridge from orders of the General Term of the Supreme Court, Second Department, affirming judgments of a Special Term for Westchester County refusing an injunction to restrain defendants from interfering with property within their jurisdictions. *Affirmed.*

These actions all grew out of the question of the constitutionality of the act annexing certain territory in Westchester county to the city and county of New York. They were argued at the same time and treated in the court of appeals as one case; the appeal was heard at a special session convened for that purpose, and the court handed down the following decision:

"1st. That the act, chapter 934 of the Laws of 1895, annexing certain territory taken from the county of Westchester to the city and county of New York, is constitutional.

"2d. That by virtue of the act the annexed territory became, for all purposes of local government and administration, a part of the city and county of New York, except as otherwise provided therein.

"3d. That the act did not operate to change the territorial boundaries of the 22d Senate district, established by the Constitution of 1894; or to take the annexed territory out of the jurisdiction of the board of supervisors of Westchester county, in forming assembly districts pursuant to section 5 of article 3 of the Constitution; or to change the boundaries of the second judicial district, as they existed when the act was passed, of the boundaries of the second judicial department, as established by chapter 376 of the Laws of 1895.

"4th. That for the purpose of voting for senator, members of assembly, and justices of the supreme court, the annexed territory is to be regarded as part of the 22d Senate district, and of an assembly district to be formed by the board of supervisors of Westchester county, and of the second judicial district.

"5th. That the public property in the annexed territory vested under the act of annexation in the mayor, aldermen, and commonalty of New York, as provided in said act.

"6th. That it became the duty of the board of supervisors of Westchester county, at its

NOTE.—As to division of county into assembly districts, see also *State v. Wrightson* (N. J.) 22 L. R. A. 543.

30 L. R. A.

meeting on the second Tuesday of June, 1895, to include the annexed territory within one of the three assembly districts allotted by the Constitution to the county of Westchester.

"7th. That having omitted to perform their duty, the mandamus was properly granted.

"The order and judgment of the general term are therefore affirmed, with costs to the relator."

Subsequently, when the court convened for its regular term, the opinion printed herewith was handed down.

Further facts appear in the opinion.

Mr. William H. Robertson, for appellant Board of Supervisors of Westchester County:

The territory detached from the county of Westchester, and annexed to the city and county of New York, by chapter 984 of the Laws of 1895, was a part of the city and county of New York, and not a part of the county of Westchester, on the 11th day of June, 1895.

Laws 1895, chap. 984; *People v. Rice*, 185 N. Y. 473, 16 L. R. A. 886; Const. art. 3, §§ 1, 5; *Bank of Chenango v. Brown*, 26 N. Y. 467; *People v. Morrell*, 21 Wend. 563; *People v. Flagg*, 46 N. Y. 401; *Kinne v. Syracuse*, 3 Keyes, 110; Const. 1846, art. 3, § 5; *Howard v. McDiarmid*, 26 Ark. 100; *Pulaski County v. Saline County Judge*, 37 Ark. 339; *Bittle v. Stuart*, 34 Ark. 224.

The question of altering judicial districts or departments is not involved in this controversy. *Rumsey v. People*, 19 N. Y. 41; *Lanning v. Carpenter*, 20 N. Y. 447.

The only apparent restriction in the light of the construction placed on section 5, article 3, of the Constitution of 1846, as amended in 1874, is only an apparent one, and has no effect upon the power conferred upon the legislature to make the division in question.

Howard v. McDiarmid, *Bittle v. Stuart*, and *Pulaski County v. Saline County Judge*, *supra*. **Mr. William D. Guthrie**, for respondent Henderson, and appellants Town of Westchester and Village of Williamsbridge:

The Constitution was adopted in order to permanently establish the fundamental law of the state, and any legislation inconsistent with its express or implied provisions is invalid.

Minor v. Happersett, 88 U. S. 21 Wall. 162, 22 L. ed. 627; U. S. Const. art. 4, § 4; *Oakley v. Aspinwall*, 3 N. Y. 547; *Newell v. People*, 7 N. Y. 9; *People v. Draper*, 15 N. Y. 532; *Lanning v. Carpenter*, 20 N. Y. 447; *Re Gibson*, 21 N. Y. 9; *People v. Albertson*, 55 N. Y. 55; *People v. Porter*, 90 N. Y. 68; *People v. New York C. R. Co.* 24 N. Y. 495; *Metropolitan Bank v. Van Dyck*, 37 N. Y. 400; *People v. Potter*, 47 N. Y. 876; *Settle v. Van Borea*, 49 N. Y. 280; *People v. Fancher*, 50 N. Y. 289; *People v. Wemble*, 125 N. Y. 485; *People v. Rice*, 185 N. Y. 473, 16 L. R. A. 886; *Calder v. Bull*, 3 U. S. 8 Dall. 886, 1 L. ed. 648; *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 657, 9 L. ed. 1233; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274.

The division of the state into counties has always existed, and the policy of preserving and perpetuating the unity of interest and local associations in counties has been observed in every Constitution.

People v. Porter and *People v. Draper*, *supra*; 30 L. R. A.

Coutant v. People, 11 Wend. 511; *Clark v. People*, 26 Wend. 598; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759; 4 Record Const. Conv. 1878; Const. art. 6, §§ 14, 15; Const. arts. 3, 5, §§ 26, 27; Const. art. 10, § 1; Code Crim. Proc. §§ 102, 111, 115; *Re Gertum v. Kings County Supra*, 109 N. Y. 170.

The framers of the new Constitution, and the people who adopted it, intended to base such apportionment permanently and unalterably upon the county system.

People v. Rice, 185 N. Y. 473, 16 L. R. A. 886; Const. art. 3, §§ 3-5; Const. art. 2, § 1; *Lanning v. Carpenter*, 20 N. Y. 447; *Rumsey v. People*, 19 N. Y. 41; *People v. Holihan*, 29 Mich. 116; *Kinne v. Syracuse*, 3 Keyes, 110; *Sweet v. Syracuse*, 129 N. Y. 316; *People v. Angle*, 109 N. Y. 564; *People v. Potter*, 47 N. Y. 375; *Brown v. Maryland*, 25 U. S. 13 Wheat. 419, 6 L. ed. 678.

The scheme of the Constitution was based upon the continuance of this election machinery until duly changed. It has not been changed.

Laws 1892, chap. 569, §§ 12, 117, 135; *Gertum v. Kings County Supra*, 109 N. Y. 170.

The act of 1895 violates the provisions of the Constitution as to the judicial districts and departments.

Const. art. 6, §§ 1, 2; Laws 1876, chap. 24; Code Civ. Proc. §§ 232, 340, 982, 984, 2456; *People v. Porter*, 90 N. Y. 68; Laws 1881, chap. 415; Code Crim. Proc. §§ 223, 1035; Laws 1882, chap. 410, §§ 1638, 1663, 1667; *Geraty v. Reid*, 78 N. Y. 64; *Lafayette F. Ins. Co. v. Remmers*, 29 La. Ann. 419; *Com. v. Gamble*, 62 Pa. 343, 1 Am. Rep. 423.

The legislature intended the act to annex the territory for all purposes, and that intention cannot be pruned down within the limits of what might have been constitutional.

Wynehamer v. People, 18 N. Y. 378; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Trademark Cases*, 100 U. S. 82, 25 L. ed. 550.

Messrs. William B. Hornblower and M'Cready Sykes, for appellant Field:

The act is constitutional.

When the Constitution provides, by section 5, of article 3, that "nothing in this section shall prevent the division, at any time, of counties and towns, and the erection of new towns by the legislature," it follows logically that the legislature can divide "counties and towns," and erect "new towns" even though the assembly district and senatorial district may be thereby divided by other than town or county lines.

The counties whose division is forbidden are the political organizations, not the territorial areas, and no county, *i. e.*, no political organization, has been divided by the act of 1895.

Howard v. McDiarmid, 26 Ark. 100; *Bittle v. Stuart*, 34 Ark. 224; *Pulaski County v. Saline County Judge*, 37 Ark. 339.

The objection that judicial districts are divided, and that the act is thus unconstitutional, is not well taken.

The act being constitutional, and the territory in question having been duly taken out of the county of Westchester and annexed to the city and county of New York prior to the meeting of the board of aldermen on the 11th

day of June, 1895, to apportion assembly districts, it was the duty of that board to deal with the then existing state of affairs, and to divide the county of New York as it then existed, and not as it had existed theretofore.

No county lines are laid down by the Constitution itself, nor is there anything sacred about the boundaries of a county. The general power of the legislature to alter county lines cannot be disputed.

People v. Morrell, 21 Wend. 568.

In determining the constitutionality or unconstitutionality of a statute, the court will inquire into its general character and effect, and will consider facts of which it can take judicial notice as bearing upon the meaning and intent of the act.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 877, 52 Am. Rep. 34; *People v. Gillson*, 109 N. Y. 389; *Health Department of New York v. Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710.

Messrs. Francis M. Scott and John Proctor Clarke, for the Board of Aldermen of the City of New York and Haffen *et al.*:

The legislature possesses the whole legislative power of the people except so far as limited by the Constitution.

People v. Flagg, 46 N. Y. 401; *Bank of Chenango v. Brown*, 26 N. Y. 467; *People v. Morrell*, 21 Wend. 568.

The convention made a complete apportionment.

The provisions of the Constitution cited as prohibiting the division of counties are applicable solely to the political division thereof for apportionment purposes, and do not limit or affect the inherent power of the legislature to divide and sub-divide the territory of the state for local and municipal purposes.

People v. Morrell, *supra*; *Kumsey v. People*, 19 N. Y. 41; *Lanning v. Carpenter*, 20 N. Y. 447; *Kinns v. Syracuse*, 8 Keyes, 110.

A law is presumed to be constitutional, and the court will not otherwise declare except under the plainest provisions.

People v. Rice, 185 N. Y. 478, 16 L. R. A. 836.

Andrews, Ch. J., delivered the opinion of the court:

This controversy involves the constitutionality of chap. 984 of the Laws of 1895, approved June 6, 1895, and which took effect the same day, annexing a portion of the county of Westchester to the county of New York. The annexed territory at the time of the annexation consisted of a town and parts of towns, and of two villages in the county of Westchester, having a population of upwards of 18,000 persons, excluding aliens, of whom about 2,500 were duly qualified voters. The act declared that the territory therein described, "with the inhabitants and estates therein, is hereby set off from the county of Westchester and annexed to, merged in, and made a part of the city and county of New York and of the twenty-fourth ward of said city and county, subject to the same laws, ordinances, regulations, obligations, and liabilities, and entitled to the same rights, privileges, franchises, and immunities in every respect and to the same extent 30 L. R. A.

as if said territory had been included within said city and county of New York at the time of the grant and adoption of the first charter and organization thereof, and had so remained to the passage of this act, and except as may be modified by this act, as if such territory had been included within said twenty-fourth ward by the provisions of chapter 613 of the Laws of 1873, entitled 'An Act to Provide for the Annexation of the Towns of Morrisania, West Farms, and Kingsbridge in the County of Westchester to the City and County of New York, and the Several Acts Amendatory thereof, and had so Remained up to the Passage of This Act.' " The board of supervisors of Westchester county assembled on the second Tuesday of June, 1895 (six days after the act of annexation took effect), pursuant to the requirement of section 5, article 3, of the new Constitution, to divide the county into three assembly districts, equal to the number of members of assembly apportioned to Westchester county, and made the division of the then existing territory of the county into three assembly districts, excluding from the division the territory embraced in the act of annexation. The board of aldermen of the city of New York on the same day assembled and divided the city and county of New York into assembly districts, but in the division no notice was taken of the annexed territory, and the division was confined to the territory of the city and county of New York as it existed before the act of annexation. The result of the action of the two boards was, therefore, to leave the annexed territory unattached to any assembly district. Thereupon this proceeding was instituted to compel the board of supervisors of Westchester county to reassemble and reform the assembly districts by including in the division the territory taken from the county of Westchester by the act of annexation. The proceeding was taken on the view that, notwithstanding the act, the annexed territory remained a part of Westchester county for assembly district purposes. A mandamus proceeding was also instituted in the city and county of New York to compel the board of aldermen of that city to reassemble and include in an assembly district to be found therein the territory added to the county by the act of annexation. This proceeding was based on the contention that the act of annexation operated from the time of its passage to make the excluded territory for all purposes, including the formation of assembly districts, a part of the city and county of New York. In addition to the two proceedings mentioned, actions were commenced in the county of Westchester, one by the town of Westchester and one by the village of Williamsbridge, which town and village were included in the act of annexation, against certain officers of the street and police departments of the city of New York, who, acting under the authority of the city, had intermeddled with the public property of the town and village, to obtain an injunction to restrain them from interfering therewith. The act of annexation by its terms vests in the mayor, aldermen, and commonalty of the city and county of New York all the pub-

lic property in the annexed territory, and these actions were based upon the theory that the act of annexation was wholly unconstitutional and void for all purposes whatever. The mandamus proceeding against the board of aldermen of the city and county of New York has been heard and decided by the special and general terms in the first district and department, and the other mandamus proceeding and the injunction actions by the courts in the second department, and all the cases have been argued before us on appeal. The courts below have concurred in the opinion that the annexed territory should be treated as a part of Westchester county in the formation of assembly districts, and that it was the duty of the board of supervisors of Westchester county to have included it in one of the three districts in that county. The courts in the second department affirmed the constitutionality of the act, chapter 934 of the Laws of 1895, as an act of annexation, but held that the annexed territory is still a part of the 22d Senate district, and that for the purpose of voting for senator, assemblyman, and judges of the supreme court, it must still be considered as a part of Westchester county. The learned judge who delivered the opinion at special term in the case arising in the city and county of New York, held substantially the same view as that of the judges in the second district. The general term of the first department did not pass upon the question of the constitutionality of the act, but limited itself to deciding the precise question presented in that case, *viz.*, whether the annexed territory should be included in an assembly district in the city and county of New York, or in the county of Westchester. The appeals before us, taken together, cover the whole field of controversy, and they impose upon the court the duty of finally determining the grave and difficult questions presented.

The main grounds of attack upon the constitutionality of the annexation act are (1) that it changes the 22d Senate district, which by the Constitution was declared to consist of the county of Westchester, the claim being that no alteration in county lines can be made without changing the Senate district, since by the constitutional arrangement the county of Westchester with its established boundaries at the time of the adoption of the Constitution of 1894 and the Senate districts, were and must remain inseparably associated until after another enumeration; (2) that taking from Westchester county a part of its territory changes the basis of the apportionment of members of assembly made by the Constitution to the county of Westchester and nullifies the requirement that each assembly district shall be wholly within a Senate district formed by the Constitution, because it would become impossible of execution if the act is valid. The 22d Senate district, it is claimed, existing after the act took effect, would not be the same district defined in the constitutional apportionment, *viz.*, the county of Westchester as then organized; (3) the act changes the lines of judicial districts and departments theretofore established, in defiance of constitutional restrictions.

It becomes necessary in considering these objections to refer to the provisions of the new Constitution. The Constitution, by section 3, article 3, divides the entire territory of the state into fifty Senate districts, corresponding to the number of senators to be elected, consisting of one or more counties or of subdivisions of a county. It declares that the 22d Senate district shall consist of the county of Westchester, and it divides the city and county of New York into twelve senate districts, bounding each of the twelve districts by streets and avenues, or by streets, avenues, and public waters, except that in constituting the 21st Senate district (one of the twelve districts) a general clause is added to the description by streets and avenues, which includes therein territory taken from the county of Westchester and annexed to the city and county of New York by the act chapter 618 of the Laws of 1878, which territory, it is said, had not been mapped and laid out with streets or avenues on a permanent plan when the convention prepared the legislative article. Section 4 of the same article provides that an enumeration of the inhabitants of the state shall be taken in the year 1905, and every tenth year thereafter, and directs that the Senate district "shall be so altered by the legislature at the first regular session after the return of every enumeration, that each Senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as possible, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a Senate district except to make two or more Senate districts wholly in one county." The section also prohibits the division of a town, or block in a city inclosed by streets or public ways, in the formation of a Senate district. By section 1 of the same article the assembly is to consist of one hundred and fifty members. Section 5 deals with the subject of apportionment of members of assembly, and prescribes the manner of constituting assembly districts in counties entitled to more than one member. It perpetuates the single district system, and declares that each county theretofore established (counting Fulton and Hamilton counties as one county) shall be entitled to one member of assembly. It directs that the members of assembly shall be apportioned by the legislature at the first regular session, after the return of every enumeration, "among the several counties of the state as nearly as may be, according to the number of their respective inhabitants, excluding aliens." It prescribes the ratio for apportionment and how members shall be apportioned on remainders. The section itself makes the first apportionment. It declares that, "until after the next enumeration, members of assembly shall be apportioned among the counties as follows:" and apportions thirty-five members to the county of New York and three members to the county of Westchester. The Constitution does not, as in the case of Senate districts, divide counties entitled to more than one member into assembly districts. It imposes that

duty upon the boards of supervisors, except that in any city embracing an entire county and having no board of supervisors, the common council or the body exercising the powers of a common council is to make the division. This latter provision, under existing circumstances, is applicable only to the city and county of New York. The board of supervisors of any county entitled to more than one member of assembly, or in the city and county of New York, the common council of that city, is required to "assemble on the second Tuesday of June, 1895, and at such time as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts, as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a Senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled;" and (the section adds): "Such apportionment and districts shall remain unaltered until another enumeration shall be made as herein provided." It prohibits the division of a town or block in a city in forming assembly districts, and following the provisions above enumerated are the words: "Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature."

Section 1, article 6 of the new Constitution, continued the existing judicial districts "until changed as hereinafter provided," and authorizes the legislature to alter the judicial districts "once after every enumeration of the inhabitants of the state." Section 2 of the same article declares that the legislature shall divide the state into four judicial departments: "The first department shall consist of the county of New York, the others shall be bounded by county lines." In obedience to this mandate of the Constitution the legislature on the 13th day of April, 1895, two months prior to the act of annexation now in question, divided the state into four judicial departments, the first consisting of the county of New York, and the second "of the counties embraced within the present second judicial district," of which Westchester county was one.

The act of annexation, as has been stated, set off from the county of Westchester the territory described therein, with its inhabitants and estates, and declared that it was annexed to and merged in, and made a part of the city and county of New York. As a necessary consequence, it divided the county of Westchester and changed the boundary lines both of the county of Westchester and the county of New York. It preserved, however, the existing arrangements for the collection of unpaid taxes and assessments in the territory annexed, and the sale of lands therefor, and provided for the equitable apportionment and for the payment by the city and county of New York, of such portion of the debts and obligations of the county of Westchester and of the towns and villages taken from Westchester, as should be fixed by the

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apportionment. If the act is valid the territory taken from Westchester county became from the time of the approval of the act on the 6th day of June, 1895, except as otherwise specified therein, for all purposes of local government and administration, a part of the city and county of New York, and it was made subject to the burdens and became entitled to the rights, privileges, and immunities, "in every respect and to the same extent" as if the annexed territory had originally been a part of that city and county and had been included in the territory annexed thereto from the county of Westchester by the act chapter 613 of the Laws of 1873 and the acts amendatory thereof.

The Constitution vests in the Senate and assembly the legislative power of the state (Const. art. 3, § 1), and the power to divide counties or towns, and to erect new counties and towns, or to change their boundaries, is legislative in its character and is conferred upon the Senate and assembly by the general grant of legislative power; and unless restrained in a particular case by other provisions or arrangements of the Constitution, the time and mode of its exercise is in the discretion of the legislature. The power of the legislature to erect new counties, although not conferred by any express grant, is implied in the prohibition in section 5, article 3, relating to members of assembly, that "no new county shall be hereafter erected unless its population shall entitle it to a member." The power is by this clause both recognized and limited. The power to divide towns or counties, or to erect new towns, was not given by any direct language in the Constitution of 1846, but it was exercised in many cases by the legislature as a part of its ordinary legislative power. We shall have occasion to refer to some provisions in the Constitution of 1894, in which the existence of this power is expressly recognized.

The act of annexation now in question is, therefore, presumptively valid, because it is an act of legislation within the ordinary scope of legislative power, and for the further reason that the presumption of constitutionality attaches to every statute enacted by the legislature. The duty and the burden of establishing that the act of annexation is unconstitutional rest, therefore, upon the parties asserting its unconstitutionality. It needs no citation of authorities in support of the doctrine that a statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law, and that until every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld.

The Senate districts are established by the Constitution. The whole territory of the state is, by section 3, article 3, divided into Senate districts upon a plan which preserves the unity of the county in their formation, no county being divided except to constitute two or more Senate districts within the same county. The rule that counties were not to be divided in the formation of Senate districts, except in the cases specified, was fol-

lowed by the convention, and it was made obligatory in all future apportionments. We think it is plain that the general scheme of the Constitution was to associate Senate districts with county organizations and to make them coterminous with county boundaries, and that when by the Constitution it was declared that a Senate district was to consist of certain specified counties, there was established an organic relation between the counties as they existed territorially at the adoption of the Constitution and the Senate districts thereby established, and that a subsequent change of county boundaries by the legislature, whereby a Senate district would comprise a part of two counties, would violate the constitutional plan, unless permitted by some other provision of the instrument. The claim that the counties determine the Senate districts merely in the sense that their boundaries on a certain day were used as convenient measurements for the districts ignores the constant relation between counties and Senate districts which has been maintained during the whole existence of the state government. This was equally true of the large Senate districts established by the Constitutions of 1777 and 1821, and of the single Senate districts under the Constitution of 1846 and the Constitution of 1894. The general principle that the apportionment of representatives in the legislature is to be made upon the basis of population has been modified to preserve the autonomy of counties and their relation to representative Senate districts. There could doubtless be a more exact mathematical division of population for the purpose of legislative representation, if the boundaries of counties were disregarded. But the principle of equality in representation is to some extent subordinated to the purpose of making counties the representative territorial units in the apportionment of senators. It is not difficult to trace the origin of this system embodied in our state Constitution. It has its root in the prominence given to county government and to county organizations from the earliest period of our history and to the habits and associations of the people formed under the county system. The territory of the state in colonial times was divided into counties. Under the state Constitution the county has been the agency of local government and administration in county affairs. Through the counties the state collects its taxes, and through county officers the judgments of its courts have been executed. Powers of local legislation from the beginning have to a greater or less extent been exercised by county boards, and the inhabitants of a county have been accustomed to act together in public affairs and in the promotion of local interests. It was not for mere convenience, therefore, that Senate districts established by the Constitution were made to consist of counties. There was inserted in the Constitution of 1821 a provision which has been incorporated into every subsequent state Constitution, that "no county should be divided in the formation of a Senate district," a provision which, though addressed to the legislature and applicable to future apportionments only, is an emphatic

formulation of the policy which has uniformly prevailed.

We assent, therefore, to the proposition that when the Constitution declares that the 22d Senate district shall consist of the county of Westchester, it was a declaration that the county of Westchester as then organized, with its then existing territorial limits, should constitute that district, and that a change of the territorial boundaries of the county would change the Senate district as established, because neither the whole district nor any part of it was by the general scheme to remain outside of the county organization. The answer that the word "county" in article 3, section 3, constituting Westchester county as the 22d Senate district, refers to that county as a political organization, and that so long as the county exists, although shorn of a part of its territory, the part remaining constitutes the district, must be rejected. The claim assumes that by the act of annexation the excised territory became, for Senate district purposes, a part of the city and county of New York. The specific boundaries in the Constitution of the Senate districts in the city and county of New York by streets, avenues, and public waters, with the general clause in connection with the boundaries of the 21st district, inserted to embrace territory in the city not capable of a description by street boundaries, do not admit of enlargement so as to include territory subsequently added to the city by the legislature, and the added territory would form no part of any Senate district in the state if dissevered from the 22d district. But there is a broader objection to an interpretation of the Constitution which would permit the legislature to take territory from one county and Senate district and annex it to another Senate district. It would interfere with the basis of apportionment founded upon population, upon which the convention acted, and enable the legislature at any time, by changing the boundaries of counties, to subvert the approximate equality in population of the Senate districts which it was the aim of the Constitution to establish. It would place it in the power of the legislature to undo and defeat the work of the convention under guise of changing county boundaries. The Constitution gave to the county of Westchester one senator and three members of assembly, and the apportionment was fixed on the basis of its then existing population. The argument assumes that Westchester county would continue until another enumeration entitled to one senator and three members of assembly, although the greater share of its population may, by an act of annexation, be transferred to another county, and although the county to which it is annexed will gain no additional representation. The consequences which might flow from the interpretation of the Constitution just considered forbid its adoption. It would open the door for legislative interference with representative districts for partisan purposes under the guise of changing the boundaries of counties, the prevention of which was the object of several provisions of the Constitution.

Leaving out of view for the present a consideration of special clauses in the new Constitution relating to the division of counties and towns, and assuming that the legislative power over the subject is that only which is embraced in the general grant of legislative power, we have on the one hand Senate districts consisting of counties constituted and defined by the Constitution, and on the other a general legislative power to change the boundaries of counties and towns and to erect new ones. The Constitution contains no express declaration restraining the legislature from altering the Senate districts established by that instrument, intermediate a decennial enumeration. It requires the legislature so to alter the districts as to produce equality as near as may be, at the first regular session after the return of every enumeration, but no power is given by express language to alter them at any other time. If the validity of the act of annexation now in question depends solely upon the force of the general grant of legislative power, the case of *Lanning v. Carpenter*, 20 N. Y. 447, is an authority against its constitutionality. That case arose under the Constitution of 1846 and involved the validity of the law passed in 1854 (intermediate two decennial periods), creating Schuyler county out of parts of three counties, and the new county as formed embraced parts of two Senate districts and of two judicial districts. The act was held by a divided court to be unconstitutional for the reason that the existing judicial, Senate, and assembly districts organized by or in pursuance of the Constitution then in force, continued unchangeable until after the next succeeding enumeration, and that a change of county boundaries, which should leave Senate districts not bounded by county lines, was a change in contravention of the constitutional requirement that they should consist of entire counties. It was claimed in support of the act that the power to erect a new county was vested in the legislature under the general grant of legislative power and that such incidental and temporary changes in the county boundaries of judicial and legislative districts as might result from the exercise of this power did not invalidate the act. The court rejected this view, and held that the general power must yield to the specific regulations for the formation of Senate and judicial districts, and that the power of the legislature to erect a new county, if it involved a change in the boundaries of Senate and judicial districts by county lines, could only be exercised contemporaneously with the return of a new enumeration. In the subsequent case of *Kinne v. Syracuse*, 8 Keyes, 110, an act changing the boundaries of the city of Syracuse, passed in 1858, by annexing territory belonging to an assembly district in that county to territory in another assembly district therein, was held to be invalid on the ground that it was an alteration of assembly districts intermediate two decennial periods, in violation of the Constitution.

But the question as to the validity of the annexation act of 1895 does not arise under the Constitution of 1846. The Constitution

of 1894 contains provisions not found in the Constitution of 1846, which in our judgment materially affect the question now to be determined. When the constitutional commission of 1873 assembled these cases had been decided. The legislative article proposed by that commission divided the state into eight Senate districts, as under the Constitution of 1821, and apportioned the members of assembly among the counties as under the Constitution of 1846. It appears from the journal of the commission that after the legislative article had been reported by the committee having this subject in charge, on motion of a member from the 7th judicial district, who resided in one of the counties from which Schuyler county was taken, the article was by unanimous consent amended by adding to the section relating to the apportionment of members of assembly and the constitution of assembly districts the clause: "Nothing in this section shall prevent division at any time of towns and counties to be effectual for the purpose of town and county administration." (See Journal of Constitutional Commission, p. 408.) Subsequently, when the article was reported by the committee on revision, this clause was changed so as to read: "Nothing in this section shall prevent division at any time of counties and towns and the erection of new towns and counties by the legislature," and in this form was adopted by the people. But the plan of eight Senate districts was rejected. The clause in a form slightly changed is incorporated in the present Constitution. There was no similar clause in the Constitution of 1846. There can be no doubt that this provision was inserted to overrule the doctrine of the *Kinne Case* and to relieve the legislature in the exercise of the power to divide counties and towns from the restriction imposed by the decision in that case. The power, it declares, may be exercised "at any time." It is neither restricted as to time, nor by the relation which the dis severed territory may bear to existing assembly districts. Under this power a town may at any time be taken from one county and added to another. Towns belonging to one assembly district may be divided, and the part taken away may be added to a town in another assembly district. Such changes would not violate the prohibitions that "no town shall be divided in the formation of assembly districts," and that assembly districts once formed "shall remain unaltered until another enumeration," on the construction that the assembly districts existing when a division is made remain territorially the same, notwithstanding the division. It is true that the clause is inserted in the section relating to the apportionment of assemblymen and the creation of assembly districts, and declares that "nothing in this section shall prevent," etc. Upon this reading is based an argument that the rule in *Lanning v. Carpenter*, as applicable to the change of Senate districts, remains unaffected. But we think the insertion of this clause indicates an intention to leave the legislature free to exercise the power to change the boundaries of counties and towns and to erect new towns at any time in its discretion. It is difficult

to see any reason for denying this power when its exercise would affect a Senate district, and for permitting its exercise in the case of the smaller unit. There is another clause of some significance in the legislative article of the new Constitution, taken from the amendments of 1874: "but the legislature may abolish the county of Hamilton and annex the territory thereof to some other county or counties." This power could not be exercised between two apportionments without changing the lines of the 27th Senate district, since after the division that district would cease to be bounded by county lines.

We are of the opinion that, under the present Constitution, the act, chapter 984 of the Laws of 1895, as an act of annexation, was within the constitutional power of the legislature, although it changed, as to the 22d Senate district, the county boundaries of the district. But such effect should be given to the act as will least disturb the general plan, and this will be accomplished by regarding the annexed territory as still a part of that district for the election of a senator. The departure from the plan that Senate districts shall be bounded by county lines will be temporary. Upon a new enumeration, the counties of New York and Westchester, as they stand at that time, will be units of division in forming the new legislative districts. It will be, then, the duty of the legislature, under the mandatory provisions of the Constitution, to organize the Senate districts out of the then existing counties, and courts in considering the constitutionality of statutes may act upon the assumption that a duty positively enjoined will be performed. This mode of reconciliation between the Constitution and the statute will not interfere with the policy, so carefully guarded in the Constitution, of preventing a change of representative districts intermediate two enumerations, for partisan purposes. It also gives full effect to the requirement of the Constitution (art. 3, § 5) that boards of supervisors in constituting assembly districts shall so arrange them that each assembly district "shall be wholly within a Senate district formed under the same apportionment."

There are some embarrassments in regarding the annexed territory as part of the county of Westchester for the purpose of division of the county into assembly districts. Boards of supervisors in counties entitled to more than one member of assembly are, by section 5, article 3, of the Constitution, to meet and "divide such counties" into assembly districts. The annexation act took the annexed territory out of Westchester county and made it a part of the county of New York. Its corporate relation to Westchester county was changed. The framers of the Constitution may not in using the word "counties" have had in view the case of a change of county boundaries after an apportionment and before a division into assembly districts. But, construing the word "counties" in this connection as meaning the territorial division existing when the apportionment was made, the difficulty may be overcome. So also upon

the construction we give to the act of annexation, the inhabitants of the annexed territory will not be represented in the board of supervisors of Westchester county when it comes to form the assembly districts. So also their interests as residents of the city and county of New York may possibly at times be antagonistic to those of the inhabitants of Westchester county, and yet the senator and members of assembly from that county will be the common representatives of such diverse interests.

We are not unmindful of the difficulties in the case. But they attend any construction which may be given to constitutional provisions, on their face somewhat hostile, but which the court is bound if possible to reconcile. We think the construction of the act of annexation, which affirms its validity as such, but leaves the annexed territory part of the 22d district and of the 2d judicial district and department, and within the jurisdiction of the board of supervisors of Westchester county for the purpose of forming assembly districts, most nearly harmonizes the provisions of the Constitution relating to Senate, judicial, and assembly districts, and the power possessed by the legislature to divide counties and towns.

The objection to the annexation act, that it violates the constitutional provision establishing judicial districts and departments, is answered by the reasoning upon which we sustain the change in the county lines of the 22d Senate district.

The words, "in every respect and to the same extent," found in the annexation act, read in connection with the context, are satisfied by construing them as referring to municipal burdens and municipal rights in which the annexed territory and its inhabitants were to share. The voters in the annexed territory will be entitled to vote for senator, member of assembly and for justices of the supreme court, the same as though the annexation act had not been passed. Elections in the annexed territory will of necessity be conducted under the control of the election officers of the city and county of New York, and the returns will be made to the proper authorities of Westchester county. This was the plan adopted under the annexation act of 1873, and for several years elections were conducted thereunder without confusion or difficulty.

Our conclusion is that the annexation act of 1895 is constitutional, but that it did not operate to take the annexed territory out of the jurisdiction of the board of supervisors of Westchester county in forming assembly districts pursuant to section 5, article 3, of the Constitution, and that it was the duty of the board at its meeting, on the second Tuesday of June, 1895, to have included the annexed territory within one of the three assembly districts allotted by the Constitution to the county of Westchester. The board having failed to perform this duty, the mandamus was properly granted.

The judgment should be affirmed.

All concur.

TENNESSEE SUPREME COURT.

John QUEEN, by Next Friend, *Appt.*,
v.
DAYTON COAL & IRON COMPANY,
(LIMITED).

(.....Tenn.....)

1. Violation of a statute by hiring a boy under twelve years of age to work in a mine constitutes negligence per se which will sustain a civil right of action whenever the boy sustains injuries in consequence of the employment.
2. Liability to persons for whose protection a statute was made, in case of their injury by breach of it, is subject to the defense of contributory negligence.
3. Contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger.

(October 17, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Rhea County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Givens & Locke for appellant.

Messrs. Burkett, Miller, & Mansfield for appellee.

McAllister, J., delivered the opinion of the court:

This suit was commenced in the circuit court of Rhea county by the plaintiff in error, a minor, suing by his next friend, against the defendant company, to recover damages for personal injuries. The record discloses that the plaintiff in error, a boy about ten years of age, was employed by the defendant company to work in its mines in the capacity of a trapper. His duties were to open and close the gates for the cars to pass through, and, in addition, to keep the track between the two gates clear of coal and slate. The plaintiff testified that at the time of his employment he "was told by the superintendent to mind the car driver, and do whatever he told me. That on the day of the injury Jim Carter was car driver, and was coming on his last trip, with empty cars, and he told me to prop open the gates, and go with him to the headway of the entry, and hold his mule while he got out the loaded cars. I did as he told me and after he got the loaded car he told me to get on the car, which I did, and he then started on the return trip. When he got to the gate, on his way to the main line, he told me to jump off. But this I refused to do and asked him to stop the car; but after he told me several times to jump off, I did so,

and fell under the wheels of the car, which crushed my right leg and knee." He further states he had been in the habit of riding on the cars a greater part of the time, but the driver prior to this trip always stopped for him to get off. The superintendent of the company denied that he had placed the boy under the order of the car driver, and stated that he had repeatedly forbidden the plaintiff in error to ride on the cars. The theory of the company was that at the time of the accident the boy was attempting to get on the car, but his foot missed the bumpers, and was caught beneath the car. It was claimed by the company that the boy frequently boarded the car, and had been repeatedly warned of the danger, but that he persisted in violating the rules of the company. The cause was tried by the circuit judge and a jury, resulting in a verdict and judgment in favor of the defendant company. The plaintiff appealed, and has assigned errors.

The Act of 1881 entitled "An Act to Provide for the Ventilation of Coal Mines and Collieries and the Protection of Human Life therein," provides in the 10th section, viz.: "And no boy under twelve years of age shall work or enter any mine, and proof must be given of his age, by certificate or otherwise, before he shall be employed, and no father or other person shall conceal or misrepresent the age of any boy knowingly." A violation of the act is thus declared a misdemeanor punishable by fine or imprisonment or both at the discretion of the court trying the same. The record discloses that at the time of his employment the plaintiff in error was a boy about ten years of age. The superintendent states that at the time he hired him he did not know his age, and did not inquire; that he did not demand from him, or any one else, a certificate of his age, and did not receive one. He claims, however, that he hired the boy at the request of his mother, who called to see him frequently on the subject. As applicable to this state of facts, counsel for plaintiff in error requested the court to charge as follows: "I instruct you that the laws of the state of Tennessee prohibit the employment of any child under twelve years of age in any mine in this state, and any such employment by the defendant company would be gross negligence." The circuit judge refused the instruction, and in lieu thereof submitted the following remarks to the jury, viz.: "I instruct you that the statute in question has no application to the facts of this case. It makes it a misdemeanor to employ a child under twelve years of age, and, if defendant did so, it would be guilty of a misdemeanor, and liable to be punished therefor. But the statute does not provide

NOTE.—The generally accepted rule that violation of a statute designed for the protection of persons constitutes negligence, is considered in a note to *Sowles v. Moore* (Vt.) 21 L. R. A. 722, so far as it is affected by the fact that compliance with the law would not have prevented the injury for which action is brought, and the same question is

presented in the later cases of *Brember v. Jones* (N. H.) 25 L. R. A. 408; *Reipe v. Riting* (Iowa) 25 L. R. A. 769.

As to the right of a wrongdoer to the protection of such statutes, see note to *Condran v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 25 L. R. A. 749.

that one failing to comply with its provisions shall answer civilly for all damages that may result to any such child in its employ; hence it does not apply to the facts of this case. Neither does it appear that the statute prohibits anything in or about which plaintiff was injured. If it did, and defendant disobeyed it, and as a consequence thereof plaintiff was injured, then such failure to obey might be actionable negligence; but such are not the facts of this case." The refusal of the court to give the instruction asked and the remarks made in refusing it constitute the basis of the principal assignment of error. The question presented is one of first impression in this state, but it has been frequently adjudged in other states, and is well settled upon principle. It is laid down in Comyns' Digest "that in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Mr. Francis Wharton, the eminent text-writer, in his work on Negligence (sec. 443) states the rule thus: "Where a statute requires an act to be done or abstained from by one person for the benefit of another, then an action lies in the latter's favor against the former for neglect in such act or abstinence, even though the statute gives no special remedy." Thus, in an action against a public officer for neglect, whereby the plaintiff was injured, it is no defense that the defendant contracted, not with the plaintiff, but with the government; the action being founded, not on contract, but on breach of duty. Even the imposition of a penalty by the statute does not oust the remedy by indictment, nor, *a fortiori*, by suit for negligence, unless the penalty be given to the party injured in satisfaction for injury." Says Mr. Bishop, in his work on Non-Contract Law (sec. 182): "Whenever the common law, a statute . . . imposes on one a duty, if of a sort affecting the public within the principles of criminal law, a breach of it is indictable, and a civil action will lie in favor of any person who has suffered especially therefrom. Or, if the matter of the law involves only the interests of individuals, any one who has received harm from another's disobedience may have his suit against him for the damages."

This question was considered in *Pauley v. Steam Gauge & L. Co.*, 181 N. Y. 90, 15 L. R. A. 194. In that case it appeared that a statute of New York required that fire escapes should be provided on the outside of all factories three or more stories in height. The act imposed penalties for a disobedience of its provisions. The defendant failed to construct fire escapes on its buildings as required by the statute. It caught fire, and plaintiff's intestate was burned to death. The court said: "I am unable to agree with the contention of the appellant that the sole remedy under the statute was the public remedy which consisted of an enforcement of the penalties provided. The requirement of fire escapes was for the direct and special benefit of the operatives in such factories, and in-

tended for their protection, and the rule applies that when a statute commands or prohibits a thing for the benefit of a person he shall have a remedy upon the same statute for the thing enacted for his advantage, or for a wrong done to him contrary to its terms." See also *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536. As another illustration of the rule it has been repeatedly held that the running of a railroad train, within city limits, at a rate of speed prohibited, constitutes negligence *per se*, and gives a right of action to any one suffering injuries in consequence thereof. 1 Thomp. Neg. p. 506, § 8. So we think the employment of this minor in violation of the provision of the statute in question was an act of negligence on the part of the defendant, and, a causal connection between the employment and the injuries sustained by the boy being shown, a case of liability is made out. Of course, we do not hold that if the boy had died of organic disease of the heart, or from a stroke of paralysis, or from some cause wholly disconnected with his employment, the company would have been liable in damages simply on account of the employment in violation of the statute. But we do hold that the breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment. This view of the case does not preclude the defense of contributory negligence on the part of the plaintiff. Says Mr. Bishop in his work on Non-Contract Law (sec. 140): "It suits the argument in many of the cases for the judges to look upon disobedience to a legal command as an act of negligence. Thereupon the doctrine of contributory negligence applies to the plaintiff, precluding his recovery in cases within its rules." Says Mr. Thompson (vol. 2, p. 1175, § 28): "Statutes exacting special precautions on the part of the owners of dangerous machinery are generally construed as not abrogating the ordinary rules of contributory negligence," etc. "The effect of such statutes is simply to make the failure to comply with their requirements negligence *per se*, and not to excuse negligence in other persons." Thus, a statute of Iowa requiring the tumbling rods of threshing machines to be boxed, and providing that the owners of such machines shall be answerable in damages to any person injured by a failure to do so, does not give a right of action where the negligence of the party injured directly contributed to the injury. Again, it was held in an English case that, although a shafting was unfenced, in violation of a statute, yet, if the plaintiff, contrary to the commands of the proprietor, took hold of it, and set it in motion, whereby he was injured, he could not recover damages. *Canwell v. Worth*, 5 El. & Bl. 849.

It is hardly necessary to add that contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. He is not chargeable with the same degree of care as an experienced adult, but is only required to exercise such prudence as one of his years may be expected to possess. We think the charge of the court is ob-

jectionable in not fully explaining to the jury the degree of care which is required of an infant of tender years; but we would not reverse for this reason, since there was no request for additional instructions, and more especially because the assignment of error in respect of this subject is fatally defective.

We are also of opinion that the request submitted by counsel for plaintiff in error in respect of the violation of the statute was not strictly accurate, in that it assumed that the employment of the boy was gross negligence,

which charge would have constituted in itself a basis for the assessment of exemplary damages. A proper request would have made the breach of the statute actionable negligence or negligence *per se*.

It appears, however, that the circuit judge, in refusing the instruction submitted by counsel, undertook to give an exposition of the statute which we hold to be erroneous, and for this reason the judgment is reversed, and the cause is remanded.

MINNESOTA SUPREME COURT.

Jonas F. BROWN, *Appl.*,

v.

Joseph M. MARKHAM, *Respnt.*

(.....Minn.....)

*1. The log-lien law of 1876 (Gen. Stat. 1878, chap. 82, §§ 63-77, inclusive; Gen. Stat. 1894, §§ 2451-2466) is constitutional.

2. A judgment for the plaintiff in such an action does not preclude the owner of the logs from denying the right of the plaintiff to a lien upon them in an action brought to recover the logs, or their value in case recovery cannot be had. But in such action the judgment in the original proceedings to establish the lien, regular on its face, must be held valid unless the contrary affirmatively appears, and all reasonable presumption consistent with the record must be made to sustain it.

3. The writ issued to the sheriff in this case contained all that was required by the statute. The return of the sheriff indorsed thereon, a copy being filed, also contained all that was contemplated by the statute, but, in addition, the sheriff certified that he had attached all of the right, title, and interest of the defendant in the described logs. Held, that the irregularity in the return should be disregarded, and that the return was sufficient to give the court jurisdiction over the logs to the extent necessary to proceed to a judgment establishing the lien.

(February 4, 1895.)

APPEAL by plaintiff from an order of the District Court for Hennepin County overruling a motion for a new trial after judgment in favor of defendant in an action brought to recover possession of certain logs which had been seized for the satisfaction of a laborer's lien. *Affirmed.*

The facts are stated in the opinion.

Mr. George R. Robinson, for appellant;

The log-lien law of 1876 (Gen. Stat. 1878, p. 845, §§ 63-77, etc.), so far as it assumes to take

*Headnotes by COLLINS, J.

NOTE.—The decision sustaining the constitutionality of the Minnesota logger's lien law is of importance in several other states at least. For various matters about the rights of laborers under mechanics' lien laws, see note to Farmers' Loan & T. Co. v. Canada & St. L. R. Co. (Ind.) 11 L. R. A. 740.

As to due process of law furnished by opportunity for subsequent contest of question first de-

the property of a third party to satisfy a claim for a lien without making him a party to the proceedings to enforce the same by actual notice of the proceedings or an actual seizure instead of a constructive seizure of the logs, is unconstitutional and void.

U. S. Const. art. 5; Minn. Const. art. 2, § 7. The proceeding is a proceeding *in rem* as to the logs.

Griffin v. Chadbourne, 82 Minn. 126.

To give the court jurisdiction of the logs, some actual seizure is necessary from which the court could presume notice to the owner; otherwise the owner should be notified.

Waples, Proc. in Rem. p. 88, § 64; *Taylor v. Carryl*, 61 U. S. 20 How. 583, 15 L. ed. 1028; *Pellham v. Rose*, 76 U. S. 9 Wall. 103, 19 L. ed. 602; *The Silver Spring*, 1 Sprague, 551.

The proceeding under which the sheriff claimed possession was based, not on a seizure, but on a purely constructive one, by filing notice in the office of the surveyor general of logs, and could not be notice to the owner of any interference with his rights.

The levy in this case could only be good if W. M. Smith was the owner or had some interest in the property.

Waples, Proc. in Rem. §§ 43, 69, with authorities cited.

Such a levy in an ordinary execution levy has only been sustained where the defendant actually had title.

Vilas v. Reynolds, 6 Wis. 214.

The levy in this case would be construed as a deed of quitclaim of right, title, and interest should have been and was construed by our courts prior to the amendment of our statute as to construction of such conveyances.

Martin v. Brown, 4 Minn. 282; *Hope v. Stone*, 10 Minn. 141; *Everest v. Ferris*, 16 Minn. 26.

The seizure voluntarily abandoned was a release of the lien.

Waples, Proc. in Rem. p. 74; Freeman, Executions, § 271 B; *Engley v. Ward*, 87 Cal. 121, 99 Am. Dec. 256; *Speelman v. Chaffee*, 5 Colo. 247; *Snell v. Allen*, 1 Swan, 208.

cided, with notice to a party interested, see also *Poulsen v. Portland (Or.)* 1 L. R. A. 673; *Scott v. Toledo (C. C. N. D. Ohio)* 1 L. R. A. 688; *Speer v. Athens (Ga.)* 9 L. R. A. 402; *State v. Stewart (Wia.)* 6 L. R. A. 394; *Re Madera Irrigation Dist. Bonds (Cal.)* 14 L. R. A. 755; *Cleveland, C. C. & St. L. R. Co. v. Backus (Ind.)* 18 L. R. A. 723.

Mr. George H. Reynolds, for respondent:

The return shows that the officer, under writ of attachment, made a levy upon the logs themselves, but if such were not the case it would be the duty of the court to strike out that part of the return which indicates that the interest of some particular person has been levied upon.

Robertson v. Kinkhead, 26 Wis. 560; *Fullam v. Stearns*, 30 Vt. 443; *Bacon v. Leonard*, 4 Pick. 277; *Vilas v. Reynolds*, 6 Wis. 214; *Buck-Reiner Co. v. McCoy*, 85 Iowa, 577; *Tufts v. Volkering*, 51 Mo. App. 7.

The general statutes of the state of Minnesota providing for the renewal of an execution do not take away the common-law right to an alias.

Walter v. Greenwood, 29 Minn. 87; *Barrett v. McKenzie*, 24 Minn. 20.

Chapter 89 of the General Laws of 1876, entitled "An Act Providing for a Lien for Labor upon Logs and Timber," is constitutional.

Where a particular construction has been placed upon an act for over fifteen years, without question by either the legislative or executive department of the government, it would be on considerations of public policy too late to question its correctness, unless it is very clearly wrong.

Cooley, Const. Lim. §§ 82-85; *Nash v. Sullivan*, 29 Minn. 211; *Farribault v. Misenor*, 20 Minn. 396; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241.

Chapter 89 of the Laws of 1876 entered into and became a part of the contract made by appellant and W. M. Smith who took the contract to cut the logs, and appellant is presumed to have notice of the existence of the lien in favor of the man who swings the axe, wields the goad-stick, or cooks a pot of beans.

Bardwell v. Mann, 46 Minn. 255; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 123, 35 L. ed. 961; *Reilly v. Stephenson*, 62 Mich. 509; *Mallory v. La Crosse Abattoir Co.* 80 Wis. 170; *Bourgette v. Williams*, 73 Mich. 208; *Oliver v. Woodman*, 66 Me. 54.

The general owner of the logs had notice of the pendency of the action to enforce the log lien, and it was his duty under section 6 of chapter 89, Laws of 1876, to apply to the court to be admitted as a party to such action.

Griffin v. Chadbourne, 32 Minn. 26; *Stapp v. The Clyde*, 43 Minn. 192; *Miller v. Corinna*, 43 Minn. 391; *Happy v. Mosher*, 48 N. Y. 818.

A party is not deprived of his property without due process of law if he can bring an action against the officer who seized the logs, in which action he can show that the logs are not subject to the lien.

Munger v. Lenroot, 32 Wis. 541.

Saw-logs in the boom at Minneapolis worth \$2 each would, standing in the woods on one of the tributaries of the upper Mississippi river, be worth not more than 25 cents. The addition in value has been created by the labor of some one entitled to a lien under chapter 89 of the Laws of 1876.

Sheppard v. Taylor, 80 U. S. 5 Pet. 675, 8 L. ed. 269; *Taylor v. Carryl*, 61 U. S. 20 How. 538, 15 L. ed. 1028; *Stapp v. The Clyde*, *supra*.

Collins, J., delivered the opinion of the court:

The leading question in the case is the constitutional right to a lien.

stitutionality of the log-lien law of 1876 (Gen. Stat. 1873, chap. 82, §§ 63-77, inclusive; Gen. Stat. 1894, §§ 2451-2465). The claim is made that the law provides for and authorizes the taking of the property of one person to pay and discharge the debt of another without due process of law, because there is no requirement that notice of the pendency of the proceedings shall be given to the owner of the logs. It is true that the only defendant contemplated by the law is the person liable for the payment of the debt itself, except in cases of intervention, and frequently such person is not, and never has been, such owner. Although there has been much litigation growing out of the passage of this act almost eighteen years ago, the question was first presented to this court at its last term. While the fact that its validity has never been questioned here has been, so far as this tribunal is concerned, acquiesced in for nearly two decades, cannot be allowed to control our decision, the fact must not be disregarded altogether. No one questions the power of the legislature to give those who perform labor upon logs a lien thereon for their wages. The objection urged against the validity of the statute is that heretofore noticed. Upon the theory that the judgment in lien proceedings is conclusive against the owner of the property, the objection cannot be overcome. Treating the action as a proceeding *in rem* as to the logs, the mere constructive seizure of them by filing a copy of the writ of attachment and of the sheriff's return thereon in the office of the surveyor general is clearly inadequate as notice to the owner. If we treat the action as one *in personam*, there is also an entire absence of any provision for notice to the owner, such as would constitute "due process of law." But, if the only effect of the action is to protect or continue the lien of the laborer, if he have one, leaving the lien still *in pais* as to the log owner, who still has the right to contest it on the merits whenever his property is seized or interfered with, then there can be no constitutional objection to the law. Although the judgment in the statutory action would be as to the owner of the logs *res inter alios acta*, yet it would be competent for the legislature to make it *prima facie* evidence against him. That would be a mere rule of evidence. The log-lien law of 1876 was copied, undoubtedly, from the statutes of the state of Wisconsin. In 1873 (*Munger v. Lenroot*, 32 Wis. 542) the validity of the law was upheld in that state. It was said in the opinion in that case that, while it might have been proper to have provided for the giving of notice to and the bringing in of the log owner into the action, it was not absolutely essential, for, by the proceedings actually had, he was not prevented from having his day in court. He could bring a suit to recover possession of his property, and therein show that the claimants were not entitled to enforce any liens against it. It was held that the elementary principle that the log owner could not be concluded by a judgment to which he was not a party, was applicable when such owner attempted to assert his legal right to the property against which lien pro-

ceedings had been taken. *Redington v. Frye*, 43 Me. 578, was referred to as authority upon the question. In 1875 (*Winslow v. Urquhart*, 39 Wis. 260) the decision in the *Munger Case* was adhered to, it being distinctly laid down that the Wisconsin statutes, under which the lien proceedings were had, were valid laws, although they did not require that the general owner of the logs in controversy should be made a party, and, further, that such proceedings were not invalid merely because such owner was not made a party. But, on the authority of the *Munger Case*, it was declared that in an action brought by the general owner he might contest the right of the claimant to enforce a lien against his logs. An examination of the cases cited from Wisconsin will show that they are exactly in point here. The log-lien law of the state of Michigan is much like the one we are considering. The noticeable difference is that the officer executing the writ of attachment is required to serve, or to cause to be served, a copy of such attachment on the log owner or his agent or attorney, before the return day, if such owner, agent, or attorney be known to the officer, and be a resident of the state. The person primarily liable for the payment of the debt is made defendant in the action as he is here under the statute of 1876, and, as with us, the owner is privileged to appear, intervene, and defend. From what we have stated concerning the requirement of the Michigan statute as to service of a notice or copy of the attachment upon the owner, his agent or attorney, it is obvious that it is open to attack upon the same ground as that urged in this case, for no one could contend that this provision as to service on the log owner or his agent really aided the law as against an objection to its validity from a constitutional standpoint. While the precise question now before us was not involved, it was remarked in *Reilly v. Stephenson*, 62 Mich. 509, that such a law was valid if an opportunity was given the log owner to contest the claimant's right to a lien. See also *Oradock v. Dwight*, 85 Mich. 588, in which it is affirmed, on the strength of previous decisions, that the lien is valid.

Under our view of the statute of 1876, an opportunity is given the owner of the logs to contest the right of the claimant to a lien in an action like this to recover the property, or its value in case a recovery cannot be had. As was said in the case last cited, the owner of the standing pine knows perfectly well when he enters into a contract for lumbering that labor must be performed which, day by day, enters into the material, and enhances its value; and he knows equally as well that the laborers have the right to protect themselves in the matter of compensation by putting a lien on the logs. Knowing this, and having it within his power to care for his own interests when contracting for the work, the owner of the logs cannot say that a law which simply secures payment to the men who perform the manual labor is unreasonable. He must intend that liens shall attach, and his own rights be subjected thereto. The same thought is found in the mechanics' lien case of *Bardwell v. Mann*, 46 80 L. R. A.

Minn. 285. Nowhere in the statute now being considered is there an attempt to deprive the log owner of his right to be heard,—of his day in court. He knows the law, and, at least, expects if he has not protected himself, as well as the men, that liens will be filed. If he has not contracted with responsible parties, or provided for the payment of wages in his contract, he must intend that liens shall be filed, and the records in the office of the surveyor general of logs and lumber are open to his inspection, so that he can easily be advised of the situation. These records cannot well be held as notice which will bind him, but they convey the desired information. And by express provision of the statute the owner is given an opportunity to intervene, and take part in the original action. If he does so, he is bound by the result. If he fails to participate, the proceeding does not take away his property; it simply establishes a lien, which he expected and intended when entering into a contract for the lumbering,—a lien in which a sale is made and a sheriff's certificate given, but it cannot be made conclusive evidence of ownership as against such owner. That the action should be brought against the employer who hired the laborer, and not against the owner, when not the employer, is quite proper, for with the owner the laborer had no contract. See *Oliver v. Woodman*, 66 Me. 54. The lien is a just one, and to the extent here indicated easily sustained. In an action brought by the owner of the logs the judgment in the original proceedings, regular on its face, must be held valid, unless the contrary affirmatively appears; and all reasonable presumptions consistent with the record must be made to sustain it. *Winslow v. Urquhart*, *supra*. This disposes of the claim that the law is unconstitutional.

We will now briefly consider appellant's contention that in any event the levy of the attachment was insufficient. The writ, as provided in Gen. Stat. 1878, chap. 32, § 65 (Gen. Stat. 1894, § 2458), required the sheriff to attach and safely keep the logs described in plaintiff's lien affidavit, namely, 1,501,680 feet, bearing certain specified marks, or so much thereof as might be necessary to satisfy the amount stated as plaintiff's claim for his work and labor. Under the statute the attachment is made by filing certified copies of the writ, and of the sheriff's return of levy indorsed thereon, in the office of the surveyor general, specifying the mark or marks on the logs and the quantity levied on. The return actually made—a copy thereof being filed—contained all that the statute contemplated, but, in addition, the sheriff certified that he had attached all of the right, title, and interest of the defendant in that action, Smith, therein. But, in view of the statute, and notwithstanding this irregularity, the return was sufficient to give the court jurisdiction over the logs to the extent necessary to proceed to a judgment establishing an already existing lien. That part of the return which stated that the interest of the defendant had been levied on must be disregarded as manifestly repugnant to what the sheriff was directed to do, what

be intended to do, and what he actually did. *Fullam v. Stearns*, 80 Vt. 448; *Buck-Reiner Co. v. McCoy*, 85 Iowa, 577. This covers all

of the alleged errors which need to be specially considered.
Order affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ETNA LIFE INSURANCE COMPANY,
Pf in Err.,

v.

Nancy L. FLORIDA

(80 Fed. Rep. 922.)

1. It will be presumed that the rulings of the court below excluding from evidence a will offered to show the condition of the testator's mind, and claims filed in the probate court offered to show his financial condition, were correct where, the will and claims were not contained in the record.

2. The insured can be held to have "contemplated suicide" so as to defeat a policy of life insurance, under Mo. Rev. Stat. 1889, § 5855, only when he intended or had resolved to commit suicide at the time when he made his application for the policy.

(September 16, 1895.)

ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on certain insurance policies. *Affirmed.*

The facts are stated in the opinion. Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Mr. Frank M. Estes for plaintiff in error.

Messrs. L. R. Willsey, W. F. Boyle, and E. B. Adams for defendant in error.

Thayer, Circuit Judge, delivered the opinion of the court:

This action was brought by Nancy L. Florida, the defendant in error, against the *Etna Life Insurance Company*, the plaintiff in error, to recover the amount of two life insurance policies issued by said company on the life of Alonzo K. Florida, the plaintiff's husband. Both of said policies were made payable to the plaintiff as beneficiary. One of them was executed on July 30, 1891, for the sum of \$5,000; the other was executed on July 12, 1892, for the sum of \$10,000. The plaintiff's husband committed suicide on April 27, 1893, and a demand was thereafter made on the defendant company for payment of the policies. Payment was refused, and the present suit was thereupon instituted.

On the trial of the case the circuit court instructed the jury, in substance, that it was conceded by the defendant company that the plaintiff was entitled to recover on the policies, "unless, at the time Alonzo K. Florida made application for them, he was in contemplation of committing suicide at some future

time, so that by such acts of self-destruction the insurance company would be defrauded of the sum so insured;" and, as no exception was taken to this instruction, we must assume, for the purpose of this decision, that the only defense intended to be relied upon by the defendant company was the defense pleaded in its answer, as follows:

"Defendant states . . . that on the 27th day of April, 1893, and within two years from the date of said policies, said Florida committed suicide; and the defendant alleges the fact to be that said Florida, at the time that he made his said applications to the defendant for said policies, contemplated suicide; that, at the time of making said applications for said insurance, said Florida contemplated and intended to secure the said contracts of insurance from this defendant with the intention soon thereafter to take his own life; that the said purpose and intention of said Florida were not known to the defendant, and were purposely concealed by him in order that he might secure said policies of insurance, and thereafter, by taking his own life, enable his representatives to secure the benefits accruing under said policies; that the said acts of said Florida were a fraud upon this defendant; and that, by reason of said acts of said Florida, said policies of insurance became wholly void."

It should be stated in this connection that the policies in question were executed and delivered in the state of Missouri, and that at the date of their execution the following statutes were in force in that state:

"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." Mo. Rev. Stat. 1889, § 5849.

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Mo. Rev. Stat. 1889, § 5855.

In the circuit court of the United States for the eastern district of Missouri, where the case was tried, the plaintiff recovered a judgment for the full amount of the policies; and the case was brought to this court for review

NOTE.—A new question arising under the statutory modification of the law of insurance as applied to a case of suicide is here presented.

30 L. R. A.

For provisions against suicide sane or insane, see note to *Billings v. Accident Ins. Co.* (Vt.) 17 L. R. A. 80.

on a writ of error sued out by the defendant company. The errors assigned relate to the exclusion of testimony and to the charge of the trial court. There are numerous assignments of the former kind, but it would subserve no useful purpose to review them in detail, as most of the questions propounded which were excluded were obviously improper questions, because they were calculated to elicit hearsay or secondary evidence, or the conclusions of witnesses rather than the facts on which such conclusions were based, or because the questions were designed to establish the existence of particular facts by common rumor, or because the questions asked were too vague and general, or a mere repetition of questions that had already been asked and answered. We shall forego any discussion of the several assignments of error to which the last remark applies, confining ourselves to those exceptions taken which seem to us to be most tenable.

At one stage of the trial, counsel for the defendant company offered in evidence what purported to be the will of Alonzo K. Florida, deceased, for the purpose, as stated by him at the time of showing the condition of the testator's mind. It was objected to and excluded, and an exception was saved. We cannot decide whether this ruling of the trial court was right or wrong, because the alleged will is not found in the bill of exceptions, and, without examining it, it is impossible to say what it may have tended to show with respect to the testator's purpose or mental condition. The defendant also appears to have offered in evidence a large number of claims which had been filed in the probate court of the city of St. Louis against the estate of Alonzo K. Florida. These were objected to, the claims were excluded, and an exception was saved. The claims in question appear to have been excluded because the circuit court was of opinion that they had no tendency to show the financial condition of the deceased at or prior to the taking out of the policies in suit. Whether that ruling was erroneous or otherwise cannot be determined, because the claims are not contained in the record. The ruling of the trial court must be presumed to have been correct. A witness for the defendant company was also asked the following question: "What was Mr. Florida's financial condition during the winter of 1892 and 1893? I will put it this way: Do you know what his financial condition was during the winter of 1892 and the beginning of 1893?" The answer to this interrogatory was excluded, on the ground that it could have no tendency to show the financial condition of the deceased in July, 1891, and in July, 1892, when the policies were taken out, and that no attempt had been made to furnish authentic evidence of his financial condition at the latter dates. We cannot say that there was any material error in this ruling, although the testimony would doubtless have been competent, and would probably have been admitted if counsel had undertaken to show that the indebtedness existing against the deceased in the winter of 1892 and 1893 had its origin prior to the issuance of the policies, or either of

them. Without pursuing this branch of the case at any greater length, it will suffice to say that none of the errors assigned on account of the exclusion of testimony appear to us to be tenable.

The question in the case of paramount importance is whether the circuit court properly defined the words "contemplated suicide," as used in Mo. Rev. Stat. § 5855, *supra*. On this subject the court charged the jury as follows: "The fact of suicide is no defense, unless it be the culmination of a purpose formed at the time application was made for the respective policies. Unless, therefore, you believe from the weight of the evidence that on the 30th day of July, 1891, at the time of making application for the policy of that date, Alonzo K. Florida contemplated thereafter committing suicide, and thereby enabling his wife to collect the amount named in the policy, then your verdict upon the first count must be for the plaintiff."

Unless you believe from the weight of the evidence that on the 12th day of July, 1892, at the time of making application for the policy of insurance of that date, Alonzo K. Florida did so with the contemplated, well-formed purpose of thereafter committing suicide, and thereby enabling his wife to collect the amount named in the policy, your verdict must be for the plaintiff upon the second count of the petition. . . . The fact, if from the evidence you believe it to be a fact, that Alonzo K. Florida committed suicide, constitutes in itself no defense on the part of the insurance companies under this clause. In order to make a defense out of such fact, you must believe from the preponderance of the evidence that Alonzo K. Florida, at the time he made application for either or both of the policies of life insurance involved in this suit, contemplated suicide; and by contemplated is meant there was a complete, well-formed purpose of taking his own life, and that purpose culminated by actually killing himself, with a view and for the purpose of defrauding the defendant company out of the money stipulated in the policy to be paid."

The objection made to this part of the charge, and the only objection thereto, is that the court declared that the word "contemplated" meant the same as the word "intended." It is insisted that there is a material distinction between the words "contemplated" and "intended;" that the former word means "attentively considered," "thought about," whereas the latter word signifies "a more determinative state of mind," a well-formed purpose; and that the legislature must be presumed to have used the word "contemplated" in the sense above suggested.

The proposition maintained by the defendant company is thus concisely stated by its counsel: "It was not necessary for the defendant to show that Florida effected this insurance with the deliberate purpose to commit suicide; it was sufficient to show that he was 'considering with attention' the project of suicide, and effected the insurance with the design that, in case his contemplation should ripen into actual perpetration of suicide, then his beneficiaries should be pro-

vided for out of the proceeds of the insurance. . . . Hence it follows that the theory expressed throughout the several portions of the charge bearing on this point, that 'contemplated suicide' meant a predetermined, well-formed purpose of suicide, is erroneous, and those portions of the charge expressing this conception were erroneous."

It is no doubt true that the primary signification of the word "contemplate" is to consider attentively or to meditate; but it is equally true that a secondary meaning of the word is to "intend;" and in ordinary conversation the word "contemplate" is frequently used as a synonym for the word "intend,"—that is, to express a well-formed purpose. Moreover, instances are not wanting where the word "contemplate" has been held to be synonymous with the words "expect" or "intend." Thus, in *Buckingham v. McLean*, 54 U. S. 13 How. 151, 167, 14 L. ed. 91, 97, the words "in contemplation of bankruptcy," as used in the bankrupt act of 1841 (5 Stat. at L. 442, chap. 9, § 2), were held to be tantamount to the expression "expecting or intending to commit an act of bankruptcy." See also *Jones v. Howland*, 8 Met. 377, 41 Am. Dec. 525.

We think, however, that the sense in which the legislature intended to use the word "contemplated" in the statute now under consideration can be best determined by considering the statute itself and the connection in which the word occurs. The statute was primarily designed to prevent the plea of suicide from being thereafter interposed as a defense to an action on a policy of life insurance. It declares that, "in all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide." The subsequent clause, "unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy," was not intended to create or afford to life insurance companies a new defense to such actions, but rather to state an exception to the general rule first enunciated. The legislature was doubtless aware of the fact that at common law, without the aid of any statute, it was competent for an insurance company to show, by way of defense to an action on a life insurance policy, that the assured had taken out the policy with the preconceived intent of thereafter committing suicide, and that such purpose was subsequently executed. It doubtless intended by the concluding clause to preserve the right to still make that defense. *Smith v. National Ben. Soc.* 128 N. Y. 85, 9 L. R. A. 616. This seems to us to 80 L. R. A.

have been the manifest purpose of the concluding paragraph of the statute. It recognizes the existence of a defense well known to the law, to wit, the defense of fraud, and authorizes the insurer to make that defense. It must be borne in mind that the general purpose of the statute was to curtail the rights of insurance companies rather than to enlarge them, wherefore it cannot well be presumed that the legislature intended to create in their favor a new statutory defense consisting in the fact that the assured, prior to his application for insurance, had considered the expediency of committing suicide in a given emergency, although he had formed no fixed resolution to do so. We think, therefore, that the contention that the legislature used the word "contemplated" to signify a state of mind in which the assured had considered or thought about the subject of suicide without having any well-defined purpose or intent, is not tenable.

Another objection to the construction sought to be placed upon the statute by the defendant company is that it renders the law too uncertain and difficult of application. If we adopt the defendant's definition of the word "contemplated," and assume that it was used by the legislature in that sense, then the inquiry immediately arises, When can a person be said to have so far considered the subject of suicide, or to have so had that thought in mind, as to vitiate a policy of life insurance? In the practical administration of the law, courts will find it difficult to answer this question to the comprehension of a jury. The line must necessarily be drawn somewhere between that amount of thought or contemplation which will and that which will not defeat a policy, because a subject may be considered with different degrees of intensity or attention, and it will hardly do to say that any amount of thought on the subject of suicide as a future possibility, at the time of taking out a policy, will serve to avoid it if the assured eventually dies by his own hand.

Upon the whole, therefore, we conclude that the statute should be construed to mean that hereafter it shall be no defense to a suit upon a life insurance policy that the insured committed suicide, unless it shall be proven to the satisfaction of the court or jury that the insured intended or had resolved to commit suicide at the time when he made his application for the policy. This, as we understand the charge, was the view that was entertained by the trial court and substantially expressed in its instruction, and in thus declaring the law no error was committed.

The judgment of the Circuit Court is therefore affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

W. Briggs GREEN, *App't*,

v.

Lawrence P. MILLS.

(69 Fed. Rep. 632.)

1. An appeal lies to the United States circuit court of appeals from an interlocutory order continuing a preliminary injunction where, although there is a question of jurisdiction resting on the challenging of a state law as in contravention of the Federal Constitution, yet at the threshold of the case the further question arises whether the facts relied on make a case of equitable cognizance.
2. An injunction to restrain the exercise of governmental powers under an unconstitutional statute cannot be granted on behalf of individuals who assert no threatened infringement of rights of property or civil rights.
3. An injunction against any registration of voters on the ground that the statute providing for the registration is unconstitutional because its provisions are so unreasonable, unnecessary, and burdensome that complainant has been unable to register after repeated and persistent efforts to do so, cannot be granted, since the action sought to be enjoined is political and governmental, and will not infringe any right of property or civil right of the complainant and others similarly situated.

(June 11, 1895.)

A PPEAL by defendant from a decree of the Circuit Court of the United States for the District of South Carolina enjoining defendant from furnishing registration lists for the carrying out of an election. *Reversed*.

Before Fuller, Circuit Justice, and Hughes and Seymour, District Judges.

Statement by Fuller, Circuit Justice:

This was a bill of complaint filed in the circuit court of the United States for the district of South Carolina April 19, 1895, by Lawrence P. Mills, described as "a citizen of the state of South Carolina and of the United States," against W. Briggs Green, described as "a citizen of said state and the United States," and exhibited on behalf of complainant and all other citizens of the county of Richland, in the state of South Carolina, circumstanced like himself, and too numerous to be made parties, alleging that complainant was twenty-one years of age February 4, 1895; that he is a resident of ward 4, precinct of Columbia, in said county and state; that he is a male citizen of the United States; that he has resided in the state of South Carolina for more than one year preceding the last general election in that state, and in the county of Richland for more than sixty days prior to the said gen-

eral election; that complainant is an elector of the state of South Carolina, possessing all the qualifications of an elector of the most numerous branch of the state legislature, provided by the state Constitution, and that he is subject to none of the disqualifications set forth in said Constitution; and that he is, under the Constitution and laws of the United States, duly qualified to vote at all Federal and state elections held in said ward, county, and state.

The bill then set forth section 90 of the General Statutes of South Carolina of 1882, as follows: "All electors of the state shall be registered as hereinafter provided; and no person shall be allowed to vote at any election hereafter to be held unless registered as hereinafter required." And section 133 of the Revised Statutes of South Carolina of 1893 to the same effect: "All electors of this state shall be registered, and no person shall be allowed to vote at any election hereafter to be held unless he shall have heretofore registered in conformity with the requirements of chapter 7 of the General Statutes of 1882, and acts amendatory thereof, or shall be registered as herein required." And also section 94 of the General Statutes of 1882, providing: "When the said registration [in certain books to be provided him and made in the manner provided for in section 93] shall have been completed the books shall be closed and not reopened for registration except for the purposes and as hereinafter mentioned until after the general election for state officers. After the said next general election the books shall be opened for the registration of such persons as shall thereafter become entitled to register on the first Monday in each month to and until the first Monday in July, inclusive, preceding the following general election, upon which last-named day the same shall be closed and not reopened for registration until after the said general election, and ever after the said books shall be opened for the registration of such electors, and on the days above mentioned, until the first day of July preceding a general election, when the same shall be closed as aforesaid until the said general election shall have taken place." And in section 137 of the said Revised Statutes of 1893 it is provided: "After every general election the registration books shall be opened for registration of such persons as shall thereafter become entitled to register on the first Monday in each month until the first day of July preceding a general election, when the same shall be closed until such election shall have taken place." And also section 97 of the General Statutes of 1882, in the following words: "Any person coming of age and becoming qualified as an elector may appear before the supervisor of registration on any day on which the books are opened as aforesaid and take oath as to his age and qualification, as hereinbefore provided, and if the supervisor find him qualified he shall enter his name upon the registration book of the precinct wherein he resides."

NOTE.—An appeal from the decision in the above case was dismissed by the Supreme Court of the United States on November 25, 1895, on the ground that the occasion for which the injunction was sought had already passed.

For a somewhat similar case, see *Fletcher v. Tuttle* (111.) 25 L. R. A. 143.

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It was further alleged "that, in and by the requirements of said registration enactments of the government of the state of South Carolina, it is provided that the respective supervisors of registration in the several counties shall issue to the voter when registered a certificate of registration, and that said voter shall present the same at the polls to the managers of election, and that no one shall be allowed to vote at any election to be held in the said state unless his certificate of registration as aforesaid is exhibited at the time and in the manner aforesaid. And it is further required, in and by the said alleged enactments, that, in case a voter or elector shall remove from one county to another in said state, or from one precinct to another in the same county, or from one residence to another in the same precinct, he shall obtain a transfer and a renewal certificate. And it is further provided, in said enactments, that, in the event an elector shall lose his said certificate of registration, he must obtain a renewal thereof upon furnishing evidence satisfactory to the registrar of the said county wherein he resides that his said certificate has been mislaid or lost, and that the same has not been wilfully or intentionally disposed of." And it was averred "that, by the provisions and requirements of said enactments, the elector failing for any reason to comply with any of the provisions aforesaid is denied the right of suffrage both in Federal and state elections," and "that the provisions of the said enactments fixing the time for registration and the closing of the books for that purpose on the 1st day of July preceding every election, and the many and divers provisions, requirements, and conditions set out in the various and sundry sections of said alleged act, were intended to, and that they in effect do, abridge, impede, and destroy the suffrage of the citizen both of the state and of the United States."

The bill further averred the passage on the 24th day of December, 1894, by the government of the state of South Carolina of an act to provide for calling a constitutional convention, by section 4 of which it was declared who should be entitled to vote for delegates to the said constitutional convention: and in addition to the qualifications prescribed for electors by the Constitution of the state of South Carolina, a further qualification was provided, to wit, that the elector be "duly registered as now required by law, or who, having been entitled to register as a voter at the time of the general registration of electors in the state which took place in the year of our Lord 1882, or at any time subsequent thereto, failed to register at such time required by law, or who has become a citizen of this state and who shall register as hereinafter provided in such cases." Sections 6 and 7 of this act were set forth as follows: "That on the first Monday of March, in the year of our Lord 1895, the supervisor of registration of each county shall, at the county seat thereof, open his books of registration, and shall hold the same open for ten consecutive calendar days thereafter, except Sundays, between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon, except 30 L. R. A.

Charleston, Beaufort, and Richland counties, where the said books shall be kept open from 10 o'clock in the forenoon to 6 o'clock in the afternoon, during which time any elector then or theretofore at any time entitled to register as a qualified voter, or who has become a citizen of this state, shall be, during the time herein fixed by law for registration, entitled to register as such, as hereinafter provided; and any elector having been heretofore duly registered, or having since changed his residence, or having lost his certificate, shall be entitled to have the same transferred or renewed, as now provided by law." "Any elector who shall have been entitled to register at the general registration in the year of our Lord 1882, or at any time subsequent thereto, and who failed to register at such time as required by law, and who shall make application under oath in accordance with the printed form to be prepared by the attorney general, setting forth in each case the fact, to wit: The full name, age, occupation and residence of the applicant at the time of the said general registration, or at any time thereafter, when the said applicant became entitled to register, and the place or places of his residence since the time he became entitled to register, which affidavit shall be supported by the affidavits of two reputable citizens who were each of the age of twenty-one years on the 18th day of June, A. D. 1882, or at the time the said applicant became entitled thereafter to register, or any elector who has become a citizen of this state, by moving into the same and his place of residence since living in the state and who shall make application under oath, stating the time of his moving into the state and his place of residence since living in the state, which application shall be supported by the affidavit of two reputable citizens, who were twenty-one years of age at the time the applicant became a resident of this state, such applicant shall be allowed to register as a voter and to have issued to him a certificate as a duly qualified elector in the manner and form now provided by law, and be entitled to vote at said election for delegates to said convention."

The bill then charged that these sections so limited, abridged, and qualified the privilege of registration that they resulted in a practical denial of the right to vote to those electors who, by the operation of the provisions of the General Statutes of 1882 and Revised Statutes of 1893, are now unregistered; and that they were so "interwoven with, and are such integral parts of, the whole alleged registration laws of the state of South Carolina, that, if the same be declared unconstitutional and void, as herein prayed, the whole enactments in regard to registration are likewise void." And it was charged that said sections were in violation of the Constitution of the state of South Carolina, and of section 2 of article 1, section 1 of amendment 14, and section 1 of amendment 15, of the Constitution of the United States.

The bill continued, and concluded as follows:

"(10) By section 2 of the aforesaid act of 1894 it is provided that the election of dele-

gates to the said constitutional convention shall be held on the third Tuesday in August, 1895; that the said convention shall assemble on the second Tuesday of September, 1895; that such convention is called for the purpose of revising, amending, or changing the Constitution of said state, and when assembled will have full power to revise, alter, abridge, curtail, and qualify the right of your orator and of all citizens of the said state of South Carolina to vote for the members of the most numerous branch of the state legislature, and thereby to revise, alter, abridge, and curtail the qualifications now requisite to enable your orator to vote at all Federal elections as now imposed by the Constitution of the United States. (11) That W. Briggs Green has been appointed to the office of supervisor of registration for Richland county aforesaid, under and in pursuance of the said unconstitutional registration laws; that he is now exercising the duties prescribed by the same, and your orator has been informed and believes that he intends to continue so to do, and, furthermore, he specifically intends to furnish and deliver to the several boards of managers for the several precincts of Richland county aforesaid, to be hereafter appointed, to hold the election of delegates to the said constitutional convention, certain paper writings purporting to be the registration books aforesaid of the several precincts to be used by said managers at said approaching election. (12) Your orator further shows that, under and by virtue of the said unconstitutional registration laws, the supervisors appointed thereunder are required to continue said partial, void, and illegal registration on the first Mondays in May and June and July, 1895, and that after the 1st day of July, 1895, they are directed by section 8 of the act of 1894 to 'furnish the managers at each precinct with one of the registration books for such precinct, and no elector shall be entitled to vote whose name is not registered as hereinbefore or already provided by law, and who does not produce his registration certificate at the polls where he offers to vote.' (13) That your orator failed to register at the registration made after the general election of 1888, or to be registered during the ten days in March, 1895, provided for in said act of 1894, because, although he made repeated and persistent efforts to become registered, he found himself unable to comply with the unreasonable, unnecessary, and burdensome rules, regulations, and restrictions, prescribed by said unconstitutional registration laws as conditions precedent to his right to register, and your orator has never been allowed to vote at any Federal or state election of the said state of South Carolina. (14) That your orator is desirous of voting for delegates to the aforesaid constitutional convention at the election prescribed by the act of 1894 for the purpose; that the paper writings purporting to be books of registration now in the hands of the said defendant do not and will not contain the name of your orator as a registered voter for the reasons hereinbefore stated; that your orator, and others like circumstanced with him, will not be permitted

to vote at said special election by the managers thereof unless their names be found upon the books of registration, and they can produce the registration certificates hereinbefore mentioned; that if the said defendant be permitted to continue the aforesaid illegal, partial, and void registration, and be allowed to turn over to the managers of election for the aforesaid county of Richland (when appointed) said paper writings, purporting to be books of registration for the several precincts in said county, your orator will be deprived of his right to vote at said election, and grievous and irreparable wrong and damage will be done to your orator and a large class of citizens like circumstanced with him, which can be prevented only by the interposition of this court by way of restraining the said defendant from the performance of any of the acts hereinbefore referred to. To the end, therefore, that your orator may have full, perfect, and sufficient relief in the premises, may it please your honors to grant unto your orator a writ of injunction restraining and enjoining the said defendant, individually and as supervisor of registration, from the performance of any of the acts hereinbefore complained of, and that your orator may have such other and further relief in the premises as may be just and reasonable."

Then followed the prayer for process. The bill was sworn to by complainant as "true to the best of his knowledge and belief," and, on preliminary application, the following order was entered: "It is ordered that the defendant, W. Briggs Green, both individually and as supervisor of registration for Richland county, in the state of South Carolina, be enjoined and restrained until the further order of this court from the commission of any of the acts complained of in the above-entitled bill, a copy of which must be served upon him with this order. It is further ordered that the said W. Briggs Green do show cause before me at Columbia, S. C., on Thursday, the 2d day of May, next, why this order should not be continued, or some order of like purport and effect be then granted, enjoining and restraining him, both individually and as such supervisor of registration, from the commission of any of the acts complained of in said bill until the final hearing and determination of this cause. This hearing shall be in the United States circuit court room, Columbia, S. C."

Subpoena was issued returnable on the first Monday of June. On May 2, 1895, cause was shown by defendant under the rule, defendant stating, among other things: "(1) That he is supervisor of registration for Richland county, in the state of South Carolina, and as such is not amenable to the jurisdiction of the court for his conduct in his political capacity aforesaid; that the matters, facts, and things alleged and complained of in the said bill, and upon which the injunction has been improvidently granted, are all matters relating to the political duties of the office. That this is in effect a suit against the state of South Carolina, in violation of the 11th amendment to Constitution of the United States, and this court has no jurisdiction. (2) That he submits that the bill presents

no question arising under the Constitution or laws of the United States to give jurisdiction to this honorable court. (3) That he submits that the bill presents no case upon which the jurisdiction of a court of equity can be founded, as there are plain and adequate remedies at law for the correction of any of the matters and things alleged, if so be that the allegations are true. (4) That the bill is totally defective for the purposes of the motion in its allegations and in the verification, in this: that there is no sufficient averment of irreparable injury and statement of facts supporting it, and that the material facts on which the injunction is sought are not positively sworn to by the complainant."

On May 8, 1895, the cause having been argued upon bill and return, the circuit court filed an opinion [*Mills v. Green*] (reported 67 Fed. Rep. 818), and entered the following order: "It is ordered that the restraining order heretofore granted by this court, bearing date the 16th day of April, 1895, enjoining and restraining the said respondent from exercising duties or performing any acts complained of in the said bill of the complainant, either individually or as supervisor of registration for the county of Richmond, state aforesaid, be, and the same is hereby, continued, subject to the final determination of the issues involved in this case until the further order of this court." From this order an appeal was prayed and allowed to this court, errors being duly assigned covering the points made on the return. Objections to the docketing of the case were made and overruled, and the appeal was heard June 7, and decree entered June 11, 1895, reversing the order of the circuit court, dissolving the injunction, and remanding the case with directions to dismiss the bill.

Messrs. Wm. A. Barber, Attorney General, and Edward McCrady for appellant.

Messrs. H. N. Ohear and Charles A. Douglass for appellee.

Fuller, Circuit Justice, delivered the opinion of the court:

It is contended on behalf of appellee that jurisdiction of this appeal cannot be entertained, because if the case went to final decree an appeal therefrom would lie only to the Supreme Court. Under section 7 of the judiciary act of March 8, 1891, where, upon a hearing in equity in the circuit court, an injunction is granted or continued by an interlocutory order or decree, "in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals." By section 5 of that act, appeals or writs of error may be taken directly to the Supreme Court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for de-

cision," "in any case that involves the construction or application of the Constitution of the United States," or "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

It was early held, in *McLish v. Roff*, 141 U. S. 661, 85 L. ed. 893, that the act gave to a party to a suit in the circuit court, where the question of the jurisdiction of the court over the parties or subject-matter was raised and put in issue upon the record, at the proper time and in the proper way, the right to a review by the Supreme Court, after final judgment or decree against him, of the decision upon that question only, or by the circuit court of appeals on the whole case. *Maynard v. Hecht*, 151 U. S. 324, 38 L. ed. 179. And in *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 37 L. ed. 1041, it was ruled that, in order to hold an appeal maintainable under the second of the above-named classes, the construction or application of the Constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the Constitution. *Horner v. United States*, 143 U. S. 570, 36 L. ed. 266. In *United States v. Jahn*, 155 U. S. 109, 39 L. ed. 87, the Supreme Court decided that, if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment or decree on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come directly to the Supreme Court, or to carry the whole case to the circuit court of appeals, where the question of jurisdiction can be certified by that court.

In view of these and other cases, we are of opinion that, where the jurisdiction is not in issue, but the question of the constitutionality of a state law is raised, and must necessarily be decided in the disposition of the case, there the case on final decree should be taken directly to the Supreme Court. But, where the jurisdiction depends on the existence of a Federal question, which is controverted, the jurisdiction sustained, and the case goes to decree on the merits, the defendant may take the whole case to the circuit court of appeals. Whether that court, if the conclusion were reached that the constitutional question was controlling in the premises, should remand the case to the circuit court, or may certify the question to the Supreme Court, we are not called upon to determine. Here the jurisdiction of the circuit court rested on the existence of a Federal question, namely, the validity of the state laws, challenged as in contravention of the Constitution and laws of the United States; but, conceding the jurisdiction, the question arose on the threshold whether the case made or attempted to be made was one of equitable cognizance, and we think that, upon the final decree, an appeal would lie to this court, whether the bill were dismissed on final hearing on that ground or otherwise. The motion to dismiss will therefore be overruled.

The jurisprudence of the United States has always recognized the distinction between common law and equity as, under the Constitution, matter of substance as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holmes*, 62 U. S. 21 How. 481, 484, 16 L. ed. 198, 199; *Thompson v. Central Ohio R. Co.* 78 U. S. 6 Wall. 184, 18 L. ed. 765; *Cates v. Allen*, 149 U. S. 451, 87 L. ed. 804; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205, 37 L. ed. 1052, 1053. It is well settled that a court of chancery is conversant only with matters of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government unless under special circumstances and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402; *Luther v. Borden*, 48 U. S. 7 How. 1, 12 L. ed. 581; *Mississippi v. Johnson*, 71 U. S. 4 Wall. 475, 18 L. ed. 437; *Georgia v. Stanton*, 78 U. S. 6 Wall. 50, 18 L. ed. 721; *Holmes v. Oldham*, 1 Hughes, C. C. 70, Fed. Cas. No. 6,643. Neither the legislative nor the executive department, said Chief Justice Chase, in *Mississippi v. Johnson*, "can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." "The office and jurisdiction of a court of equity," said Mr. Justice Gray, in *Re Sawyer*, "unless enlarged by express statute, are limited to the protection of rights of property." To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government or of the courts of common law.

Similar views have been repeatedly expressed by state tribunals of high authority. Thus, in *Fletcher v. Tuttle*, 161 Ill. 41, 25 L. R. A. 143, the supreme court of Illinois says: "The question then, is, whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity." *Re Sawyer* and *Georgia v. Stanton*, *supra*; *Sheridan v. Colvin*, 78 Ill. 237, *Dickey v. Reed*, Id. 261, *Harris v. Schryock*, 83 Ill. 119, and many other cases are cited, and the court continues: "Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that, wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely po-

litical, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office. Nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery."

In *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584, where application was made for an injunction to prevent the use of a register of voters prepared for a certain county, the court of appeals of Maryland observed: "On this branch of the inquiry it seems to the court very clear that a court of equity cannot be invoked to prevent the performance of political duties like those committed to the officers of registration under the law. The wilful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officers appointed to register votes, which is the same thing, can be adequately compensated for in damages at law. *Bevard v. Hoffman*, 18 Md. 484, 81 Am. Dec. 618. The writ of injunction will not be awarded in doubtful or new cases not coming within well-established principles of equity. *Donaparte v. Camden & A. R. Co.* Baldw. C. C. 218, Fed. Cas. No. 1,617. Each voter has a separate and distinct remedy for the wilfully improper deprivation of his vote; and the joinder of others, like circumstanced or injured, as complainants in equity, on the ground of avoiding a multiplicity of suits, will not avail to afford equitable relief. To interfere in the mode asked for by the complainants would be to stop a popular election in one portion of the state, and thus arrest, as to it, the wheels of government. For irregularities in the conduct of an election, for receiving illegal or rejecting legal votes, and for the correction of consequences resulting therefrom, the law provides appropriate remedies and modes of procedure. Such matters are not the subjects of equitable jurisdiction."

The general doctrine as to public officials is thus stated by the New York court of appeals in *People v. Canal Board*, 55 N. Y. 893: "A court of equity exercises its peculiar jurisdiction over public officers to control their action only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory

power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction."

Nor will equity interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum. The doctrine is clearly established that courts of equity will not thus interfere to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature and cognizable only by courts of law. High. Inj. 3d ed. §§ 1812 et seq., and cases cited. And see *Hagner v. Heyberger*, 7 Watts & S. 104. 42 Am. Dec. 220; *Smith v. McCarthy*, 56 Pa. 359; *Smith v. Myers*, 109 Ind. 1, 58 Am. Rep. 375; *Peck v. Weddell*, 17 Ohio St. 271; *Kemp v. Ventulett*, 58 Ga. 419. The rule is not otherwise in South Carolina. The supreme court of that state has decided upon a similar application for a like injunction, made, as would appear, by this same complainant, that the relief asked "is not the appropriate remedy for the grievance set out." *Ex parte Milla*, 41 S. C. 554.

Tested by these principles, this bill of complaint cannot be maintained, for it seeks on behalf of individuals to restrain the exercise of governmental powers, and asserts no threatened infringement of rights of property or civil rights, and no recognized ground of equity interposition. No discrimination on account of race, color, or previous condition of servitude is charged, or pointed out as deducible on the face of the acts in question. No specific application to the defendant as supervisor to register complainant is alleged, but it is said that complainant has failed to register because, in spite of repeated and persistent efforts to that end, he found himself unable to comply with the provisions of the law in that behalf. In this regard, the gravamen of the bill is that, although the legislature might require registration under reasonable restrictions as proof of the possession of the qualifications prescribed by the Constitution, which is, indeed, made the duty of the general assembly by that instrument (S. C. Const. art. 8, § 8), the requirements of these acts are such as to materially abridge and impair the exercise of the elective franchise and impose additional qualifications to those prescribed; and that therefore the acts are invalid, as in contravention of the Constitutions of the state and of the United States. But, if this were true, it would not follow that complainant would have a *locus standi* in equity. The bill is brought to restrain the registering officer from discharging, at all, duties imposed upon him by law in respect of the public, least complainants and other individuals similarly situated might thereafter be deprived of a political right because of alleged inability to comply with legislative requirements, which he contends are invalid for that reason. We repeat that the action sought to be enjoined is political and governmental, and it is not 30 I. R. A.

pretended that any right of property or civil right is threatened with infringement thereby.

This being so, we are clearly of opinion that no ground of equitable cognizance exists, and, although the appeal is from interlocutory orders, yet, as we entertain no doubt that such a bill cannot be maintained, *we are constrained, in reversing these orders, to remand the cause with a direction to dismiss the bill.* And it is so ordered.

Hughes, District Judge, concurring:

This case was heard by the chief justice, Judge Seymour, and myself, on Friday last, the 7th inst. We thought it was of a character to call for an early decision, and it was determined, after adjournment on Friday, that the decision should be announced to-day, and a decree entered. The case was exhaustively argued at the bar, and nothing can be gained by waiting a further time for the examination of briefs. We are of opinion that the preliminary injunction which was granted in the case ought to be dissolved and the bill dismissed. A decree to that effect, prepared by the chief justice, will be entered at once. The opinion of the court on the important questions presented by the record will be prepared by the chief justice, and filed and reported as soon as practicable. I have thought that, in the meantime, it was due to the public, and might not be improper in me, to present at once some of the considerations which have led me to the opinion that the injunction of the circuit court below should not have been granted. I therefore submit what follows. I have had no opportunity of presenting it to the other judges who sat with me, and am solely responsible for the views expressed.

This bill is brought by the complainant, on his own behalf, and "on behalf of other citizens of the county of Richland, in the state of South Carolina, and the United States," circumstanced like himself. It sets out that he is twenty-six years of age, and that he is entitled to be registered as a citizen and voter. It describes, by quotation, in considerable detail, sundry provisions of the registration laws of South Carolina now in force. It charges that these provisions violate certain clauses of the state Constitution, in two respects, *viz.*: First, by requiring the voter always to be in possession of his certificate of registration, and to present it when offering to vote; and, second, by allowing only ten days in each year (in the month of March) for the registration of voters who have failed to register at the times provided by law for registration at periods anterior to those ten days. It charges that the registration laws complained of, by adding a compliance with these two qualifications as necessary to the exercise of the right of suffrage,—these being qualifications which are not required by the state Constitution,—thereby violate the state Constitution. It adds the charge that these two requirements also violate the Constitution of the United States, inasmuch as section 2 of article 1 of that instrument provides that electors for members of Congress "in each state shall

have the qualifications requisite for electors of the most numerous branch of the state legislature." The bill alleges that complainant failed to register at the times designated by law, or within the ten days set apart for that purpose in March, 1895, for those who had not previously registered, because, although he had made repeated efforts to become registered, he found himself unable to comply with the unreasonable, unnecessary, and burdensome rules, regulations, and restrictions prescribed by the alleged unconstitutional registration laws as conditions precedent to his right to register. He complains that, in consequence of his having thus failed to be registered, he has never been allowed to vote at any state or any Federal election in South Carolina. The bill alleges that the defendant, Green, has been appointed supervisor of registration for Richland county under these unconstitutional laws, is exercising the duties prescribed by them, and intends to deliver to the managers of the election in Richland county the registration books, which he is preparing, to be used by them in deciding upon the right of citizens to vote, among other elections, at the first next ensuing election to be held in South Carolina, which will be one to be held in August next for members of a state convention called to frame a new state Constitution. The bill alleges, in general terms, that the registration laws of South Carolina, complained of, violate, as before described, section 2 of article 1 of the National Constitution, and are also "in violation of section 1 of article 14, and section 1 of article 15, and of divers other sections and articles of the said instrument." As there are but seven articles in the original Constitution of the United States, the presumption is that the bill has reference to the 14th and 15th amendments (not articles) of the National Constitution. The complainant therefore prays the court to grant a writ of injunction restraining and enjoining the defendant, Supervisor of Registration Green, individually and officially, from the performance of any of the acts required of him by the registration laws complained of, and for other relief. The court below granted an order temporarily enjoining and restraining Supervisor Green from the commission of any of the acts complained of in the bill, and granted at a later day an order restraining and enjoining this supervisor from exercising duties or performing any acts complained of in the bill until the further order of the court. From this order appeal is taken to this court.

There is nothing in the record to show that the complainant is a man of color, or that those for whom he sues are colored persons. The bill contains no allegation that the provisions of law complained of were devised against the complainant, or those for whom he sues, on account of their race, color, or previous condition of servitude. There is nothing in the averments of the bill from which it may naturally, or must necessarily, be inferred that the complainant, and those for whom he sues, are citizens of color. There are no averments in the bill which show that the case falls within the purview

of the 15th amendment of the Constitution of the United States. Nor does the bill contain any allegations which raise a Federal question under that clause of the 14th amendment which forbids a state "to deny to any person the equal protection of the laws." It charges that the effect of the provisions of the registration acts complained of is to give unequal facilities of registration to different classes of citizens, but it does not point out how this is so. It leaves the discrimination as to the privilege of registering, if there be discrimination, to inference, and to research in sources other than its own averments. It charges that the provisions of law complained of discriminate, but does not describe the manner of discrimination, or define the classes affected pro or con., nor does it show that the law complained of, in discriminating between classes, as to the privilege of registering granted by them, violate that clause in the 14th amendment which forbids a state "to deny to any person within it, the equal protection of the laws." It confounds privilege with protection. The bill has no reference to a Federal election, in setting out complainant's case. The gravamen of the bill contemplates only a state election to be held for members of the state convention called to convene in August next. It is not shown that any Federal election is to be held in the state of South Carolina before November, 1896. To the bill thus described, and to the orders of injunction granted by the court below in pursuance of its prayers, several objections are urged, in behalf of the state of South Carolina. In what follows I shall consider but one of these.

I regret that I cannot concur in the ruling of the circuit court rendered on circuit in this case, in which it was held that the court had jurisdiction to restrain a county supervisor of registration in the performance of his duties under the election laws of South Carolina. The division of our government into the legislative, executive, and judicial departments is a distinguishing feature of our American polity, and it is essential to its existence that each of these departments shall be independent of the other. This is fundamental and organic. It would be just as dangerous to its stability for the judicial department to override the others as for the executive or legislative department to do so. Hence, while the right of the judiciary to pass upon the constitutionality of laws is undoubted, it has that right simply as an incident to its protection of private rights. It has not that right as a mere means of settling abstract questions, and, even in the enforcement of private rights, it has not the power to interfere with the discretion vested in the other departments, or with the exercise of the political powers of those departments. It seems to me that it is a dangerous encroachment upon the prerogatives of the other departments of government, if the judiciary be intrusted to exercise the power of interfering with the holding of an election in a state. If the supervisor of one county can be enjoined from the performance of the duties imposed upon him by the election laws of the state from whom he holds his

commission, those of the other counties can be also. Thus, a single citizen in each county (and in the case at bar he is not even a qualified voter) can enjoin an election throughout the entire state, and thus deprive thousands of their right to vote. If a court has power to do this, free elections are at an end. If elections are improperly held, there are appropriate means provided by law for questioning their results, and remedying wrongs, without the exercise of this dangerous power by the courts. A candidate who has been defeated may contest; a voter whose right to register has been denied may proceed to compel the enforcement of that right; and these privileges give what the legislature deems sufficient protection to the injured. But, in my judgment, one citizen cannot, in an endeavor to right his own wrongs, disfranchise others. I do not think that a court has jurisdiction to interfere, by injunction or otherwise, with the enforcement of laws by officers holding and deriving their powers from these laws; certainly not to the extent in which it is attempted to be done by this bill. In arriving at this conclusion I have not considered the question whether or not the registration laws of South Carolina violate the Federal Constitution or laws. I prefer to rest my opinion upon the ground of the independence of the different departments of government; upon the impolicy of interference by the courts in question which will result in dragging them constantly into the arena of party politics; and upon the general principle that each department of the government, and each officer thereof, high or low, has the right to administer, according to his best judgment, the duties imposed upon him by the laws creating his office. As illustrating these general principles, I refer to the following decisions: *Mississippi v. Johnson*, 71 U. S. 4 Wall. 475, 18 L. ed. 437; *Gaines v. Thompson*, 74 U. S. 7 Wall. 347, 19 L. ed. 62; *Louisiana v. Jumet*, 107 U. S. 711, 27 L. ed. 448; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805; *Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216; *Re Sawyer*, 124 U. S. 209, 31 L. ed. 405. It is useless to cite the many other cases which bear on the questions arising in this case, and cited so profusely at the bar. In the case of *Mississippi v. Johnson*, which was a bill to enjoin the President of the United States and the military commandant of the military district of Mississippi from carrying into effect certain provisions of the reconstruction acts of 1867, the Supreme Court said that "an attempt on the part of the judicial department of the government to enforce the performance of the (executive and political) duties of the President might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'" "It is true," says the court, "that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise

of executive discretion. The Congress is the legislative department of the government. The President is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." This language of the Supreme Court is quoted to show that the court was at pains to distinguish between acts of public officers which were political and executive, and those which were merely ministerial, and between duties of officers as officers, and those which belong to persons as mere citizens. These distinctions are carefully adhered to by the Supreme Court in the subsequent decisions which I have cited. I do not think it necessary to point out how particularly and carefully it has done so, in those cases.

In the one at bar the person enjoined from the performance of duties was an officer of the executive department of the government, and he was enjoined as an officer, and not as a citizen, from performing political functions. The duties which he was discharging were political,—exclusively political,—and did not appertain to him as a private citizen. I think the teaching of the cases I have cited is clear that a court cannot, by injunction, prohibit a public officer generally from discharging political duties imposed by law. If the law be vicious, the remedy must be sought elsewhere than in the courts. Probably the homely way of getting rid of a bad law, recommended by Gen. Grant, is the best, *viz.*, by enforcing it rigidly. I do not think that the fact was so; but let it be admitted, for the sake of argument, that the duties of the registration officer who was enjoined in this case were entirely ministerial, affording no room for discretion. Yet they were strictly political. They dealt with that prime subject in a republic,—the elective franchise. The duties were prescribed by legislation, and the performance of them was an executive act. For the court to enjoin an executive officer generally from discharging those duties was for the judiciary to invade the province of both the other two independent departments at once. It was, so far as the injunction operated, a nullification of legislation, and a prohibition of the performance of important executive duties.

So far as the rights of the individual complainant in the bill were concerned it may have been competent for the court to grant individual relief. The Supreme Court of the United States the other day granted relief from the payment of an income tax to the individual complainant in the suit before it, but it went no further. On the authority of *Mississippi v. Johnson*, *supra*, we may assume that it would not have entertained a bill for enjoining internal revenue officers of the government from collecting income taxes generally. The judicial power covered the right to grant individual relief, but did not extend to the general power of repealing the law imposing the tax, as to the entire public. I repeat that in the case at bar it may have been competent for the court to grant individual relief. But the bill asked more. It asked similar relief for all citizens

of the county situated like the complainant. It practically asked relief for a numerous political party forming a portion of that people to whom the legislature was solely responsible for its laws, and to whom alone the genius of our institutions makes the legislature responsible. Moreover, it brought the court into immediate and active contact with party contestation. It made the court a controlling factor in party strife. I can imagine nothing more pernicious than a direct participation by the judiciary, by ju-

dicial action, in the politics of the people. The bill asked, practically, that the process of registration under the laws of the state should be suspended in an entire county during the pleasure of the court, and that all the citizens of a county not then registered as voters should be denied the right of suffrage during that pleasure. It seems to me that the mere statement of this view of the case shows that the injunction was improvidently granted. I think the bill should be dismissed.

OREGON SUPREME COURT.

William PARSONS, *Respt.*,
v.
G. A. HARTMAN *et al.*, *Appls.*

(25 Or. 547.)

Injunction will not lie to prevent the sale under execution of exempt property, unless it has some special value to plaintiff, where the

statutes provide a remedy at law for the recovery of personal property and damages for its wrongful seizure.

(June 28, 1894.)

APPEAL by defendants from a decree of the Circuit Court for Umatilla County overruling a demurrer to the complaint in an action brought to enjoin the sale under execu-

NOTE.—*Injunctions against execution sales or other proceedings under final process.*

- I. Exempt personal property.
- II. Homestead.
- III. What kind of property first liable.
- IV. Public property.
- V. Property in the custody of the law.
- VI. Railroad and quasi public corporation property.
- VII. Partnership property.
- VIII. Property owned by third parties.
 - a. Condition precedent.
 - b. Real estate.
 - c. Wife's real estate.
 - d. Subsequent purchasers.
 - e. Fraudulent purchasers.
 - f. Equitable owners.
 - g. Right of third party to require levy on other property.
 - h. Personal property.
 1. Slaves.
 2. Wife's personal property.
- IX. Personal property of a peculiar value.
- X. Trust property.
- XI. In favor of or against executors and administrators.
 - a. English decisions.
 1. To obtain equal distribution of assets.
 2. Foreign administrators and executors.
 3. Costs.
 - b. American decisions.
 1. To obtain equal distribution of assets.
 2. To protect heirs and legatees.
 3. Judgments against administrators or executors personally.
 4. Judgments in favor of administrators or executors.
 5. Sale to pay debts.
- XII. In favor of assignees for creditors.
- XIII. In favor of or against lien creditors.
 - a. Mortgages of chattels.
 - b. Mortgages of real property.
 - c. Attachment creditors.
 - d. Judgment creditors.
 - e. Merchant's lien.
 - f. Landlord's lien.

XIV. In favor of general creditors.

XV. Ejectment cases.

XVI. Summary proceedings in forcible entry and detainer.

XVII. Jurisdiction of courts.

a. To protect third party.

b. Exempt property.

c. Other cases.

d. Federal and state courts.

XVIII. Remedy at law.

a. Personal property.

b. Real property.

XIX. Irregularities.

a. Execution.

1. Condition precedent.

2. Form.

3. Time.

4. Party.

5. Excessives.

b. Levy.

1. Excessives.

2. Mode, manner, and description.

3. Notice.

c. Sale.

1. Notice and advertisement.

2. Appraisement.

3. Costs.

4. Time, place, and manner.

5. Officer.

XX. Effect of injunction on executions, sales, and final process.

a. Release of errors.

b. Release of lien.

c. Officer.

d. Limitation.

XXI. Effect of time upon injunctions, executions, and judgments.

a. Injunctions and executions.

b. Dormant judgments.

This note considers the right to enjoin an execution sale or final process as distinguished from the judgment itself. Cases of injunctions against executions on account of payment of the debt, fraud, usury, set-off, and the like, are in effect injunctions against judgments, although usually classed as injunctions against executions, and will be fully treated in subsequent notes on injunctions against judgments. A slight departure from this rule is

tion of property alleged to be exempt therefrom. *Reversed.*

The facts are stated in the opinion.

Messrs. Bailey & Balleray for appellants.

Mr. William Parsons, in propria persona.

Moore, J., delivered the opinion of the court:

This is a suit by William Parsons to restrain the defendants from selling exempt personal property upon execution. The plaintiff, in substance, alleges that the defendant George A. Hartman, having obtained a judgment against him in the circuit court of Umatilla county, Or., caused an execution to be issued thereon, and delivered to the defendant William J. Furnish, the sheriff of said county, who, in pursuance of the direction of his codefendant, levied upon necessary wearing apparel of the plaintiff and his family, and upon the household goods, furniture, utensils, books, library, tools, implements, and apparatus necessary to enable him to carry on his profession of an attorney at law, by which he earns a living; that at the time of said levy he was a householder of said county, and as such selected, and reserved as exempt from execution and sale under said writ, all said

personal property, and delivered to said sheriff a schedule thereof, with the reasonable value of each article set opposite thereto, amounting in the aggregate to \$550.80, but that said sheriff, acting under the direction of his codefendant, advertised and was threatening to sell all of said property, to his irreparable injury; that he had no plain, complete, or adequate remedy at law for the injury threatened, and prays an injunction restraining said sale. The defendants demurred to the complaint, alleging that it did not state facts sufficient to constitute a cause of suit, and that the court had no jurisdiction of the subject-matter thereof; and, the demurrer having been overruled, they refused to further plead, whereupon the court, by decree, made the temporary injunction which had been granted perpetual, and awarded the plaintiff his costs and disbursements, from which decree the defendants appeal. Their counsel contend that the plaintiff has a plain, speedy, and adequate remedy at law, and that equity will not entertain jurisdiction to enjoin the sale upon execution of personal property that is exempt therefrom.

There is a conflict of authority upon the right of a judgment debtor to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process. It has been

made in this note in subheads XL, XVI, XXI, b, on account of the questions involved.

L. Exempt personal property.

The case of *PARSONS v. HARTMAN* denies the right to obtain an injunction against an execution sale of exempt personal property. There is some conflict of authorities on this question, but where there is a special statutory remedy, that is quick, adequate, and affords the same relief as would be obtained by injunction, as in *PARSONS v. HARTMAN*, the rule adopted in that case is supported by some authorities. But where the objection to the injunction is, that there is a remedy by replevin, trover, damages, or the like, the weight of authority is in favor of granting the injunction.

So, relief against an execution sale of exempt personal property will be denied in equity where, under Ark. Mansf. Dig. § 3068, a stay of proceedings could be maintained until the debtor's claim of exemption could be determined. In this case the debtor did not file his schedule and claim of exemption with the officer under Ark. Mansf. Dig. § 3006, as he did not know of the levy in time, and the court holds that the statutory mode of making the claim of exemption excludes all others. *Driggs' Bank v. Norwood*, 49 Ark. 188.

And in *Baxter v. Baxter*, 77 N. C. 118, an injunction was refused against a sale under execution of personal property where possession had not been disturbed, on the ground that the title to personal property claimed to be exempt will not be tried by injunction, but if it should be seized, the remedy is an action to try title at law under N. C. C. P. § 177, subsec. 4, allowing complainant's right to continue in possession, and try title. But see next case, *infra*.

But in *Gaster v. Hardie*, 75 N. C. 460, where it seems the same section of the Code was in effect but not referred to, it was held that a debtor owning chattels that are mortgaged is entitled to the exemption in the same, as against a subsequent judgment creditor claiming that the mortgages are fraudulent, and may enjoin the execution sale, as the rights of the parties cannot be ascertained and

administered in an action by the creditor against one only of the other parties, or by a levy and sale of the property as belonging to one only of two adverse claimants; and this suit prevents a multiplicity of suits; and an injunction was granted. This case is not referred to in *Baxter v. Baxter*, *supra*.

In *Stout v. McNeill*, 98 N. C. 1, where it was held that an injunction will not be granted to restrain a sale of personal property, out of firm assets, under a judgment against the firm, claimed as exempt by one member, where the other member had consented to his claiming such exemption but revoked the consent before the sale, the question as to the right of injunction in case the property was exempt was not discussed, or other cases referred to on that question.

But in Nebraska it is held that a levy on exempt personal property may be enjoined, notwithstanding a remedy by mandamus to compel the officer to appraise and release the property. *Cunningham v. Conway*, 35 Neb. 618.

The weight of authority is in favor of granting an injunction to prevent the sale of exempt personal property, notwithstanding a remedy of replevin, trespass, or trover. *Stein v. Frieberg*, 64 Tex. 371; *Alexander v. Holt*, 59 Tex. 205; *Nichols v. Claiborne*, 39 Tex. 368; *Anderson v. Larremore*, 1 Tex. App. Civ. Cas. (White & W.) 947; *Dearborn v. Phillips*, 21 Tex. 449; *Hammer v. Woods*, 6 Tex. Civ. App. 179; *Naill v. Kansas Farmers' F. Ins. Co.* 47 Kan. 223.

An execution sale of property exempted, to a farmer, will be enjoined, and the fact that he stopped farming will not authorize a dissolution, as the seizure may have prevented him from carrying on farming occupation. *Ray v. Hayes*, 28 La. Ann. 641.

And an injunction will be granted against a sale of growing crops raised on a homestead. *Coates v. Caldwell*, *infra*.

But in *Bryan v. Long*, 14 Fla. 396, it was held that an injunction will not be granted to restrain an execution sale of exempt personal property where there is a remedy at law by replevin against the officer. In this case the levy was for a debt, on a

held in Texas that a sale of personal property which is exempt from execution may be restrained at the suit of the judgment debtor. *Nichols v. Claiborne*, 89 Tex. 363; *Alexander v. Holt*, 59 Tex. 205; *Stein v. Frieberg*, 64 Tex. 271. But Mr. Freeman, in his work on Executions (vol. 2, 2d ed. § 489), in commenting upon the rule established in *Nichols v. Claiborne*, *supra*, says: "No reason for the decision was given, and we doubt whether any sufficient reason can be found. The remedy at law, where exempt personal property is seized, is, in most, and perhaps in all, cases, adequate for the protection of the interests of the claimant." The rule announced in Texas has been adopted in Nebraska (*Cunningham v. Conway*, 25 Neb. 615), where the court gives the following statement and reason for its decision: "The plaintiff alleges in his petition that he possesses neither lands, town lots, nor houses subject to exemption as a homestead, and that he filed an inventory of all his property with the officer, who refused to call appraisers to appraise the same. If these statements are true, the debtor might have compelled the officer to call appraisers, or have brought an action against him for the failure to perform his duty. Yet he is not restricted to these remedies. The property being exempt,

the debtor is entitled to the peaceable possession of the same, and the officer may be enjoined from wrongfully depriving him of his property, as the officer is proceeding illegally under a claim of right. *Johnson v. Hahn*, 4 Neb. 149; *Mohawk & H. R. Co. v. Archer*, 6 Paige, 83; *Belknap v. Belknap*, 3 Johns. Ch. 463, 7 Am. Dec. 548." In *Johnson v. Hahn*, *supra*, an injunction was granted to restrain the sale of real estate for delinquent taxes, which could only result in a conveyance creating a cloud upon title. In *Mohawk & H. R. Co. v. Archer*, *supra*, the defendant sought to dissolve an injunction which restrained him from opening a private way across plaintiff's real property. The court continued the injunction for the reason that the act complained of was not a mere trespass, but an attempt to exercise a continued right of passing across and through the complainant's premises, to the permanent injury of the property. The case of *Belknap v. Belknap*, *supra*, was a suit to enjoin the defendant from lowering the outlet of a pond which furnished water to operate plaintiff's mill. The court found that it was not a case of an ordinary trespass impending; but one great and special, leading to lasting mischief and the destruction of the estate, and tending to promote a multiplicity of suits, and per-

purchase-money note, which waived the exemption, and the county court had tried the question and held that the waiver prevented an injunction. The supreme court decides the case on the further ground that an action of replevin will be sufficient remedy.

And an injunction will not be granted against a sale under execution of exempt personal property, where it is not shown that the damages are irreparable or that the constable making the levy is insolvent. And Mo. Rev. Stat. § 2722, provides for injunctions only where an adequate remedy cannot be afforded by an action for damages; and there is no allegation in this case that the horse seized has any peculiar value that could not be measured in damages. *Bailey v. Wade*, 24 Mo. App. 186.

And in Texas *M. R. Co. v. Wright* (Tex.) 29 S. W. Rep. 1124, it was said that an injunction will not be granted to restrain the sale of exempt property where there is a remedy at law.

An injunction will not be granted where the bill of complaint does not show that the property seized is exempt from such seizure, or where the attack is on the judgment ordering the sale of such property.

An injunction will not be granted where the property is not exempt from seizure,—as gathered crops. *Coates v. Caldwell*, *infra*.

And where there is no exemption against a judgment for tort, the defendant cannot claim an exemption on an execution for the costs in such a case, on the ground that the liability for costs is a liability on a contract; and he cannot have a sale of personal property enjoined. *Church v. Hay*, 93 Ind. 323.

As, under Ind. Rev. Stat. 1881, § 708, such property is not exempt from levy on such a debt, although it was said that if a tender of certain of the costs against which there was no exemption had been made, an injunction would have been granted as to the other costs. *Russell v. Cleary*, 105 Ind. 503.

And an injunction should not be granted where the bill of complaint did not allege that the debt grew out of contract, for if it grew out of tort there was no exemption. *Berry v. Nichols*, 96 Ind. 287.

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And an injunction will not be granted against a sale on execution, commanding the constable to make collection without appraisal, where the judgment was not rendered "without relief from valuation and appraisal laws," as complainant's remedy is in the justice's court to have the execution corrected, and there has been no attempt to have it corrected. *Martin v. Pifer*, 96 Ind. 245.

And a judgment of a justice directing a forced sale of exempt personal property should not be enjoined, where there is a remedy by appeal, and the remedy to attack erroneous judgments is not by injunction but by appeal. *Rountree v. Walker*, 46 Tex. 200.

Where the record does not show the value of the exempt personal property, or amount involved, an appeal from the order dissolving an injunction against the sale will not be dismissed for want of jurisdiction. *Ray v. Hayes*, 28 La. Ann. 641.

II. Homestead.

An injunction will be granted to restrain the sale of a homestead under execution, where such injunction is necessary to prevent a cloud on title, or extraneous evidence is necessary to establish the homestead; and relief may be obtained by the wife of the defendant in the execution, or by a purchaser from the debtor.

A case in Missouri denies the right of injunction on the ground of adequate remedy in the court rendering judgment, and a case in Texas denies relief on the ground that the bill of complaint does not show that the sale would be a cloud, and that the other Texas cases had granted relief because extraneous evidence was necessary to establish the homestead right as against the lien of the judgment. See also subdivision XVII. b.

The homestead exemption will be protected in equity, and an injunction will be granted to prevent the sale of the same, and this relief is generally given on the ground of preventing a cloud from being cast on the title. *Clegg v. Varneil*, 18 Tex. 294; *Irwin v. Lewis*, 50 Miss. 368; *Lewton v. Hower*, 18 Fla. 372; *Farley v. Hopkins*, 79 Cal. 306; *Dunn v. Tozer*, 10 Cal. 167; *Culver v. Rogers*, 28 Cal.

perpetually enjoined the threatened injury. It will thus be seen that each case cited in support of the rule adopted in *Cunningham v. Conway*, *supra*, related to injunctions granted to restrain the creation of clouds upon title, or to prevent trespasses upon real property.

In *Baxter v. Baxter*, 77 N. C. 118, it was held that injunction was not the proper remedy of the judgment debtor to determine the title to exempt personal property seized under execution. "Upon principle," says Mr. High, in his work on Injunctions (sec. 122), in discussing the right of the judgment debtor to enjoin the sale of exempt personal property under execution, "it is difficult to perceive any satisfactory reason for interfering by injunction in such cases, since adequate relief may usually be had by an action at law." Section 380, Hill's Code, provides that "the enforcement or protection of a private right, or the protection of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate, and complete remedy at law. Sections 182-148 furnish such a remedy at law for the recovery of personal property, and section 214 authorizes a jury to award damages for an unlawful seizure of such property. The owner of a chattel having a

complete remedy at law for its unlawful seizure or detention, equity will not entertain jurisdiction at his suit to recover possession of it, except where it has a certain, special, extraordinary, and unique value, impossible to be compensated for by damages. 1 Pom. Eq. Jur. § 177. And if it appeared from the complaint, in the case at bar, that any article of personal property levied upon by the defendants possessed a special value to the plaintiff alone, such as a keepsake or memento of any kind, the loss of which could not be compensated in damages, equity would interfere to prevent its sale. Where an unlawful and oppressive seizure of exempt property has been made upon execution, the claimant, under ordinary circumstances, may safely risk his cause to the keen sense of justice inherent in mankind, and feel assured that a jury will, by its verdict, award him damages for the injury sustained.

The plaintiff having, under the statute, a complete remedy at law for his injury, and nothing appearing in the record to entitle him to invoke the interposition of a court of equity, the decree of the court below is reversed, the demurrer sustained, and the complaint dismissed.

500; *Tucker v. Kenniston*, 47 N. H. 297, 98 Am. Dec. 425; *Webb v. Hayner*, 49 Fed. Rep. 601.

And an execution sale of a house on leased land owned and occupied as a homestead confers no title, and the purchaser will be enjoined where he is in possession and threatens to remove the house. *Conklin v. Foster*, 57 Ill. 104.

And an execution sale of a homestead would be enjoined as a cloud upon the title where a necessity might exist of the introduction, in an action of ejectment, of extrinsic evidence to show that the property was a homestead. *Roth v. Insley*, 86 Cal. 134.

And an injunction was granted to remove a cloud on title, of a homestead as against a judgment, but the court refused to make the injunction perpetual, on the ground that the property might increase in value, or might be abandoned, and granted the injunction on the ground that extrinsic evidence was necessary to protect the title, reserving, however, to the creditor the right to move to have the same vacated on showing cause. *Corey v. Schuster*, 44 Neb. 209.

A levy on an execution upon growing crops upon a homestead will be enjoined. *Coates v. Caldwell*, 71 Tex. 19.

A restraining order against the levy and sale under execution on a dormant judgment, of a homestead, may properly be made, notwithstanding the remedy of applying to the court to recall the execution. *Krinke v. Parish*, 9 Ohio C. C. 141, 2 Ohio Dec. 85.

And the defendant is entitled to an injunction to restrain the collection of a judgment out of property bought with pension money, as it would create a cloud on his title; and the remedy to move to set aside the levy will not prevent an injunction, as he was entitled to have the case tried on common-law evidence, and not on *ex parte* affidavits. *Buffum v. Forster*, 77 Hun. 27.

The act of Congress, June 1, 1872 (U. S. Rev. Stat. 1916), providing for similar remedies upon a judgment by execution or otherwise as are now provided in like causes by the laws of the state in which such court is held, having been passed subsequent to the homestead exemption statute of Wisconsin, that statute applies to judgments in favor of the United States, and an execution sale 30 L. R. A.

thereunder will be enjoined. *Fink v. O'Neil*, 108 U. S. 272, 27 L. ed. 196.

So, an injunction will be granted restraining the sale on execution of a homestead claimed under the laws of the United States, if the judgment on which the execution issued was recovered for a debt contracted before the homestead claim was patented. *Miller v. Little*, 47 Cal. 348.

And a sale under execution of land exempt as a homestead will be enjoined where the land levied upon had been conveyed by deed as security for the debt; but it is questionable whether or not the deed was not void on account of usury. *Johnson v. Griffin Bkg. & T. Co.* 55 Ga. 691.

An injunction will be granted after an execution sale of the homestead to prevent the purchaser from conveying such land, where the requirements of the statute as to settling off the homestead have not been complied with, and the sale is for a grossly inadequate price. *Bullen v. Dawson*, 139 Ill. 633.

And a homestead acquired after a judgment will be protected by injunction against execution sale, where possession could not be obtained by the owners for some months after purchase and after the judgment, owing to a lease on the premises, and such homestead was bought with the proceeds of a former homestead. *Gardner v. Douglass*, 64 Tex. 76. See *Mann v. Wallis*, *infra*.

And the homestead right may be claimed by a wife, or widow, where an injunction is sought to protect her rights against a forced sale.

So, an injunction will be granted in favor of the wife to restrain the sale of the homestead. *Eaton v. Eaton*, 68 Mich. 158; *Nichols v. Snow*, 42 Tex. 72.

And a widow, with children depending upon her for support, may obtain an injunction against a sale of a saw and grist mill, as the same are fixtures and attached to the land which was exempt. *Tison v. Taniehill*, 28 La. Ann. 793.

And a writ of possession on a judgment against a husband to which the wife was not a party, and in which the homestead was not in issue, may be enjoined to protect the homestead right. *Freeman v. Hamblin*, 1 Tex. Civ. App. 157.

The purchaser of a homestead is generally entitled to an injunction against the sale of the same, on execution against the grantor, where he is a

bona fide purchaser for value, although some cases refuse the injunction on the ground that such sale will not affect him, or that he has other and equally adequate remedies.

A purchaser of land exempt as a homestead is entitled to an injunction against a sale on execution on a judgment existing at the time of purchase against his grantor, as preventing a cloud on his title, and a homestead exemption attaches without any assignment, where that is all the land the debtor has. *Ketchum v. McCauley*, 28 S. C. 1.

And an injunction will be granted, although the judgment was rendered against his grantor before he purchased the land. *Smith v. Zimmerman*, 66 Wis. 542.

And will be granted in favor of a purchaser of homestead property, to prevent a cloud upon his title. *Van Ratoliff v. Call*, 72 Tex. 491. See *Mann v. Wallis*, *infra*.

And an injunction will be granted under Wis. Taylor's Stat. chap. 124, § 30, providing that the owner of the homestead may sell the same, and that such sale will not render it liable to execution. *Goodell v. Blumer*, 41 Wis. 436.

And the same was held where the purchaser was also the equitable owner of the lien of a judgment attacked. *Goodell v. Blumer*, 41 Wis. 436.

But in *Mann v. Wallis*, 75 Tex. 611, a purchaser of a homestead was refused an injunction to prevent a sale under execution on a judgment against a prior owner, where the bill of complaint showed that the execution was not a lien on the land, or a cloud on the title; and the remedy of trespass to try title was adequate. It was said that if his claim of relief had been made on the ground that evidence outside of the record would be needed to protect his title, an injunction would be granted: as, in *Van Ratoliff v. Call*, *supra*, the question was whether the abstract of judgment was properly recorded in the county before the debtor sold the land, and whether there was a homestead at the time of filing the abstract, so in *Gardner v. Douglass*, *supra*; extraneous evidence would be necessary to establish the homestead right.

And in *Meiller v. Bartlett*, 89 Mo. 124, it was held that under Mo. Rev. Stat. § 2406, giving the execution debtor a right to apply to the judge of the court out of which the execution issued, to stay, set aside, or quash the same, that the judge of a court of another county could not quash the levy on a homestead in that county.

A personal representative of an estate is entitled to an injunction against a judgment setting off a homestead to the debtor as fraudulent, where there was no representative to contest the allowance of homestead at the time it was made, and it is attacked on the ground of fraud. *Brown v. Thornton*, 47 Ga. 474.

But an injunction against an execution sale of land claimed as a homestead will not be granted where the homestead right has been lost, or has not been acquired, or has been adjudicated, or the bill does not make out a cause of action.

Where an exchange of land is made, the exemption of the debtor in the tract conveyed by him does not continue after exchange, where he claims an exemption in the other tract, and the same may be levied upon for his debt, as the homestead is a mere right of occupancy, in Arkansas. *Moore v. Granger*, 30 Ark. 574.

And the purchaser of an abandoned homestead is not entitled to an injunction against a sale under a judgment against a party claimed to be entitled to the exemption, where the purchaser waived all claim by reason of any judgments on said lands against his vendor. *Warren v. Peterson*, 32 Neb. 727.

In an action to enjoin a sale of homestead property on the ground that the mortgage was void because not executed by a wife, where she died 30 L. R. A.

pending the suit, the homestead character was divested; but while the mortgage was held void, it was but an incident to the debt, and the debt was held good and the property liable, and the injunction was refused. *Revalk v. Kremer*, 8 Cal. 63, 68 Am. Dec. 304.

And 2 Ind. Rev. Stat. 1876, p. 507, providing that if the personal estate of the decedent is insufficient to make the sum of \$500 for the widow the deficit shall be a lien on the real estate, will not authorize an injunction against an execution sale, on a judgment prior to the death of her husband, as her lien did not attach until his death, and the creditors are entitled to sell two thirds of the estate. *Mead v. McFadden*, 68 Ind. 340.

The owner of an undivided part of land cannot enjoin a sale, as exemption does not apply to an undivided tract. *Henderson v. Hoy*, 26 La. Ann. 156; *Brown v. Solilbellos*, 28 La. Ann. 355.

And a sale of homestead property under a decree will not be enjoined where the matter of homestead has been fully adjudicated in the decree, and no new matters for equitable interference are set up in the bill. *Brinson v. Wessolowsky*, 58 Ga. 233.

So, where two unsuccessful attempts to claim a homestead are made, and the last one is passed upon by the court, an injunction will not be granted against an execution sale, where the sheriff refuses to recognize a third attempt that complies with the statute, as laches of complainant and *res judicata* prevent an injunction. *Platt v. Sheffield*, 63 Ga. 627.

A purchaser seeking to enjoin a sale of the land exempt as the homestead of his grantor, alleging the judgment lien, the conveyance to him, and the relinquishment of the homestead; but not showing that the relinquishment of the homestead was at the same time as the conveyance, — is not entitled to an injunction; for, if the relinquishment of the homestead took effect before the conveyance, the lien of the judgment attached. *Marriner v. Smith*, 27 Cal. 642.

And although a purchaser of a homestead would be entitled to have a sale on execution against his grantor enjoined as a cloud upon his title, the bill must allege that the value of the premises did not exceed the amount allowed under the homestead law. *Ibid*.

And an injunction against the sale of a homestead under an execution is not authorized where the bill does not state that an execution is in the hands of the sheriff, nor does it refer to the judgment. *Adams v. White*, 23 Fla. 362.

A decree enjoining the collection of a judgment, and to refrain from all proceedings on the same, is erroneous, on a bill for an injunction to prevent a sale of complainant's property exempt under the appraisement law. *Anthony v. Shannon*, 8 Ark. 52.

In *Moriarty v. Galt*, 125 Ill. 417, solicitors' fees were not allowed on dissolution of an injunction against a sale of property claimed to be homestead, on an execution against the purchaser's grantor.

III. What kind of property first liable.

The remedy by injunction to prevent an execution sale of one kind of property until another kind shall be first sold, has generally been denied, where the debtor does not point out to the officer, or deliver to him, property liable to sale; but a case in Rhode Island granted an injunction where property of a school district was seized.

An injunction will not be granted against the execution sale of real estate on the ground that complainant had personal property liable to execution, where he does not disclose the same or point it out to the sheriff. *Smith v. Frederick*, 32 Tex. 236; *Hefner v. Hesse*, 29 La. Ann. 149; *Reagan v. Van Evans*, 2 Tex. Civ. App. 35; *Devile v. Hayes*, 23 La. Ann. 550; *Cook v. De la Garga*, 13 Tex. 431; *Loes v. Lister*, 14 Tex. 469; *Kendrick v. Bloch*, 18 Tex. 254.

And a sale of land under a judgment which is a lien upon that land will not be enjoined on the ground that personal property has been taken on execution, where it was claimed by a third party and a delivery to the sheriff was not made, where it is not shown but that the land is necessary to satisfy the debt. *Garrity v. Thompson*, 67 Tex. 1.

And a levy upon real estate will not be enjoined on the ground that personal property was delivered to the sheriff where there is a remedy of certiorari at law. *Texas M. R. Co. v. Wright* (Tex.) 20 S. W. Rep. 1184.

And under La. Code Pr. art. 648, providing that the debtor shall not have the right to point out particular property to the sheriff when the creditor has a privilege or a mortgage on the property, an injunction will not be granted for refusal of the right. *Iambeth v. Sentell*, 38 La. Ann. 691.

And in Indiana the court of one county cannot enjoin a levy and sale, on process from another court, where it is claimed that realty should be sold before personalty, as the remedy is in the court issuing the process. *Indiana & I. R. Co. v. Williams*, 22 Ind. 198.

A defendant in an execution cannot obtain an injunction against a levy on the ground that sureties on the appeal bond given by the other defendants have personal property, which should be first exhausted. *Kendrick v. Rice*, 16 Tex. 364.

And an execution sale of work animals will not be enjoined on the ground that they cannot be sold separate from the plantation to which they belong, where the defendant points out the property to the sheriff. *Dorsey v. Hills*, 4 La. Ann. 108.

And irregularity in a levy in that it was not made on realty instead of personalty, as required by statute, will not entitle an injunction against the same as oppressive, where the defendant in the execution does not offer to the officer property subject to the levy. *Beard v. Foreman*, 1 Ill. 335, 12 Am. Dec. 197.

One of the defendants jointly bound cannot enjoin a sale on execution of his property on account of arrangements made between the defendants, nor because a prior levy was made on the property of another, who died before sale. *Boyce v. Woods*, 37 Tex. 245.

And the defendant in an execution cannot have a sale thereunder enjoined on the ground that property of another person was seized. *Gusman v. De Foret*, 33 La. Ann. 333.

An appeal in general terms in an action by the debtor to enjoin a *f. fa.* because the property belonged to other than the debtor must be considered as embracing, not only the plaintiff, but also the sureties, in the injunction bond. *Mitchell v. Lay*, 4 La. Ann. 514, 3 La. Ann. 593.

But in *Kenyon v. Clarke*, 3 R. I. 67, it was held that the exemption of real estate from an execution sale until after personal property is exhausted and the body of the debtor has been taken in the execution applies to judgments against school districts attempted to be enforced against a member of the district, and an injunction was allowed.

IV. Public property.

The sale of public property under execution will generally be restrained by injunction, and this is sometimes on the ground of statutory prohibition against such sales, or that such a sale is contrary to public policy.

An injunction will be granted against an execution sale of public school property on the ground of public policy, and to prevent a cloud on the title. *State v. Tiedemann*, 60 Mo. 306, 38 Am. Rep. 493.

And an injunction will be granted against an execution sale of land where the land has been condemned by the city for a park, as it will be held to be in the custody of the law, and the lien of the 30 L. R. A.

creditor is transferred to the fund. *Moore v. Barrett*, 6 Phila. 204.

And buildings furnished by a parish and used for a court-house and jail are not subject to sale on execution, and the same will be enjoined. *Police Jury of West Baton Rouge v. Mitchell*, 4 La. Ann. 84.

And the waterworks of a city are not liable to sale under an execution, and stock of a city taken on a transfer by the city of such waterworks to a corporation in trust for bondholders, under an act giving such exemption as to the stock of the city, is not liable to sale under execution, and the sale will be enjoined; and the statute continuing the exemption in another form does not impair an obligation of the contract. *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1134.

And under a statute prohibiting the issuing of writs of *f. fa.* against a city, passed after an injunction was dissolved and an appeal taken, an injunction should be granted against a sale of city property seized on execution. *New Orleans v. Ruleff*, 23 La. Ann. 708.

And under such a statute a sale will be enjoined, especially where the judgment creditor had a check on the treasury which was a novation, and never offered to return the same. *New Orleans v. Smith*, 24 La. Ann. 405.

And an injunction will be granted against an execution on a judgment against a municipal corporation, as its property is held in trust for the public. *Darling v. Baltimore*, 51 Md. 1.

And public property is exempt from seizure. *Police Jury of West Baton Rouge v. Mitchell*, 4 La. Ann. 84.

But where an execution against a municipal corporation is enjoined, it is error to enjoin all further proceedings on the judgment. *Darling v. Baltimore*, 51 Md. 1.

V. Property in the custody of the law.

Property in the custody of the law will be protected by injunction from seizure and sale on execution.

An injunction against the sale of property on execution will be allowed where it appears that such property is *in custodia legis* and is not subject to levy of execution, and a sale would confer no title. *Moore v. Barrett*, 6 Phila. 204; *Cooper v. Newell*, 38 Miss. 313; *Ryan v. Parris*, 48 Kan. 765.

And an injunction will be granted at the instance of receivers of a corporation to restrain a sale of goods belonging to the same on an execution against an agent of such corporation, although the corporation may be estopped to deny that the goods are subject to levy, having held him out as a partner; but the property, being in the custody of a receiver, should not be levied upon. *Thompson v. McCleary*, 159 Pa. 139.

And an execution sale will be enjoined where the property should be sold by a receiver to protect claims. *Russell v. East Anglian R. Co.* 3 Maon. & G. 104, 6 Ballw. Cas. 501, 20 L. J. Ch. N. S. 237, 15 Jur. 985; *Gardner v. Caldwell* (Mont.) 41 Cent. L. J. 133; *State v. King County Super. Ct.* (Wash.) 39 Pac. Rep. 244.

So, property was held to be in the custody of the law, where an assignment for creditors was made prior to a suit for a mechanic's lien, and the assignee was not a party to such suit, and a sale under the lien was enjoined. *Quinby v. Slipper*, 7 Wash. 475.

And the same was held in a similar case, where the sheriff obtained possession of the goods in replevin, and then attempted to levy another execution. *Ryan v. Parris*, *supra*.

And an injunction was granted against the execution sale of a legacy pending the settlement by the administrator, as the same was regarded in the custody of the law. *Stout v. La Follette*, 64 Ind. 335.

And leave of court must be first obtained in order to enforce a judgment against property in the custody of the law. *Brady v. Johnson*, 75 Md. 445, 20 L. R. A. 737.

And where personal property of a third person is taken by a Federal marshal in attachment, and the owner gives a bond, sells the property, and pays the money to the marshal, and the same is in the custody of the law, and claims are filed against the fund, the owner may, by ancillary proceedings in the Federal court, obtain an injunction against the distribution of the fund until his rights are settled; otherwise he would have no remedy. *Krippendorf v. Hyde*, 110 U. S. 276, 28 L. ed. 145.

The appointment by a state court of a receiver of the property of a corporation in proceedings for its dissolution gives the court jurisdiction from the time of the appointment, and an injunction will be granted against a seizure under subsequent process of a Federal court in admiralty, although the receiver has not filed his bond or taken possession. *Re Schuyler's Steam Tow Boat Co.* 138 N. Y. 169, 20 L. R. A. 391.

And property seized under process from the state court is held to be in the custody of the law, and the Federal court will not enjoin the sale. *Ruggles v. Simonton*, 3 Biss. 325.

In *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635, it was held that a garnishment is an attachment of the goods in the hands of the garnishee, and such goods are not subject to levy and sale upon process thereafter levied during the continuance of the attachment, and such sale will be enjoined,—disapproving *Bigelow v. Andrews*, 31 Ill. 322, to the contrary, and which held that the goods in such a case were not in the custody of the law, and that a garnishee could sell the goods where the attaching creditor had not obtained a judgment.

But property will not be held to be in the custody of the law, and the Federal court cannot enjoin a levy made on land in a foreign state, where the creditor is not a party or privy to the suit in the Federal court appointing a receiver. *Schindelholtz v. Cullum*, 55 Fed. Rep. 885, 12 U. S. App. 242.

And where a judgment is a lien on the property prior to the appointment of a receiver of an insolvent corporation, the sheriff will not be enjoined from delivering a deed, although the sale was made after the receiver was appointed. *Cherry v. Western Washington I. E. Co.* (Wash.) 40 Pac. Rep. 136.

As to exclusiveness of jurisdiction by appointment of a receiver, see note to *Re Schuyler's Steam Tow Boat Co.* (N. Y.) 20 L. R. A. 391.

And see *Ades v. Levi*, *infra*, XIII. a, for custody of the law.

VI. Railroad and quasi public corporation property.

In regard to protecting the property of quasi public corporations from sale, it seems that where the suit in equity is in behalf of bondholders, and an injunction is necessary to protect their interests, an injunction will be granted, as in *Pennock v. Coe*; *Phillips v. Winslow*; *Titus v. Mabee*; *Titus v. Ginheimer*; *Central Trust Co. v. Moran*; *Londenslager v. Benton*; *Minnesota & M. R. Co. v. Soutter*; *Great Northern R. Co. v. Tahourdin*; *Brady v. State*; *Brady v. Johnson*; and *Brown v. Maryland*, *infra*.

So, an injunction against a sale under an execution in favor of second-mortgage bondholders, will be granted where such sale would impair the lien of the prior bondholders on the railroad property, and the whole property is insufficient to satisfy the bondholders under the first mortgage. *Pennock v. Coe*, 64 U. S. 23 How. 117, 18 L. ed. 436, 6 Am. L. Reg. 729.

In *Ruggles v. Simonton*, 3 Biss. 325, it was held that under 1 U. S. Stat. at L. 335, § 5, prohibiting an injunction to stay proceedings in a state court, 90 L. R. A.

an injunction will not be granted in favor of bondholders to restrain the sheriff from selling rolling stock of a railroad company, under an execution issued from a state court. *Pennock v. Coe*, *supra*, is affirmed as to the question of exemption from seizure, but the court held that it was powerless to act.

And the trustee under a deed of trust of a railroad and franchise is entitled to an injunction against an execution sale of the property on a judgment against the corporation, on the ground that it would destroy the use of the railroad. *Phillips v. Winslow*, 18 B. Mon. 431, 68 Am. Dec. 729.

And an injunction will be granted at the instance of trustees for bondholders of a railroad to prevent the sale of a car on execution, if such car is in use by the railroad company, as it cannot be sold subject to the deed of trust; but as to an iron safe or a planing machine the sale of the same will not be enjoined where they were not owned by the company at the time the deed of trust was made. *Titus v. Mabee*, 25 Ill. 257.

So, an injunction will be granted to restrain an execution sale of a water-tank, locomotive, and cars at the instance of a trustee for bondholders, as the same, if in use, cannot be detached from the operation of the road; and as to one of the executions which issued from a justice's court, the same would be enjoined on the ground that under such an execution realty could not be sold. (The judgments were obtained after the making of the deeds of trust.) *Titus v. Ginheimer*, 27 Ill. 462.

Under Minn. Gen. Stat. 1878, chap. 34, §§ 72, 73, the rolling stock and property of a railroad mortgaged under these sections is an entirety, and cannot be levied on separately, and will be enjoined at suit of the mortgagee. *Central Trust Co. v. Moran*, 55 Minn. 188, 29 L. R. A. 212.

And an injunction was granted against an execution sale of equipments of an insolvent street railroad corporation, on a bill filed by the trustee for bondholders, as the execution creditor's remedy is by sequestration against an insolvent corporation; but security was required for the debt and for the lien of *li. fa.* to continue until further order of the court. *Londenslager v. Benton*, 4 Phila. 382.

And where the ownership or liens upon rolling stock on a railroad were not adjudicated in a foreclosure suit on a mortgage on a division part of the road, and the master misinterpreted the effect of the order of sale and sold the same, a bill in equity, claiming that this rolling stock was also subject to a mortgage on the other division, and that the master's sale was unauthorized, and asking for an injunction, was not subject to demurrer, although exceptions to the sale had been overruled and the sale confirmed. *Minnesota & M. R. Co. v. Soutter*, 69 U. S. 2 Wall. 609, 17 L. ed. 888.

And a dock company organized under an act authorizing such company to build a railway is protected by the railway companies' act 1867/31 & 32 Vict. chap. 127, § 4, and an execution sale of an hydraulic lift used by the company will be enjoined at the instance of mortgage bondholders. *Great Northern R. Co. v. Tahourdin*, L. R. 13 Q. B. Div. 320.

Under Md. act 1834, chaps. 241, 231, giving a state the net tolls and revenues of a canal, an injunction in behalf of a state will be granted to restrain an attachment levy upon the same, under a judgment against the canal company. *Brady v. State*, 26 Md. 290.

So, under a decree of the court placing canal franchises in the hands of trustees for bondholders subject to the rights of the state, an injunction will be granted against an execution levy on property which was really in the custody of the courts. *Brady v. Johnson*, 75 Md. 445, 20 L. R. A. 737.

And an injunction against a judgment and attachment of revenue and tolls of a canal was granted where such revenues were subject to a

prior lien of mortgage bonds for construction under a state statute, and also subject to the lien of the state for moneys advanced for the construction of the canal of which the judgment creditor had notice. *Brown v. Maryland*, 114 U. S. 598, 29 L. ed. 393.

So an injunction should be granted prohibiting the sale under a *f. fa.* of part of the property owned, used, and necessary for the use of a public canal, in which the state has an interest, where it would destroy the use of the franchise and value of the property of the stockholders. *Gue v. Tide Water Canal Co.* 65 U. S. 24 How. 257, 16 L. ed. 635.

But as to canals, see *Erie Canal Co. v. Lowrie*, and *Boyd v. Chesapeake & O. Canal Co.* *infra*.

And injunctions in some cases are granted to prevent the destruction of the use of the property or the franchise, as in *Gue v. Tide Water Canal Co.* *supra*; *Oakland R. Co. v. Keenan*; *Boyd's Appeal*, and *Southwestern Teleg. & Teleph. Co. v. Howard*, *infra*.

An injunction will be granted to prevent the obstruction of the business of a railroad company in the exercise of its franchise by an execution sale. *Oakland R. Co. v. Keenan*, 56 Pa. 198.

And the levy upon the property of a corporation in actual use apart from its franchises will be enjoined, when the corporation is for a quasi public purpose, as fire insurance patrol. *Boyd's Appeal* (Pa.) 15 Atl. Rep. 736, affirming *Patrol v. Boyd*, 44 Phila. Leg. Int. 252.

And an injunction against the levy of an execution on the property of a third person will be granted where it is shown that acts of trespass done or threatened to be done to plaintiff's property would be ruinous, or irreparable, or impair a just enjoyment of the property in the future,—as the sale of a telegraph line by sections. *Southwestern Teleg. & Teleph. Co. v. Howard*, 3 Tex. Civ. App. 385.

But other cases refuse injunctions in behalf of a mortgagee, where he fails to state a cause of action or has another remedy, and deny an injunction in favor of an execution creditor; and others deny relief to the debtor, where it is not shown that the debtor is insolvent.

So, a mortgagee of a railroad is not entitled to an injunction where the bill does not show that the security of a mortgage would be impaired. *Coe v. Knox County Bank*, 10 Ohio St. 412.

And a mortgagee cannot obtain an injunction against a sale under execution of the personal property of a street railway company, where he has a remedy by interpleader. *Eckfeldt v. Starr*, 5 Phila. 497.

And an execution creditor of a street railroad corporation is not entitled to an injunction against other execution sales of the same property, even if he holds bonds of the railroad as collateral security for his debt. *Spering v. Kern*, 4 Phila. 388.

Where an original bill for an injunction against an execution sale of railroad property which was not exempt from seizure shows no ground of relief, it cannot be aided by a supplemental bill filed after final decree, setting up that the original judgment had been reversed. *Fahs v. Roberts*, 54 Ill. 132.

Under Tex. Const. art. 10, § 4, providing that rolling stock shall be personal property, and that all the property of a railroad shall be liable to execution and sale, and Tex. Rev. Stat. art. 2237, providing that a levy shall be first made on personal property where it is delivered into possession of an officer,—that a levy on a box car was not made before the realty will not be ground for an injunction where possession was not delivered as required by the statute. *Texas M. R. Co. v. Wright* (Tex.) 31 S. W. Rep. 613, affirming 20 S. W. Rep. 1134. See also *Lamolle Valley R. Co. v. Bixby*, *infra*, VII.

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And a railroad company is not entitled to an injunction against a levy and sale of a locomotive on an execution against the company for a valid debt, where it is not shown that the debtor is insolvent. If the suit had been by bondholders, it is said it might be different. *Midland R. Co. v. Stevenson*, 180 Ind. 97.

And to the same effect as to a levy on personal property, was said to be the rule in *Londenslager v. Benton*, *supra*.

A canal company is not entitled to an injunction against a judgment of condemnation in attachment, on the ground that it has executed mortgages to the state, of all its assets, as the state must assert its own claims. *Boyd v. Chesapeake & O. Canal Co.* 17 Md. 195, 79 Am. Dec. 646.

And a canal company is not entitled to an injunction against an attachment of its funds on execution under judgments, on the ground that it is necessary to keep the canal in repair, as the remedy is in the court issuing execution. *Erie Canal Co. v. Lowrie*, 5 Clark (Pa.) 464.

Stockholders in a railroad company cannot obtain an injunction against a decree of foreclosure and reorganization, where the creditors were agreed as to the decree and the company was not injured. *Mexican Ore Co. v. Mexican Guadalupe Min. Co.* 47 Fed. Rep. 361.

(For cases as to execution against stock or stockholders of corporations, see *Stout v. La Follette*, XI. b. 1; *Bargate v. Shortridge*, and *Hampson v. Weare*, XIX. a. 4; *Anderson v. Biddle*, and *Weber v. Bullock*, VIII. h.)

VII. Partnership property.

An injunction against the sale of personal property of a firm for the individual debt of a member will be granted. But an injunction will not be granted where the interest only of the member is attempted to be sold, or where there is no attempted interference with the property; and a partner suing individually in replevin, or a surety in a replevin bond, cannot obtain an injunction on the ground that the property is firm property; and a dormant partner is not entitled to an injunction against a levy made under a judgment confessed by the other partner. So, where the debt is a firm debt, an injunction will not be granted, unless as in a case where the statutory notice of levy was not given which would allow a partner to surrender other property.

An injunction will be granted at the suit of a firm, to prevent specific articles of firm property from being sold on an execution against a member of the firm for his individual debt. *Williams v. Lewis*, 115 Ind. 45; *Place v. Sweetzer*, 16 Ohio, 142; *Cropper v. Coburn*, 2 Curt. C. C. 465.

And in *Sutcliffe v. Dohrman*, 18 Ohio, 181, 51 Am. Dec. 450, it was said that an injunction would be granted against the sale of partnership personal property on an execution against one member, where he would have no interest in the property after paying firm debts.

And in *Harney v. First Nat. Bank*, *infra*, it was said that the equity of each partner to have land held individually, but really firm property, to be applied to the firm debts before it can be seized by individual creditors, will entitle them to an injunction against the sale of firm property.

And in *Greenwood v. Brodhead*, *infra*, it was said that a partner is entitled to the aid of equity to prevent the sale of firm property for the individual debts of a member.

And an execution sale of goods of a firm for the individual debt of a partner may be enjoined when such partner has no interest in the same and plaintiff offers an accounting to establish the same. *Turner v. Smith*, 1 Abb. Pr. N. S. 804.

Where a partner died before a writ of execution came into the hands of the sheriff against him, the

surviving partner was entitled to the goods, and an injunction was granted against the levying of the execution on the partnership effects. *Newell v. Townshend*, 6 Sim. 419.

Equity will not enjoin an execution sale of the interest of one partner in firm property for an individual debt; and it was said that the cases referred to in *Madd. Ch.* do not warrant the conclusion made by Mr. Maddock, that chancery stops such executions by injunction. The bill in this case was filed by partners for an accounting and for a settlement of the firm debts. *Moody v. Payne*, 2 Johns. Ch. 548.

And an execution levy on the interest of a partner in the goods of an insolvent firm will not be enjoined at the suit of the other partners, as the purchaser acquires no right of possession; and in Minnesota the officer levying may take the property into his possession till he executes the levy. *Wickham v. Davis*, 24 Minn. 167.

In *Mowbray v. Lawrence*, 44/ra, it was said that in New York the authorities are adverse to the interference by injunction to restrain the sale of the interest of one partner in firm property, on an execution against him individually. But in *Turner v. Smith*, *supra*, referring to that case, it is said that the refusal to grant an injunction was predicated on the fact that it did not appear by the complaint that the debtor had no interest which the creditor should be allowed to reach by a sale on his execution.

Partnership creditors cannot enjoin a levy on the firm property for individual debts, as a sale of such property would only pass the interest of the members subject to the rights of firm creditors; and if the sheriff sold the whole interest in the property and delivered possession to the purchaser, he would be a trespasser; and the presumption is that he will do his duty. *Saunders v. Trevin*, 17 Hun. 342.

And in *Young v. Frier*, 9 N. J. Eq. 465, it was held that creditors at large of a firm are not entitled to an injunction against the sale of firm personal property, on judgments claimed to have been fraudulent, overruling *Blackwell v. Rankin*, 7 N. J. Eq. 153, which granted an injunction in favor of general creditors against a levy on firm property for individual debts of members.

The same rule is declared in *Mittnacht v. Smith*, 17 N. J. Eq. 259, 58 Am. Dec. 238, and said to be the rule in *Harney v. First Nat. Bank*, 53 N. J. Eq. 697.

And the same is held in *Greenwood v. Brodhead*, 6 Barb. 563.

Levy of an execution and sale of partnership effects under an execution against one partner will not be enjoined where the bill does not show any interference, actual or threatened, with the possession of the partners, and it does not appear from the bill of complaint but that only the interest of the partner is going to be sold. *Daniel v. Owens*, 70 Ala. 297.

And a partner cannot prevent levy and sale by execution, on the other partner's interest in copartnership property, where he does not show that there is no interest of such partner, after paying partnership debts, which could be sold on execution. *Mowbray v. Lawrence*, 23 How. Pr. 107, 18 Abb. Pr. 317. (But see *Turner v. Smith*, *supra*).

Under Vt. Rev. Laws, § 3443, providing that cars and engines may be levied upon on judgments against a railroad company for injuries, a levy on the property of a railroad run by three companies on a judgment against one, where it was not known that a partnership existed, was sustained, as under this statute the right of a creditor is superior to the general equity of the partners, and an injunction was refused. *Lamolle Valley R. Co. v. Bixby*, 55 Vt. 235.

A partner, having replevied property taken under an execution on a judgment against the other partner, and being defeated, cannot then obtain an injunction against the judgment for the return of 30 L. R. A.

the goods, as the fact that the property is that of a person not a party to the replevin suit is no defense against the judgment, and there is a remedy at law if the judgment is erroneous. *Bowman v. McGregor*, 6 Wash. 118.

And surety in a replevin bond cannot enjoin the judgment on the ground that the property is firm property and not individual property of his principal. *Smyth v. Barbee*, 9 Lea. 173.

And a dormant partner is not entitled to equitable relief enjoining a levy of an execution and judgments confessed by the other partner for individual debts. *Cammack v. Johnson*, 2 N. J. Eq. 163.

And an execution lien obtained by the creditor of one partner will not be enjoined where there has been a sale of the firm effects to such partner by the other partner without reserving any lien for firm creditors. *Ketchum v. Durkee*, 1 Barb. 480, 45 Am. Dec. 412.

One of a firm who is a party defendant in an attachment suit against the firm, and who made an assignment of the firm property for creditors, cannot prevent a confirmation of a sale of firm property held in the name of the other partner who had absconded, and which was attached for a firm debt, where he made no defense at law. *Ashton v. Jones*, 14 Neb. 426.

A purchaser, A, from one partner, of his real estate, was refused an injunction against the sale of the same on a judgment against the firm, where a mortgage had been foreclosed on the real estate of the other partner, subject to the judgment against the firm prior to the purchase, and the purchaser, B, at foreclosure obtained control of the judgment, and it was claimed that the real estate already acquired was a primary fund; but the court required the complainant to pay into court the amount of the judgment or give the bond required, provided by N. Y. Code Civ. Proc. § 612, subsec. 1, and § 612, as complainant was a privy to the judgment. *Rosow v. Bank of Commerce*, 22 N. Y. Week. Dig. 448.

In *Garlick v. McArthur*, 6 Wis. 450, where one partner had securities as collateral, and had given a bond in penalty to apply the proceeds to a judgment against the firm, and had sufficient property to satisfy the judgment, liable to execution, an injunction was granted against the collection of the execution from the property of the other members, as equity will prevent an inequitable use of the judgment where the assignee of the judgment had notice of such equity.

A purchaser of goods from one partner is not entitled to an injunction against the sale of the same on an execution against the other partner where he leaves the goods mingled with those in the possession of the defendant in execution. *Chappell v. Cox*, 18 Md. 518.

Under *Pasc (Tex.) Dig. art. 3937*, providing that on dissolution of an injunction, if the petition is continued after final hearing, the defendant shall give bond to refund, such bond should be required in an action by a legatee of a deceased partner attempting to enjoin the surviving partner from collecting assets. *Foster v. Shephard*, 33 Tex. 687.

An injunction will not be granted against the sale of individual property of a partner to satisfy a judgment against the firm on the ground that he has not been made liable by sol. fa., where the bill does not allege that the judgment was against the firm and not against the members individually, and does not show that sol. fa. remedy has not been pursued. *Jones v. Jones*, 18 Iowa, 276.

But the statutory notice of seizure, required to be given three days prior to the sale, must be given to both partners on an execution for a firm debt, as each partner had the right to point out property to the sheriff; and a failure to give such notice will authorize an injunction. *Lapens v. McCann*, 28 La. Ann. 749.

VIII. Property owned by third parties.

For purchaser of homestead, see II.
a. *Condition precedent.*

An injunction against the sale of land will not be granted at the instance of a third party having a defective title inferior to the judgment lien, or not having possession, where such possession is a condition precedent to obtaining an injunction.

In order to maintain an injunction against a sale of lands, as a cloud upon title of complainant holding the same under a tax deed, it is necessary that the bill should allege possession. *Bevill v. Smith*, 25 Fla. 209.

And a sale under foreclosure will not be enjoined as a cloud on title, unless complainant shows that he has title in himself. *Benner v. Kendall*, 21 Fla. 584.

Or where complainant's title is shown to be defective. *Hall v. Theisen*, 61 Cal. 534.

So, the purchaser of land under a void tax deed cannot enjoin a levy of an execution on the land under a judgment lien superior to the title under the tax deed. *Hill v. Gordon*, 45 Fed. Rep. 375.

And in order to remove a cloud on title by enjoining an execution levy, and the judgment, it must be shown that the person complaining has some property which could be seized on execution, or subjected to the judgment. *Titaworth v. Cook*, 49 Ill. App. 367.

An injunction will not be granted against a sale on execution of property which the defendant had conveyed by warranty, where the judgment was rendered after the conveyance, as it would not be a breach of the covenants of the deed, and plaintiff has no interest in the property. *Small v. Somerville*, 58 Iowa, 262.

Under La. Code Pr. art. 44, providing that no one can maintain a petitory action except the party in whom the legal title is vested, a vendor of land cannot enjoin the sale of property of his vendee on an execution against a third person. *Kelly v. Wiseman*, 14 La. Ann. 671.

b. *Real estate.*

Where an injunction is sought to prevent the sale of real estate on process against another, and the defense of the title against the purchaser at such sale would be required to depend on extrinsic evidence, an injunction will be granted. Where the injunction is asked on the ground of preventing a cloud on the title, and the distinction above is not made, there is much conflict in the cases, but some uniformity in the different states.

Where the title of complainant or the defense of the same depends upon extrinsic evidence, an injunction will be granted to protect the property of a third party from a sale under process against another party, or will be denied if extrinsic evidence is not necessary. *Talieferro v. Barnett*, 37 Ark. 511; *Schuyler v. Broughton*, 65 Cal. 252; *Pixley v. Hugins*, 15 Cal. 127; *Barnes v. Mayo*, 19 Fla. 542; *Clifton v. Anderson*, 40 Mo. App. 616; *Texas Land & M. Co. v. Worham*, 5 Tex. Civ. App. 245; *Roman Catholic Archbishop v. Shipman*, 60 Cal. 586; *Shalley v. Spillman*, 19 Fla. 500; *Moore v. Cord*, 14 Wis. 214; *Lehman v. Roberts*, 88 N. Y. 232; *Conkey v. Dike*, 17 Minn. 457.

And the same rule has been applied to protect a wife's property from a sale for the debts of the husband. *Rea v. Longstreet*, 54 Ala. 291; *Caldwell v. Lawler*, 70 Ala. 238; *Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 6-9; *Tibbets v. Fore*, 70 Cal. 242; *Roe v. Dailey*, 1 Tex. Unrep. Cas. 247.

Some of the states make this their rule of decision. Some use it as a rule in some of their cases, thereby implying that it is applicable in that state. This rule might probably be applicable to the cases where complainant has an equitable title.

An execution sale of land on a judgment against another person will be enjoined where it would be
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a cloud on the title and would require proof of extraneous facts. *Talieferro v. Barnett*, 37 Ark. 511; *Schuyler v. Broughton*, 65 Cal. 252; *Pixley v. Hugins*, 15 Cal. 127.

An injunction will be granted against the sale of land of an heir under a judgment that is void because the debtor died pending a suit as to the owner not made a party, as a multiplicity of suits will be avoided, and cloud on title prevented, when the invalidity of the sale depends on matters outside of the record. *Clifton v. Anderson*, 40 Mo. App. 616.

In *Budd v. Long*, 18 Fla. 285, it was held that a third party is entitled to an injunction against the sale of his land, upon an execution in favor of another person, where the sale would be a cloud on his title. But in *Barnes v. Mayo*, *infra*, this general rule was criticized as improper, the limitation being that injunctions should not be granted unless extraneous evidence was necessary.

In *Barnes v. Mayo*, 19 Fla. 542, it was held that where the defendant in the execution never had any interest in the land a third party cannot enjoin a sale of the land on execution against another person, unless he shows that his rights are injuriously affected or irreparable injury will follow, and the distinction is made that injunction will not be granted unless extrinsic evidence is necessary.

So an injunction will be granted in favor of an owner of land to prevent an execution sale against his grantor, where the vendor's lien notes on which the judgment was obtained are paid, and parol evidence is necessary to show that fact, as it would create a cloud on the title. *Texas Land & Mortg. Co. v. Worham*, 5 Tex. Civ. App. 245.

Other Texas cases put the right of injunction on other grounds. See *infra*.

But if the complainant's title does not depend on extraneous evidence, an injunction will not be granted against a sale of his property on an execution against another person.

A judgment of foreclosure of lien, and sale thereunder, will not be enjoined at the instance of the party owning the fee and in possession of the land, who was not a party to such foreclosure suit, and it does not create a cloud on his title, and does not require extrinsic evidence; besides there are remedies in the court at law,—to refuse a writ of *fi. fa.* or supersedeas, or by an original action in that court. *Roman Catholic Archbishop v. Shipman*, 60 Cal. 586.

So, an injunction will not be granted where extraneous evidence is not necessary to defend complainant's title. *Shalley v. Spillman*, 19 Fla. 500.

And the same was held where the holder of the equity of redemption was not a party to the suit. *Moore v. Cord*, 14 Wis. 213.

Some cases may be classed within the rule that injunctions will only be granted in case extrinsic evidence is necessary, not that the decisions are made on that ground, but that such seems to be the rule in that state; as—

In *Lehman v. Roberts*, 88 N. Y. 232, it was held that an action to remove a cloud upon the title, or to restrain a sale or conveyance, upon the ground that it would create a cloud, can only be maintained where the pretended title, which is alleged to constitute the cloud, or the proceeding which it is apprehended will create one, is apparently valid on its face, and the party in possession will be compelled to resort to extrinsic evidence to show the invalidity of the pretended title, and to defend his own. But when the pretended claim is invalid on its face, or requires extrinsic evidence to establish its validity, equity will not interfere. Where objection to the jurisdiction of equity is not made, and a judgment creditor insists on a mechanic's lien against complainant's property where the contract for the lien was not made by a legal title holder, the purchaser may obtain an injunction.

A bona fide purchaser may have an execution sale of the property enjoined, and have a discovery as to the validity of the judgments, in order to remove the cloud on his title, where he claims the judgments are satisfied, the question involved not being a trial of title, but a bill for the discovery of title. *Kimberly v. Seils*, 8 Johns. Ch. 470.

But injunction will not be granted where a remedy exists by filing notice of *lis pendens*. And the court on final decree may declare that the judgment was not a lien, and preliminary injunction will not be granted unless necessary to protect some interest or right of complainant. *Osborn v. Taylor*, 5 Paige, 515.

And will not be granted where the judgment mentioned constitutes no apparent cloud on the title of the purchaser. *Gamble v. Loop*, 14 Wis. 466.

In *Armstrong v. Sanford*, 7 Minn. 49, it was held that a purchaser of mortgaged property cannot enjoin a sale on foreclosure under a mortgage made before his purchase, on the ground that the sale of the entire estate is threatened without regard to the equity of redemption; for if such sale could not be made, the purchaser would not acquire title, and the plaintiff's interest would not be clouded. But see *Conkey v. Dike*, *infra*.

And in *Hart v. Marshall*, 4 Minn. 294, it was held that an injunction will not be granted against an execution sale in favor of a purchaser *pendente lite*, where he claimed that such judgment was void; as, if so, it would not be a cloud on his title, and if not, he has no right to delay the execution sale.

But in *Conkey v. Dike*, 17 Minn. 457, which was an injunction to prevent the sale of the debtor's property because the holder of the lien had acquired the same by a fraudulent assignment which should have been discharged, it was held that Minn. Gen. Stat. chap. 66, § 182, provides that a temporary injunction may be granted where the act enjoined would injure the plaintiff; and referring to *Montgomery v. McEwen*, 9 Minn. 103, based upon *Armstrong v. Sanford* and *Hart v. Marshall*, *supra*, it was said that the remark in *Armstrong v. Sanford*, that "the injury is not of that kind that a writ of injunction should be granted to restrain," is not agreed to. "The remark in *Armstrong v. Sanford*, that a sale which violates a right of plaintiff, apparent on record, is not such an injury; which is true, but the reason why it is not, is that such a sale is not a cloud, for, what is meant by a cloud on plaintiff's title, is where the proceedings are valid on the face of the record, and extrinsic facts are necessary to be proved to establish their invalidity."

These cases *infra* do not show clearly that extraneous evidence is necessary, but in *Roman Catholic Archbishop v. Shipman*, 99 Cal. 588, the distinction is made and it is claimed there that the prior California cases really can be classed under that distinction.

A third party may have an injunction against the sale of his lands on an execution issued against another person. *Hickman v. O'Neal*, 10 Cal. 202.

And the same was held where the defendant in execution had no interest in the land. *Shattuck v. Carson*, 2 Cal. 588.

And a purchaser from an administrator's intestate may enjoin a sale by an administrator under a decree of the probate court, as it would cast a cloud upon his title. *Thompson v. Lynch*, 29 Cal. 189.

And in California it is not necessary that the complainant should be in possession in order to enable him to maintain an action to restrain a sale of lands on process against another person. *Ibid*.

And a party claiming to be a purchaser in good faith and in possession is entitled to an injunction against a sale under an execution against his grantor, where the creditor claimed that the deed to complainant's grantor from the debtor was only a

mortgage. *Porter v. Jennings*, 89 Cal. 440; *Chase v. Jennings* (Cal.) 23 Pac. Rep. 681.

But in *Macovich v. Wemple*, 18 Cal. 104, it was held that an injunction will not be granted in favor of the purchaser of an equity not having a deed against a sale under a decree enforcing a mechanic's lien, where complainant was not a party to such suit, as his rights are not affected.

And a party claiming that the lien of a mortgage is invalid as to property owned by him is not entitled to enjoin a sale; but he may obtain an injunction against the delivery of the deed, as it is discretionary with the court to grant him an injunction restraining the sale. *Goldstein v. Kelly*, 61 Cal. 301.

In *Rea v. Longstreet*, 54 Ala. 291, it was said that "the true test recognized by the authorities in this state is: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary the cloud would exist; if the proof would be unnecessary, no shade would be cast by the presence of the deed."

So, an execution sale may be enjoined by a purchaser of the land, where the lien of the execution is lost by lapse of time. *Downing v. Mann*, 43 Ala. 206.

Or where the purchase is made before lien of execution attached. *Martin v. Hewitt*, 44 Ala. 418.

So, a purchaser of land is entitled to an injunction against an execution sale against his grantor, where the debtor had tendered payment of the debt in confederate money, which was a good tender under the Alabama statutes; and the lien of the judgment was lost by failure to issue an execution until after a lapse of a term of court. As Ala. act Dec. 10, 1861, 'provides that the lien of the judgment shall be lost for refusal to take such tender, and Ala. Code 1852 provides that the lien shall be lost by the lapse of an entire term without a release of the execution. *Downing v. Mann*, 43 Ala. 206.

Where the injunction is asked to prevent a sale of the property of a third party on the ground of quieting complainant's title, in cases not controlled by the rule as to extrinsic evidence there is a conflict. The right to injunction is recognized in Indiana, Iowa, Louisiana, Maryland, Ohio and Oregon, and denied in Nebraska, New Jersey, Pennsylvania, North Carolina, South Carolina, and Tennessee.

In Georgia, Arkansas, and Illinois some of the cases appear to conflict with others in the same state. And in Texas the right to injunction seems to depend on interference with the possession or irreparable damages, though some cases make the distinction as to extrinsic evidence.

In Missouri injunctions are generally denied when claimed on the ground of quieting title, but the cases might be classed under the distinction that extraneous evidence was not necessary.

In Indiana injunctions are granted to protect purchasers and third parties from sales under execution or final process against other parties, and an owner of land may have an injunction restraining an execution sale of his land, on a judgment against another person, as a cloud on his title. *Otis v. Gregory*, 111 Ind. 504; *Petry v. Ambroscher*, 100 Ind. 510; *Scobey v. Walker*, 114 Ind. 254; *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Boes v. Morgan*, 130 Ind. 306; *Thomas v. Simmons*, 103 Ind. 538.

So, one who has conveyed real estate by deed of warranty may maintain a suit for an injunction against the sale of land upon an execution against a former owner where he claimed the debt was paid. *McCulloch v. Hollingsworth*, 27 Ind. 115.

Where, after a judgment was obtained, an action was brought upon such judgment in another state, as this merged the former judgment and all liens

thereunder were lost, an injunction was granted in favor of a purchaser from the judgment debtor. *Gould v. Hayden*, 63 Ind. 442.

A purchaser of trust property from a trustee is entitled to an injunction against a sale of such property on an execution against the trustee individually, when such trustee had the legal title at the time of the execution, and had no interest whatever in the property. *Hollingsworth v. Trueblood*, 59 Ind. 542.

Where land was conveyed to the husband and wife jointly, the right of survivorship was not a contingent or vested remainder, and the land was not subject to execution for the husband's debt, and a purchaser of the property might enjoin the sale as a cloud upon his title. *Davis v. Clark*, 26 Ind. 425, 89 Am. Dec. 471.

Where a plaintiff insists upon his levy despite an injunction obtained by a third person, he cannot after the lapse of ten years enforce the lien of the judgment against another parcel of land, and the owner of such land may have the levy enjoined, when such judgment is not a lien. *Shanklin v. Sims*, 110 Ind. 143.

But where necessary dates are left blank in the bill of complaint, which should show that the land was not subject to levy, an injunction should be refused. *First Nat. Bank v. Deitch*, 88 Ind. 181.

And a party claiming that a judgment is a cloud on his title, and seeking to have the execution enjoined, and showing that he became the owner of the land before the commencement of the suit, must also show that he is a purchaser for value. *Petry v. Ambroscher*, 100 Ind. 510.

In Louisiana a vendor is entitled to protect the title warranted by him by an injunction against an execution sale on a judgment against his grantor, where it is not shown that such judgment was any lien upon the land. *Bach v. Goodrich*, 9 Rob. (La.) 361.

And an injunction will not be dissolved for failure to show registration of title in the plaintiff in the injunction, where the property does not belong to the debtor in the execution. *Mallion's Estate v. Lynch*, 15 La. Ann. 547.

And where an injunction is granted against a sale on execution, on the ground that the property seized belongs to plaintiff, no other issue can be made but that of ownership. *Basso v. Benker*, 38 La. Ann. 432.

A sheriff, defendant in a suit to enjoin a *fi. fa.* levied on land of a third party, need not be a party in an appeal from a judgment dissolving the injunction, where he is not prejudiced. *Hobgood v. Brown*, 2 La. Ann. 323.

A third party obtaining an injunction is not entitled to an order to restore possession pending the suit to try title. *State v. Judge of Tenth Dist.* 6 La. Ann. 548.

But an injunction will not be granted where there is no description given of the property seized, or statement of its value, in the affidavit. *McRae v. Brown*, 12 La. Ann. 181.

In Maryland one joint owner acquiring conveyance from the other takes it subject to judgment liens, but he is entitled to an injunction against a levy on judgments rendered against his grantor subsequent to the conveyance. *Hollida v. Shoop*, 4 Md. 465, 59 Am. Dec. 88.

In Ohio a purchaser is entitled to an injunction where the lien of the judgment against his grantor expired before purchase, on the ground of clouding the title. *Norton v. Beaver*, 5 Ohio, 178; *Bank of United States v. Schultz*, 2 Ohio, 471.

And a third party is entitled to an injunction where his deed was made by mistake to another party, the defendant in the execution, who conveyed to him when he was embarrassed. *Tear v. Mathews, Wright* (Ohio) 371.

And a levy under a decree for alimony will be 30 L. R. A.

enjoined at the instance of a purchaser from the defendant where such decree is not a lien. *Olin v. Hungerford*, 10 Ohio, 298.

In *Wilhelm v. Woodcock*, 11 Or. 518, it was said that a third party is entitled to an injunction against a sale where he is a privy to the title and the judgment is not a lien or a charge thereon, and such proceeding clouds the title.

In Iowa a purchaser six months after a decree eliminating usury where the principal and interest were paid into the court and accepted, was entitled to an injunction against a sale where the plaintiff in such judgment appealed to the supreme court after the purchase, and obtained a reversal and issued execution. *Davis v. Bonar*, 15 Iowa, 171.

And an execution sale against the property of a third person will be enjoined, where the judgment never was a lien upon his property, although the execution levy may purport to be upon the interest only of the judgment debtor in such property. *Key City Gas Light Co. v. Munsell*, 19 Iowa, 805.

A purchaser is entitled to an injunction against a sale under a decree for a mechanic's lien, where he was not a party to such decree, and the action on the lien was barred by the statute of limitation. *Gates v. Ballou*, 55 Iowa, 741.

Or where the owner of the decree simply denied knowledge of an alleged payment. *Gates v. Ballou*, 54 Iowa, 485.

Or where land levied upon was held only as a security. *Eberke v. Hecht* (Iowa) 54 N. W. Rep. 652.

But in Nebraska the holder of a tax title is not entitled to an injunction against an execution sale on a prior judgment, as the purchaser under the judgment will have the right to contest the validity of the tax-deeds. *Rickards v. Coon*, 12 Neb. 420.

And in New Jersey an injunction will not be granted against the sale of property of a purchaser or a third party, on an execution against another party, the ground of refusal being that the question of title will not be tried by injunction, and there is a remedy at law. *Sheldon v. Stokes*, 24 N. J. Eq. 87.

In *Holmes v. Chester*, 28 N. J. Eq. 79, under *Pamph. Laws 1870, p. 20*, an act "to Compel the Determination of Claims to Real Estate in Certain Cases, and to Quiet the Title to the Same" providing that any person in peaceable possession of lands, whose title is disputed, may bring suit to quiet title to the same, an injunction was granted against an execution sale, where the complaint alleged that the debtor had no interest in the land, on the ground that such a suit compels a speedy trial of the question, and until the result can be reached prevents casting a cloud on the title, and the question of the validity of the lien could not be tried in the suit in which the execution issued, and such a suit is within the meaning of the act. (But see next case.)

But in *Swayze v. Hackettstown Nat. Bank*, 44 N. J. Eq. 9, although the bill was filed under the same act, a purchaser was denied an injunction on the ground that the question of superiority of title should be settled at law. Referring to *Holmes v. Chester*, *supra*, it was said that the case was heard on demurrer to the bill, and such case determined that the bill may be filed under the statute, notwithstanding an execution has been issued upon a decree of this court, which constitutes the defendant's claim upon the real estate. The question as to the propriety of issuing an injunction to restrain a sale under an execution upon a judgment at law was not discussed. In his opinion upon the final hearing the chancellor said that the demurrer merely called in question the right of the complainant under the circumstances of the case to maintain a suit in this court by virtue of the statute.

And where this act was claimed as ground for relief in equity, this case of *Holmes v. Chester* was not referred to, but it was held that the state was not a proper party defendant, where it had parted

with the title, and the order appealed from was one simply dissolving an *ad interim* injunction and denying an injunction to stay a sale by trustees under their foreclosure decree until the question of title should be determined, and the complainant's bill was not dismissed, and the subject-matter as to claims of ownership is still pending in chancery. The statute confers jurisdiction only where the complainant is in peaceable possession and no suit pending to enforce or test the validity of the adverse claim, and as to whether this bill was properly filed under this statute will not be discussed, as such discussion is not necessary to the subject under review, whether the chancellor should have enjoined the mortgagees from a sale under foreclosure where the stay is sought by parties who were not parties to that decree, and against whose claim of title a sale will be destitute of all legal force. A court of equity will ordinarily not interfere to enjoin a sale of lands under an execution against one person, the title to which is claimed by another, for the manifest reason that the sale will not prejudice the rights of the latter, and the question of title is properly triable in a court of law. And to warrant such interference there must be some recognized ground for equitable relief, fraud, or irreparable injury. Besides, the state cannot be enjoined, and this suit is to enjoin a sale of complainant's land under a mortgage given by another owner under another grant to secure funds to the trustees of public schools. *American Dock & Imp. Co. v. Public Schools*, 32 N. J. Eq. 428, 35 N. J. Eq. 181.

Where the same statute came under consideration, it was held: "It is merely intended to bring to trial here the question as to the validity of the complainant's title to the land, and to restrain the defendants from proceeding to sell the property under the judgment until that question shall have been decided in this court. No fraud, gross injustice, or irreparable injury, or other ground of equitable jurisdiction is alleged. This court therefore will not entertain jurisdiction. It is the ordinary case of the threatened sale under execution against one person of property claimed by another, and equity will not take jurisdiction in such case." *Dawes v. Taylor*, 35 N. J. Eq. 40.

An injunction against an execution was denied on the ground that there was a remedy at law under ejectment where the complainant claimed to have purchased in 1838 and to have obtained a deed in 1837, and recorded the same in 1846, and a judgment was recovered against his grantor in 1841, which the purchaser claimed was not a lien on his premises and that his deed was not recorded through ignorance of law, the court saying: As the complainants are in possession, the effect of N. J. Rev. Stat. 643, § 18, declaring deeds void against subsequent judgment creditors not having notice unless recorded within fifteen days after delivery, can be decided in ejectment. *Fresman v. Kilmendorf*, 7 N. J. Eq. 475, 655.

And a purchaser of a judgment will not be enjoined from a levy and sale although purchased after he saw the owners of lands, subject to such judgment, erecting a building thereon believing the same to be free from any lien, as he is not estopped, and the ignorance of the owner in not knowing that there was any supreme court in New Jersey is gross negligence. *Dellatt v. Kemble*, 25 N. J. Eq. 66. (The temporary injunction was granted in *Dellatt v. Kemble*, 23 N. J. Eq. 58.)

The general rule in Pennsylvania is not to enjoin a sale of land under execution, where the levying creditor claims that the execution debtor has some interest in the land, as, if he has no interest, the title does not pass, and if he has, the question is left to an action of ejectment. *Small v. Greenough* (Pa.), 8 Cent. Rep. 240; *Griesinger v. Booth*, 12 30 L. R. A.

Lanc. L. Rev. 259; *Taylor's Appeal*, 8 W. N. C. 122; *Walker's Appeal*, 118 Pa. 579.

And an owner of land must file an original bill to restrain a levy upon the land on a claim against a former owner, as he cannot interplead in a suit at law to which he is not a party. *Dent v. Ross*, 35 Pa. 387.

In South Carolina a third party cannot obtain an injunction against an execution sale where no fraud, accident, or mistake, or equitable ground is shown, as equity will not prevent a trespass; and if no title is conveyed by sale, there is no ground for injunction. *Wilson v. Hyatt*, 4 S. C. N. S. 369.

So, in North Carolina third parties and purchasers are not entitled to an injunction against the sale of their property on an execution against another person, as the question of title will not be tried in the injunction suit. But an injunction was granted to prevent dispossession under a foreclosure suit where complainant was not a party and owned the land mortgaged by another.

And an injunction will not be granted against an execution sale on land claimed to be free from the liens of the judgments, as, if the plaintiff has a good title, a sale under execution against another will not affect it. *Gatewood v. Burns*, 99 N. C. 357; *Bristol v. Hallyburton*, 98 N. C. 384.

So, an owner of land in possession cannot have an injunction against the sale on an execution against his grantor on the ground of fraud, as the validity of the judgment can be tested in a suit to try title after sale. *Southerland v. Harper*, 83 N. C. 320.

And under N. C. act 1885, chap. 147, providing that a conveyance of land shall not be valid as against creditors and purchasers for value unless registered, a claimant under a trust deed that is not recorded is not entitled to an injunction against a sale on execution against a prior grantor, as the question of title will not be tried by injunction. *Bostic v. Young*, 116 N. C. 766.

But, in *Turner v. Cuthrell*, 94 N. C. 239, where a widow made a mortgage of all the land of her deceased husband and it was sold under foreclosure, an injunction was granted against a writ of possession at the instance of an heir, who was not a party to the suit, as to all the property except the widow's dower, on the ground that it would be unjust to eject him from that portion of the land that apparently belongs to himself and sisters, without opportunity to assert his title and right to remain in possession. He may establish his right to the relief he seeks. It was therefore proper to grant the injunction pending the action and until the hearing upon the merits. N. C. Code, § 388.

The apparent conflict in North Carolina cases may be reconciled by observing the distinction between a sale and dispossession under a writ, similar to injunctions against enforcing writs in ejectment.

In Tennessee an injunction will not be granted, as the creditor has the right to try title in an action of ejectment. *Moore v. Hallum*, 1 Lea. 511.

In Georgia there appears to be some conflict of authority as to the right to obtain an injunction to prevent the sale of property for the debts of another person, some cases denying relief on the ground of the statutory remedy of claim of title, the earlier cases granting relief to prevent annoying suits.

A holder of a title through a voluntary deed older than the judgment cannot obtain an injunction against an execution sale, as the same is not a cloud upon his title and there is a remedy by claim of title under the statute. *Jones v. Word*, 61 Ga. 28.

But an injunction was granted against the enforcement of an execution where such was claimed to be a cloud on title, and a sale was attempted to be made, under the execution, of machinery which plaintiffs claimed belonged to them as fixtures, and on which machinery the party constructing it

same had placed a chattel mortgage, and the removal of the machinery would destroy the value of the property and the damages would be irreparable as the debtor was insolvent. Harrell v. Amerious Refrigerating Co. 32 Ga. 463.

And in Cox v. Griffin, 17 Ga. 249, an injunction was granted against a sale on execution of property dedicated to the public, at the instance of the city, where the judgments were recovered against a former owner long after he had dedicated the land to the public. The levies on the property dedicated were many, annoying, and vexatious; the point of objection to the injunction was that in a prior suit there had been a *retroact*.

And in Kendall v. Dow, 46 Ga. 607, it was held that an execution sale will be enjoined whereafter the judgment there was an agreement to release this land from the operation of the judgment lien. "The remedy in a court of law would not be as adequate and complete as in a court of equity; it will prevent a multiplicity of suits by quieting the title to a number of lots of land by one final decree, and remove a cloud from her title."

But a defendant in execution is not entitled to enjoin a levy and sale of property which he alleges belongs to and is in possession of another person, in the absence of some equitable ground, as the third party is not asking any relief. Tompkins v. Tumlin, 40 Ga. 460.

And a sale on execution against the life tenant will not be enjoined at the instance of the holder of the fee, as such sale does not cast any cloud on his title. Stone v. Franklin, 89 Ga. 126.

Or, where it is doubtful whether execution would not lie against the life estate. Watson v. Goolsby, 36 Ga. 305.

In Stone v. Franklin, *supra*, it was said that it has never been the practice in Georgia to restrain sheriffs or others by injunction from making harmless sales or executing harmless conveyances.

In Arkansas there appears to be some conflict as to the right of a third party to obtain an injunction to prevent the sale of his property for the debt of another, as a cloud on his title.

In King v. Clay, 34 Ark. 291, a levy and sale under an execution on the land of third parties was enjoined as a cloud upon their title where a levy was made on lands of children, under an execution against their father, as a sale by the sheriff would cloud the title, which equity will prevent.

But in Blakeney v. Ferguson, 14 Ark. 640, where three injunctions by the heirs of A were obtained against a sale of land for the debt of B, to whom A had conveyed the legal title, and the injunctions were granted on the ground that A subsequently had obtained a tax title, but which was not perfected when he died, the supreme court dismissed the bill for injunction on the ground that the evidence did not show that complainant was a widow or heir, and held that there was no pretense that the complainants feared waste or irreparable injury or mischief which it is the object of an injunction to prevent, while they showed that the defendant claimed by adverse title, and as between him and them the title was at least disputed if not doubtful.

In Illinois there seems some conflict as to the right to an injunction, the later cases granting the same to prevent a cloud on title.

In Coughron v. Swift, 18 Ill. 414, an injunction to prevent the sale of land belonging to a third party was refused on the ground that there was a remedy at law to contest title. The bill for injunction showed that the mechanic's lien judgment was obtained without making complainant a party, and he had a chain of title overreaching the lien, and it was held that his title was paramount and could not be affected. This case has been approved, on the ground that a remedy at law prevents equitable interference, in Winkler v. Winkler, 40 Ill. 184; 30 L. R. A.

Chittenden v. Rogers, 43 Ill. 99; Hubbard v. Jasinski, 46 Ill. 162; and Gore v. Kramer, 117 Ill. 182.

But in Groves v. Webber, 72 Ill. 608, where the purchaser paid for land and took a conveyance before the writ of attachment issued against his grantor and of which he had no notice, and his deed was made several hours prior to the issue of the attachment, an injunction was granted to prevent a sale of the property.

And in Bennett v. McFadden, 61 Ill. 334, an injunction was granted in favor of a third party to prevent a sale of his land under an execution against another person who never had any interest in the land, as it was a cloud on his title.

In neither of these cases is Coughron v. Swift, *supra*, referred to.

In Texas the rule in some cases is that the right to injunction must depend on interference with the possession, or irreparable damages, although in Ivory v. Kempner, 2 Tex. Civ. App. 474, it is held that a mortgagee is entitled to an injunction against proceedings on a judgment affecting his rights, where extrinsic evidence is necessary to protect his title, claiming this is the rule in Mann v. Wallis, *infra*; Gardner v. Douglass, 64 Tex. 76; and Van Ratcliff v. Call, 72 Tex. 492.

In Wofford v. Booker (Tex.) 80 S. W. Rep. 67, an injunction was allowed against the enforcement of a decree of a lien, and writ of possession under Bayles's (Tex.) Civ. Stat. art. 1840a, providing that an order of sale on foreclosure of lien shall have the effect of a writ of possession, where the purchaser was not a party to the suit of foreclosure of a vendor's lien note, and bought before suit was filed; the court saying: "It is held that ordinarily an injunction will not be granted to prevent a cloud on a title where such sale will not dispossess the complainant of his land or deprive him of his enjoyment, or embarrass him in his legal remedies for any injury to his title or possession."

And in Carlin v. Hudson, 12 Tex. 203, 68 Am. Dec. 521, it was held that injunctions are only granted in cases to restrain the alienation of property where it is indispensable to secure the enjoyment of specific property, or to preserve the title to such property, or to prevent frauds, or gross and irreparable injustice; and an injunction in favor of a purchaser will not be granted to prevent a sale under execution against his grantor, as, if the grantor had no title, the complainant would not be affected by the sale.

And a sale of land under execution against another party will not be enjoined, unless a showing is made that complainant's right will be injured or that some irreparable injury will follow. Mann v. Wallis, 75 Tex. 611; Gaskins v. Peebles, 44 Tex. 390; Whitman v. Willis, 51 Tex. 429.

An injunction will not be granted where complainant does not allege that he is in possession or will suffer loss by the sale, and does not allege his ignorance of the pendency of the suit, for if his rights are affected he should have interfered. Henderson v. Merrill, 12 Tex. 1.

In Missouri an injunction will not be granted to restrain the sale of property of a purchaser or a third party on an execution against another, where a valid defense may be made in ejectment or a remedy exists by suit to quiet title.

And a sale of the right, title, and interest of B in land which may be owned in fee simple by A does not cast a cloud upon the title of A; and it is settled in this state that an injunction will not be granted against a sale of land under execution, on the ground that such a sale will pass no title and will not cast a cloud on the title of the true owner. Witthaus v. Washington Sav. Bank, 18 Mo. App. 181.

Or, while it is alleged that the sale will pass no

Where the judgment creditors of a husband obtain an injunction against an execution sale of land held by the wife sought to be sold for her debts, on the ground that it was conveyed by the husband without consideration and liable for his debts, an appeal was dismissed for defect of parties. *Alston v. Rowles*, 13 Fla. 110.

In *Lucas v. Rickerriob*, 1 Lea. 723, under Tenn. Code, § 2481, providing that the interest of a husband in the real estate of his wife shall not be sold under process against him, nor shall the husband and wife be ejected from such real estate by virtue of such decree or judgment, it was held that this did not apply to the rents and profits of her real estate, and that the same was liable for his debts as at common law, and the garnishment of the same would not be enjoined at her instance.

Subsequent purchasers.

A purchaser of property subject to the lien of a judgment cannot obtain an injunction against a sale of such property. *Henry v. Tricou*, 81 La. Ann. 519; *Mallory v. Dauber*, 83 Ky. 239; *Pettit v. Shepherd*, 5 Paige, 493, 28 Am. Dec. 437; *Sauvinet v. New Orleans*, 1 La. Ann. 344; *French v. Shotwell*, 6 Johns. Ch. 235.

Or where he agreed to pay the judgment. *Calhoun v. Tullasa*, 35 Ga. 119.

So, a purchaser of land assuming a deed of trust erroneously describing the land is not entitled to an order staying the execution of a judgment on such deed of trust, where he deducted the same from the purchase money, and had sold the land to an innocent purchaser, and thereby prevented a reformation of the deed of trust. *Price v. Reed*, 38 Mo. App. 501.

So, a purchaser with knowledge of an unrecorded mortgage is not entitled to an injunction against the sale thereunder. *Harrison v. Yerby* (Ala.) 14 So. Rep. 351.

And a mistake of law, by a purchaser at an execution sale supposing that a prior judgment held by the same party would not thereafter be enforced, is not sufficient to authorize enjoining a sale under such judgment. *Shotwell v. Murray*, 1 Johns. Ch. 512.

And a purchaser of property against which are judgment liens cannot obtain an injunction against the sale under the same by tendering the value of the land at the time exclusive of the improvements he has made, claiming that he did not know of the existence of the judgments. *Taylor v. Morgan*, 85 Ind. 295.

And a sale will not be enjoined where the purchaser claiming to be a bona fide purchaser pending attachment proceedings does not show any defects in the attachment proceedings, nor what interests the grantor had at the time of levy. *Manistique Lumbering Co. v. Lovejoy*, 55 Mich. 189.

And where an amended attachment included lands privately sold by the defendant therein, pending the original attachment, an injunction was refused against a sale in attachment at the instance of a purchaser pending the attachment. *Tilton v. Coffeld*, 93 U. S. 163, 23 L. ed. 553.

Laches in enforcing a judgment lien against land claimed by a purchaser will not authorize an injunction against levy and sale where it was doubtful if anything could be realized, and the purchaser also controlled a large amount of liens, holding them against the property. *Hill v. Gordon*, 45 Fed. Rep. 273.

And adverse possession of land in Florida for more than seven years will not authorize an injunction against a levy on an execution under a judgment lien that exists against the land. *Hill v. Gordon*, 45 Fed. Rep. 273.

And purchasers of property owned by a judgment debtor claiming that such judgment was entered satisfied of record, and that they were mis-

led by the records, and seeking to have their title protected, cannot have an injunction against a levy, where there is no allegation that they were purchasers for value or that they were misled by a record of satisfaction of the judgment. *Yeates v. Mead*, 63 Miss. 59.

Where a grantor, who is a stranger to the title of the defendant in the *fi. fa.* conveys the land to a third person under a warranty, and the vendee interposes a claim for the property under the statute, which is not successful, his grantor cannot thereafter obtain an injunction against the sale on a writ of *fi. fa.* without some special reason. *Welch v. Gordon*, 63 Ga. 610.

And the failure of a purchaser who was a party to make all his defense against the mortgage on the land at the time of the judgment, prevents an injunction. *Smith v. Brownson*, 19 La. 312.

And a bidder who has failed to comply with his bid is not entitled to an injunction against a subsequent sale of the property. *Boyer v. Cannon*, 46 La. Ann. 767.

And a purchaser of land is not entitled to an injunction against a sale in favor of a previous prior vendor on the ground of equities between the owner and his immediate grantor. *Hawkins v. Dearing*, 93 Ga. 103.

Claimants under succession, who are in possession of the property, have no ground of complaint, if the sheriff did not divest them of that possession while the property was under seizure, and the party in possession cannot maintain that it is an act which authorizes an injunction, under La. Code Pr. art. 908, and cannot make a defense to the original mortgage on which the sale was ordered that the mortgagors could not make. *Citizens' Bank v. Webre* 44 La. Ann. 384, 1081.

c. Fraudulent purchasers.

Generally a party holding title to real estate under a fraudulent conveyance is not entitled to an injunction to restrain a sale of the same for the debt of another, but in Louisiana the creditor cannot disregard the conveyance and levy on the land, but must resort to a revocatory action. Yet in that state if it is shown that the complainant's title is simulated, the injunction will be denied.

A grantee taking a conveyance to defeat the creditors of his grantor is not entitled to an injunction against an execution sale of the property. *Potter v. Phillips*, 44 Iowa. 363.

So, where a purchaser obtains title pending a suit against his grantor, and then files a bill to enjoin an execution levy on his land, alleging that the execution creditors claim that his title is fraudulent, an injunction will not be granted. *Welde v. Scotten*, 59 Md. 72.

And where a judgment is a lien on the land because a voluntary conveyance was in fraud of creditors, the fact that no harm would come on enjoining the sale on account of there being a term of court soon, at which the case could be tried on its merits, is not sufficient for an injunction. *Jones v. Word*, 61 Ga. 23.

A third party cannot enjoin an execution sale of personal and real property, where he acquires the same in fraud of his vendor's creditors. In this case the evidence of title was three promissory notes, and the sale was shown to be a mere simulation. *Lewis v. Dinkgrave*, 24 La. Ann. 499.

But in *Payne v. Graham*, 23 La. Ann. 771, it was held that real estate of a third party under a recorded title cannot be seized on an execution against his grantor, where fraud is charged, until the title is set aside by a direct action, and a sale will be enjoined.

And the same was held in *Theurer v. McGibbon*, 23 La. Ann. 22, as it is only in purely simulated acts, where through deeds of transfer purely fictitious, having only the semblance of title, parties seek to

screen property from seizure under the pretense of sales, that creditors may seize directly, disregarding mere paper titles utterly void. In this case the complainant proved that he was a bona fide holder for value.

1. Equitable owners.

The owner of land by a superior equitable title at the time of the judgment lien is entitled to an injunction against the sale of his property, under process against another. *Fonda v. Sage*, 48 N. Y. 173; *Uhl v. May*, 5 Neb. 187; *Rodriguez v. Buckley* (Tex.), 30 S. W. Rep. 1123; *Parks v. People's Bank*, 97 Mo. 130, 31 Mo. App. 13, 18; *Gerry v. Stimson*, 60 Me. 186; *Monticello Hydraulic Co. v. Loughry*, 73 Ind. 562; *Merriman v. Polk*, 5 Helsk. 717.

As where the execution defendant held title under a deed which was only a mortgage. *Nell v. Bank of Upper Canada*, 2 Grant, Ch. (U. C.) 366.

And possession under an unrecorded deed entitles the owner to an injunction against a judgment subsequently rendered against his vendor, on the ground of casting a cloud upon his title. *Burt v. Cassey*, 12 Ala. 734.

So, a purchaser of land under a parol contract and in possession for ten years, obtaining a deed of the same, may enjoin an execution sale on a judgment against his grantor rendered after he had taken possession and before his deed. *Niles v. Davis*, 60 Miss. 750.

And an execution sale against A will be enjoined at the instance of B where A had bought the property for B taking title in his own name, and after the judgment against A the title bond was assigned to B, who was in possession of the land from the time of purchase. *Dierks v. Martin*, 16 Neb. 120.

And an execution sale will be enjoined where there are peculiar equities between the holder of such judgment and the owner of land to whom the holder of the judgment had bargained it before the judgment was rendered, as the ordinary remedy of claim would not be adequate. *Horne v. Seisel*, 92 Ga. 682.

So, a vendor of land having executed a deed upon conditions which were never fulfilled, and suing for a rescission, may obtain an injunction against an execution levy upon the land under a judgment against his grantee. *Taylor v. Strong*, 10 Smedes & M. 63.

And a bona fide purchaser without notice is entitled to an injunction against a sale under a judgment that was satisfied at the time of his purchase on the records, and the attorney of the judgment creditor told him that the judgment was satisfied, although it is subsequently shown that no money was received, as plaintiff's claim is not based on a mere legal right, but on an equity. *Wheeler v. Alderman*, 34 S. C. 533.

And in *Knight v. Mayberry*, 48 Me. 158, it was said that a person having an equitable title to land may obtain relief in equity against a levy, under a judgment against another party.

Although a court of equity will protect an equitable title of a purchaser against the legal lien of a judgment against his grantor by enjoining the sale, where the equity is denied by the answer, and has not been overcome by evidence, an injunction should be refused. *Jones v. Jones*, 13 Iowa, 276.

g. Right of third party to require levy on other property.

A purchaser of land is generally entitled to an injunction to prevent a sale of his property under execution, where the debtor has other property liable to seizure. *Welch v. James*, 23 How. Pr. 474; *Agricultural Bank v. Pallen*, 8 Smedes & M. 367, 47 Am. Dec. 92; *Edwards v. Applegate*, 70 Ind. 825; *Russell v. Houston*, 5 Ind. 180; *Sidener v. White*, 46 Ind. 568.

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And an injunction against a sheriff's sale will be allowed, where it is a question whether such judgment was a lien on complainant's land, or had not been released by releasing other land. *Van Mater v. Holmes*, 6 N. J. Eq. 575.

So, where the holder of the judgments stayed a levy on other property that could have been sold, and which he should have exhausted first. *Hurd v. Eaton*, 26 Ill. 122.

A purchaser of personal property is entitled to an injunction against a levy of an execution on a judgment against his vendor where an execution had been returned before the purchase "satisfied in full," which satisfaction was set aside without notice to the purchaser. *Sevier v. McWhorter*, 27 Miss. 443.

And an injunction will be granted where the judgment creditor had surrendered to the judgment debtor securities sufficient to pay the debt knowing complainant's rights to the property. *Ingrall v. Morgan*, 10 N. Y. 178.

In *Masile v. Wilson*, 16 Iowa, 390, it was said that a purchaser or a mortgagee was entitled to an injunction against a sale of real estate on an execution against his grantor, where the grantor has sufficient property subject to execution to satisfy the debt.

In *Jones v. Jones*, 13 Iowa, 276, it was said that a purchaser from a judgment debtor is entitled to an injunction against the sale of his property on a judgment against his grantor, where such grantor has property liable to levy, sufficient to satisfy the same.

A party to an action to enjoin a sheriff's sale of land on execution, until other land of the debtor is first exhausted, is entitled to a jury trial. *Edwards v. Applegate*, 70 Ind. 825.

But an injunction will not be granted to restrain a sale on execution where the officer has not threatened or is not about to make an illegal levy upon the property of the replevin bail before exhausting the property of the defendant. *Eason v. O'Dowd*, 40 Ind. 300.

A purchaser of property from the judgment debtor after the issue of an execution is not entitled to an injunction against the sale on the ground that the sheriff has permitted the execution defendant to remove other property from the state that was subject to the lien of the same. *Sidener v. White*, 46 Ind. 568.

See also subheads XI., XIII. a.

h. Personal property.

The general rule is that a third party cannot obtain an injunction against the sale of his personal property on process against another person, as he has a remedy at law of trespass, trover, replevin, damages, and the like, and a fraudulent purchaser cannot obtain an injunction against the sale of his personal property on process against another.

To the general rule denying injunctions there are some exceptions, (1) as where the remedy at law is prevented or denied, or where he has no remedy at law; (2) in Louisiana; (3) the equitable owner of corporate stock; (4) where there is other property of the debtor that should be first levied upon, or where the judgment was satisfied at the time of the purchase.

For *Slaves*, and *Wife's personal property*, see *infra*, VIII. i, j.

For *Property of peculiar value*, and *Merchandise*, see *infra*, IX.

An injunction will not be granted against the sale of personal property on an execution against a third party. *Garstin v. Asplin*, 1 Madd. 150.

As there is a remedy at law. *Jackson v. Stanhope*, 10 Jur. 676, 15 L. J. Ch. N. S. 446; *Hammond v. St. John*, 4 Yerg. 107; *Hall v. Davis*, 5 J. J. Marsh. 290.

Or a remedy by action against the officer. *Freeland v. Reynolds*, 16 Md. 416.

Of damages. *Lewis v. Levy*, 18 Md. 85.

Or a remedy by writ of replevin. *Bouldin v. Alexander*, 7 T. B. Mon. 426; *Allen v. Winsteadly*, 135 Ind. 105.

Or a remedy of trespass or trover. *Johnson v. Connecticut Bank*, 21 Conn. 143.

Or where the remedy at law is adequate to try title. *Marriott v. Givens*, 8 Ala. 694.

And an injunction will not be granted where there is a remedy by action of claim of property. *Ferguson v. Herring*, 49 Tex. 123; *George v. Dyer*, 1 Tex. App. Civ. Cas. (White & W.) 780.

And a third party cannot enjoin an execution sale of personal property belonging to him under a judgment against another party, unless the same is of peculiar value. *Allen v. Winsteadly*, *supra*; *Baker v. Binehard*, 11 W. Va. 238.

In *Hollins v. Hess*, 27 W. Va. 570, the same was said to be the rule.

And a party intervening by third opposition, and claiming the proceeds of a sale, prevents an injunction. *Jackson v. Hoffman*, 81 La. Ann. 97.

Or where he has instituted a suit for the recovery of the same property in an action of claim and delivery. *Richards v. Kirkpatrick*, 53 Cal. 433.

Or has failed in a previous injunction suit. *Wells v. Hunter*, 5 Mart. N. S. 120.

And an injunction against a levy on personal property claimed by a third party should not be allowed where the claimant has not given the officer any notice of his claim so that the levy might have been abandoned. *Hinkle v. Baldwin*, 98 Mich. 422.

A third party cannot obtain an injunction against a sale of his personal property on execution against another person, in a proceeding by third opposition where it is not before the court rendering judgment, and where the property seized is in the parish of the court rendering judgment. *Oger v. Daunoy*, 7 Mart. N. S. 653.

The owner of goods is not entitled to an injunction against a judgment obtained by another party against a purchaser who bought from the latter with knowledge of title, as the purchaser should have defended against the judgment, and is still liable to the true owner. *Scott v. Whitlow*, 30 Ill. 310.

And an injunction should be refused unless the injury is irreparable by a clear showing of the plaintiff's right and the defendant's insolvency; although it was alleged that the sheriff was unable to respond in damages for more than a small part. *More v. Ord*, 15 Cal. 204.

Unless it be shown that if the property was sold the complainant would be without remedy at law, an injunction will be refused. *Henderson v. Bates*, 3 Blackf. 460.

An execution sale of personal property for the debt of a third person will not be restrained in West Virginia. *Dunn v. Baxter*, 30 W. Va. 572.

And a tenant in possession of a furnished house cannot obtain an injunction against the levy of an execution of the same on a judgment against the lessor, as there is a remedy at law and the sheriff has no right to seize. *Garstin v. Asplin*, 1 Madd. 150.

So, an injunction will not be granted at the instance of the debtor against the sale of a house which the debtor had built on land belonging to the creditor, as, if he could transfer his title, he cannot prevent an execution sale of the same. *Augustin v. Dours*, 28 La. Ann. 231.

And a third party who does not claim title in himself, is not entitled to an injunction against a judgment of detinue nor an execution of a distringas *fi. fa.*, for on such an execution the sheriff cannot distrain the property for which the distringas issued, nor can he seize and sell it to pay the damages mentioned in the execution. *Jordan v. Williams*, 3 Rand. (Va.) 501.

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to enjoin an execution sale of personal property at the instance of one of them on the allegation that the other had died without showing that the personal property belonged to complainant. *Gothard v. Redley*, 14 Tex. 461.

And neither a surety nor a principal can obtain an injunction against an execution on a forthcoming bond on the ground that the property was not that of the principals. *Syme v. Montague*, 4 Hen. & M. 180.

A party holding personal property under a fraudulent sale cannot defeat the rights of a seizing creditor by injunction. *Mora v. Avery*, 23 La. Ann. 417; *Moree v. Diamant*, 41 N. J. Eq. 612; *Payne v. Owings*, 4 T. B. Mon. 80; *Hobgood v. Brown*, 2 La. Ann. 323; *Devonshire v. Gauthreaux*, 38 La. Ann. 1122.

And a purchaser of a stock of goods from one partner, allowing the same to remain in the store and become mingled with the goods of the other partner, cannot obtain an injunction against an execution sale on a judgment rendered against the partner in possession where he fails to point out his goods to the sheriff. *Chappell v. Cox*, 18 Md. 513.

But where the remedy at law is prevented or unavailable, an injunction will be granted against the sale of personal property belonging to a third party.

So, an injunction will be granted against the distribution of proceeds of attached property, claimed by a third party who was not allowed to intervene in the attachment suits, and gave a forthcoming bond to the marshal and sold the goods and paid their value on his bond, where the attaching creditors are nonresidents, as he could not maintain an action of replevin, and there is no adequate remedy at law. *Krippendorf v. Hyde*, 110 U. S. 276, 23 L. ed. 145.

So where the state of Georgia was refused the right to intervene in a suit at law and claim the proceeds of money obtained on execution, an injunction against the disposition of the money was granted, although a remedy by appeal or error was insisted upon as a bar to the injunction. *Georgia v. Brailsford*, 2 U. S. 2 Dall. 402, 1 L. ed. 433.

So, fraud in procuring an execution to be levied upon property not subject to execution, and in procuring a bond for its delivery to be forfeited, refusing a trial of right of property, will be relieved against by enjoining the judgment. *Nunn v. Matlock*, 17 Ark. 512.

And an alias execution issued on the same judgment pending the trial of the right of property claimed by a third party will be enjoined. *Huntington v. Bell*, 2 Port. (Ala.) 51.

So, a surety on a delivery bond given for property levied upon may obtain an injunction against a levy of other executions before the day of sale, as there is no remedy at law. *Dechard v. Edwards*, 3 Sneed, 93.

A defendant in a replevin suit, having executed a forthcoming bond for the property, is entitled to an injunction against the sale of the property, on an execution against the plaintiff in the replevin suit, on the ground that the property is in the custody of the law and to prevent multiplicity of suits. *Cooper v. Newell*, 38 Miss. 516.

Where personal property has been converted into money by judicial sale, a claimant of the property may obtain an injunction against the payment of the money to the creditors, as he has no remedy on the property. *Mann v. Flower*, 26 Minn. 479.

And a purchaser of personal property leased to, and in the possession of, a lessee, may have a sale under execution against the lessor enjoined, as, not having the right of immediate possession, he has no remedy at law. *Ford v. Rigby*, 10 Cal. 442.

And an injunction against an execution should be granted, where the judgment was obtained against garnishees, and they appealed without su-

persuades and threatened to surrender to the sheriff the property held by them belonging to the plaintiff in the injunction suit, and the plaintiff in the garnishment suit is insolvent. *Hitt v. Ehrlich*, 89 Ga. 824.

In *Bristol v. Hallyburton*, 98 N. C. 384, it was said a third party would be entitled to an injunction against a sale of his personal property on an execution against another party, where the sheriff and the plaintiff in the execution are both insolvent.

And in *Langton v. Horton*, 1 Hare, 549, it was held that the equitable owner of a ship, obtaining possession, is entitled to an injunction against the levy of an execution on a judgment against another party, as equity will protect an equitable title.

In *Kent v. Bridgman*, *Proc. in Ch.* 228, an injunction was granted against the levy on personal property for the debt of another, notwithstanding a judgment in trover, where in such action the plaintiff had failed to prove a judgment on which he relied for title, as the matter is cognizable either in law or in equity.

In Louisiana an injunction against an execution sale of personal property belonging to a third party will be granted. *Lewis v. Daniels*, 23 La. Ann. 170; *State v. Parlange*, 26 La. Ann. 550; *Arenstein v. Weber*, 21 La. Ann. 199.

In *Poincy v. Burke*, 23 La. Ann. 673, where the plaintiff was joint owner with another in a painting, an injunction was granted against a levy and sale on the right, title, and interest of a party other than these two on a judgment against him, where he had no title, as, if the owner had stood by and permitted the sale, he might have been estopped from denying the title of the defendant in the execution, and the pretext that it was only the interest of the debtor that was seized is unsound.

And a third party acquiring property from a husband may enjoin the execution of the judgment obtained by the wife in a hypothecary action against him, on the ground that she has intermeddled with the estate of the husband and appropriated property. *Matta v. Gayle*, 10 La. Ann. 347.

And parties holding under a parol assignment of a lease are entitled to enjoin a sale of their personal property on the farm, on an execution against the lessor. *Gay v. Nichol*, 23 La. Ann. 237.

And in *Coleman v. Brown*, 16 La. Ann. 110, it was said that a third party may obtain an injunction against the sale of his property on an execution issued against another in a third opposition.

But, in *Van Norden v. Morton*, 99 U. S. 373, 25 L. ed. 452, it was held that an injunction against a seizure and sale under an execution of property on a judgment against a third party will not be granted as there is ample remedy at law by suit in trespass for damages. Although the Louisiana Code does not give a remedy of replevin, it provides a remedy similar under La. Code Pr. arts. 209-223 of sequestration, and the statutory remedy under La. Code Pr. art. 298, p. 7, providing for injunctions against sale by a sheriff, is not a chancery proceeding but a petition or motion with notice to the sheriff; and as a court of chancery the United States circuit court has no jurisdiction in this case.

The claimant of property seized on a *f. fa.*, who obtained an injunction to stay the sale, is not entitled to the possession of the property pending the trial of his right. *Lacy v. Bubler*, 8 Mart. N. S. 662; *State v. Judge of Tenth Dist.* 6 La. Ann. 543.

Where the complaint by an intervenor for an injunction against a seizure under a judgment does not show that there is a contemplated seizure, but states that the plaintiff is about to subject the schooner or the bond to the payment of the judgment, an injunction will be refused. *Taylor v. Clark*, 11 La. Ann. 560.

The equitable owner of shares of stock in a company may obtain an injunction against an execution sale on a judgment against the nominal owner, the remedy at law being insufficient. *Anderson v. Biddle*, 10 Mo. 23; *Weber v. Bullock*, 19 Colo. 214. (See also *Stout v. La Follette*, XI. b. 1; *Bargate v. Shortridge*; and *Hampson v. Wear*, XIX. a. 1.)

It is error to render judgment against a third party and his sureties on a dissolution of an injunction against a levy of his personal property when he was not a party to the judgment, as the remedy is by damages on the injunction bond. *Ferguson v. Herring*, 49 Tex. 123.

An injunction against an execution sale will not be granted where all the defendants in the judgment are not made parties. *Gates v. Lane*, 44 Cal. 302.

1. Slaves.

Injunctions have generally been granted to prevent the sale of slaves on an execution against a third party, and this sometimes on the ground of peculiar value of slave property, or clear proof of title, or of peculiar relationship of master and slave; but in Virginia a purchaser of slaves at auction was denied an injunction on the ground of absence of such attachment. In North Carolina and Kentucky the injunction was usually denied, but allowed in peculiar cases.

A levy of an execution upon a slave owned by a third party may be enjoined, as a different rule applies in regard to slaves. *Sevier v. Ross*, *Freem. Ch. (Miss.)* 519; *Levistone v. Bona*, 4 Rob. (La.) 459; *Stroud v. Humble*, 1 La. Ann. 310; *Wilson v. Butler*, 3 Munf. 559; *Sims v. Harrison*, 4 Leigh, 343; *Kelly v. Scott*, 5 Gratt. 479; *Randolph v. Randolph*, 6 Rand. (Va.) 194; *Harrison v. Sims*, Id. 506; *Loftin v. Espy*, 4 Yerg. 84.

An execution sale of a slave, the property of complainant, upon a judgment against a third party will be enjoined, as the remedy at law of replevin is inadequate, as the purchaser would easily remove a slave beyond legal process, denying the rule announced in *Lovette v. Longmire*, 14 Ark. 330, where the property of a wife was levied upon for the debt of her husband. *Sanders v. Sanders*, 20 Ark. 610. And the same was held in *Bell v. Greenwood*, 21 Ark. 249.

In *Lovette v. Longmire*, *supra*, it was held that an execution levy on slaves of a wife, owned by her as separate property, will not be enjoined. In this case the debt was contracted by the husband before the married woman's act of 1846, and her property was liable for his debts, as debts contracted were exempted from the operation of the act. The authority of this case is denied in *Sanders v. Sanders*, *supra*.

But, injunctions are generally granted to protect the rights of a wife in slave property, as against a sale for the husband's debts. *Smith v. Bank of Wadesborough*; *Calhoun v. Cozens*; *Stockley v. Rowley*; *Lawes v. Chinn*; and *Gerald v. McKenzie*, —*infra*.

In *Amis v. Myers*, 57 U. S. 16 How. 422, 14 L. ed. 1029, an injunction was granted against an execution sale of slaves owned by a third party, although there was a remedy at law under La. Code Pr. 298, § 7. The court said: "It is not usual for this court to take an exception of this nature on its own motion and where no objection has been made by the defendant; but this case is one so clearly beyond the limits of the equitable jurisdiction of the circuit court that the fact is noticed that it may not serve as a precedent."

In *Hammond v. St. John*, 4 Yerg. 107, it was said that the right of a third party to enjoin a sale of slaves on execution against another is an exception to the general rule.

And applies only where the execution is against a third party, and not where it is against the debtor, as he has a remedy by motion or supersedeas. *Williams v. Wright*, 9 Humph. 423.

Negroes manumitted by a will are entitled to an injunction against being sold under execution on judgments against the estate, on a bill to marshal assets. *Negroes Charles, etc. v. Sheriff*, 12 Md. 274.

In Kentucky an execution sale of slaves owned by a party other than the defendant in the execution will not be enjoined in the absence of some peculiar ground in equity, as there is a remedy at law of trespass or trover. *Kendrick v. Arnold*, 4 Bibb, 235; *Nesmith v. Bowler*, 3 Bibb, 487.

Or replevin. *Young v. Young*, 9 B. Mon. 66.

And in *Watkins v. Logan*, 3 T. B. Mon. 20, it was held that an injunction will not be granted to restrain the sale of slaves owned by a third party and held by a trustee on seizure for debts of another, there being a remedy at law (overruling *McGinty v. Haggin*, 2 Bibb, 265, as to the right of trustee to obtain an injunction, as in that case a rehearing was had and the case was decided on another point not reported). This case appears only in the original edition, although indexed in the reprinted editions.

But an injunction will be granted against an execution sale of property belonging to a third person, where the title of such person is only an equitable interest. *Orr v. Pickett*, 3 J. J. Marsh. 269.

In North Carolina an injunction will not be granted against an execution sale of slaves on a judgment against a third party in the absence of some especial equitable ground of interference. *Du Pre v. Williams*, 5 Jones, Eq. 98.

In *Howell v. Howell*, 5 Ired. Eq. 258, where negroes were bequeathed to the plaintiff for life, and the executor assented to her taking the same, and afterwards obtained an *ex parte* order for their sale on false allegation of debts of the estate, an injunction was denied as there is a remedy of trespass, trover, or detinue, although plaintiff was old and infirm and in all probability her estate would terminate by her death before an action at law could be determined.

But in *Smith v. Bank of Wadesborough*, 4 Jones, Eq. 308, it was held that slaves the separate property of the wife would be protected by injunction against a sale for the husband's debts, as, the legal title being in the husband, there was no one who could sue for the trespass, and an equitable interest of the wife will be protected in equity.

A purchaser of slaves at auction under circumstances of fraud on the part of the vendor cannot obtain an injunction against an execution sale of the same on a judgment against his vendor, as the question of mutual attachment does not apply. *Allen v. Freeland*, 3 Rand. (Va.) 170.

A purchaser of slaves from a husband and wife is not entitled to an injunction against execution in detinue, in favor of the trustee holding the legal title to the slaves. *Jordan v. Thomas*, 34 Miss. 72, 69 Am. Dec. 387.

And a purchaser of a slave cannot enjoin a seizure under a f. fa. at the suit of a party having a superior or encumbrance, where the vendor of the complainant disclaimed ownership at the time of the attempted levy. *Michel v. Her Husband*, 1 La. Ann. 174.

1. Wife's personal property.

The weight of authority is in favor of protecting the wife's separate personal property from seizure and sale for her husband's debts, but this is denied in Texas, where she has adequate remedy at law, and in Maryland the later cases deny her right on the same ground.

A wife having a separate estate in slaves is entitled to an injunction against an execution sale of the same on a judgment against her husband and another party. *Stookley v. Rowley*, 2 Head, 493; *Calhoun v. Cosens*, 3 Ala. 498; *Hawes v. Chinn*, 4 Mart. N. S. 888; *Smith v. Bank of Wadesborough*, 4 Jones, Eq. 308. But see *Lovette v. Longmire*, 14 Ark. 389.

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As Ala. Code, § 2181, authorizing a wife to maintain a suit at law in her own name, does not apply where the matters involved are her separate estate. *Gerald v. McKenzie*, 27 Ala. 168.

The separate estate of a married woman will be protected in equity against a sale for the husband's debts. *Holthaus v. Hornbostle*, 60 Mo. 439; *Newlands v. Paynter*, 4 Myl. & C. 408, 10 Sim. 377, 4 Jur. 232; *Broussard v. Le Blanc*, 44 La. Ann. 380; *Lewis v. Winston*, 26 La. Ann. 707.

An injunction will be granted to restrain the sale of a wife's separate personal property for the husband's debts, as she cannot sue as *feme sole* or give a bond, and has no remedy at law. In this case she alleged the insolvency of the sheriff and his sureties. *Fairchild v. Knight*, 18 Fla. 770.

And in *Pawley v. Vogel*, 42 Mo. 201, it was said that an execution sale of property held in trust for a wife, on a judgment against the husband, will be enjoined.

The wife is entitled to an injunction against the sale of her personal property which is of peculiar value, as against an execution sale on a judgment against her husband. *Lady Arundell v. Phipps*, 10 Ves. Jr. 139.

In *Deville v. Hayes*, 23 La. Ann. 550, it was held that where a sheriff does not take possession of personal property under an execution against the husband, the sale will be enjoined where the husband gives it to his wife in payment of a judgment she held against him. In this case the seizing creditor had intervened and opposed the wife's claim, and the property was decreed to belong to her, and that question was *res judicata*, and as to the other property the sheriff did not take possession of them.

But an injunction will not be granted to prevent the sale of the wife's property on an execution against her husband where the affidavit of complainant does not describe the property seized or its value. *McRae v. Brown*, 12 La. Ann. 181.

Nor unless she establishes her ownership with legal certainty. *Goldsmith v. Michel*, 19 La. Ann. 272; *Erdman v. Rosenthal*, 60 Md. 312; *Beatty v. Smith*, 2 Smedes & M. 567.

Or where the transfer to her trustee is a fraud on the husband's creditors. *Ragsdale v. Gossett*, 3 Lea. 729.

In *Bridges v. McKenna*, 14 Md. 253, an injunction was granted to prevent the sale of a wife's personal property for the debts of her husband where she held the same in her sole and separate use, under Md. act 1843, chap. 298, § 8, providing that a married woman may acquire property to the extent of \$1,000; while the act of 1863, providing that it shall not hereafter be necessary to interpose a trustee in order to secure to a married woman the sole and separate use of her property, and the 2d section, providing that she may have her remedy in a court of law, as a *feme sole*, against the creditors of her husband unlawfully subjecting to the payment of his debts her sole and separate property, do not deprive the court of equity of its jurisdiction.

But in *Frazier v. White*, 49 Md. 1, an injunction was refused to protect a married woman's personal property from sale for the debts of her husband, as Md. Code Pub. Gen. Laws art. 45, giving her a separate estate in her property, and Id. § 4, providing that a married woman having no trustee may by her next friend sue in a court of law or equity in all cases for the recovery, or security, or protection of her property as if she were a *feme sole*, do not mean that she should sue in equity where she can sue in replevin or for damages. The previous case was not referred to.

An injunction against an attachment sale of a wife's separate personal property consisting of horses branded HX will not be granted, although the order directed a sale of horses branded HX, where she had been a party to the suit in attachment, but was dismissed before judg-

ment, as she has an adequate remedy at law and cannot enjoin for error in dismissing her claim in the other suit. *Perrin v. Stevens* (Tex.): 29 S. W. Rep. 327.

The rents and profits of the wife's real estate are not protected against garnishment for the husband's debts, by Tenn. Code, § 2481, providing that the interest of a husband in his wife's real estate shall not be sold under process against him, as the rents and profits are his property at common law, and an injunction will not be granted. *Lucas v. Bickerich*, 1 Lea. 728.

IX. Personal property of a peculiar value.

Injunctions are sometimes granted against the sale of personal property of third parties or others on process against another, on the ground of preventing their business from being ruined, or causing irreparable damages; and injunctions have been generally granted to restrain the sale of personal property of a peculiar value, as relics, and the like, but there are some cases which deny this right.

So, a seizure of plaintiff's stock of goods, under an execution against a third person, injuring the business, will authorize an injunction, where such levy was excessive and plaintiff was excluded from his store, and replevin would not afford a remedy, as the creditor could give bond and retain the goods. *Sickels v. Combs*, 10 Misc. 551.

A third party owning a stock of merchandise is entitled to an injunction against a sale on execution under a judgment against another, where such sale would ruin his business, trade, and credit, and other remedies would be inadequate. *McCreery v. Sutherland*, 23 Md. 471, 87 Am. Dec. 578; *North v. Peters*, 128 U. S. 271, 34 L. ed. 938; *Watson v. Sutherland*, 72 U. S. 5 Wall. 74, 18 L. ed. 580.

In *Carrington v. Holabird*, 19 Conn. 84, 17 Conn. 530, it was held that the fact that the judgment creditor is not insolvent will not prevent equitable interference against an execution sale which would destroy complainant's business as a merchant. In this case the debtor was also discharged from the debt by bankruptcy.

In *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779, an injunction was granted in favor of a third party against the levy of an execution on store goods of a merchant for the debts of another, and Va. Code, chap. 162, §§ 4-7, providing for an indemnifying bond to the sheriff in order to make a levy, do not prevent an injunction. (But see next case.)

But, in *Baker v. Rhinehard*, 11 W. Va. 238, *Walker v. Hunt* was in effect overruled, the court saying that in that case the court misapprehended the question and really never gave it any consideration, and did not pass upon the remedy under the 6th and 7th sections of that Code, and held that W. Va. Code, chap. 107, § 6, providing that a claimant may give a suspending bond, and § 7, providing that he may give a forthcoming bond on which he may have a trial by jury, prevent an injunction against an execution sale of property levied on for another person's debt.

Where the property is of peculiar value and belongs to the wife, an injunction will be granted to restrain a sale of the same for the debts of the husband. *Lady Arundell v. Phipps*, 10 Ves. Jr. 139.

An execution sale of wedding presents will be enjoined where they are of peculiar value and the damages would be irreparable, and a satisfactory bond is given for damages in injunction. *Church v. Haeger*, 65 N. Y. S. R. 681.

And in *Allen v. Winsteadly*, 185 Ind. 105; *Baker v. Rhinehard*, 11 W. Va. 238; *Rollins v. Hess*, 27 W. Va. 570; and *Davidson v. Floyd*, 15 Fla. 667,—the same was said to be the rule.

And in *Bailey v. Wade*, 24 Mo. App. 186, the same was intimated, where it was said in regard to an execution sale of a horse: "In the absence of a pre-

tium affectionis there would be no difficulty in establishing his value,"—although this was property of the defendant in the execution.

But in *Johnson v. Connecticut Bank*, 21 Conn. 148, it was held that an executor cannot maintain a bill of injunction to prevent an execution sale of relics belonging to an heir when she is not a party to the suit,—especially when there is no offer to pay the value of the articles.

X. Trust property.

The sale of trust property will generally be enjoined, unless the same has been ordered to be sold in a suit where all parties interested are parties to the suit. But an injunction was denied where the interested party did not complain or there was adequate remedy by its pendens.

An execution sale of trust property on a judgment against the trustee individually will be restrained at the instance of the *cestui que trust*, where the trust depends upon parol evidence. *South Presby. Ch. v. Hintze* 72 Mo. 362, 5 Mo. App. 578, appx. To the same effect, *Hollingsworth v. Trueblood*, *infra*.

Or where by mistake the title was not conveyed for the use of complainant and other *cestuis que trust*. *Simms v. Phillips*, 51 Ga. 428.

And a sale of trust property under an execution issued upon a general judgment against the trustees will be enjoined, as trust property is not bound, unless the judgment specifies the property to be bound. *Clinch v. Ferril*, 48 Ga. 365.

And a guardian is entitled to an injunction against a judgment on a mortgage made by him, and proceedings thereon, on the ground that part of the property belongs to the ward, and an infant is not estopped by action of her guardian, in the judgment against the guardian personally. *Eagan v. Bell*, 18 La. Ann. 508.

So, a ward may obtain an injunction against distribution of funds belonging to her and reclaim the same from a creditor of a guardian who has acquired the same with notice of the ward's title, even though another pending petition to set aside the decree has been filed in that case. *Alspaugh v. Adams*, 80 Ga. 345.

And a sale of personal property on an execution from a state court will be enjoined by a state court to protect a lien under Ga. act 1799, providing for the security of orphans and trust estates, where the lien is pending in the Federal court. *Read v. Dewa, R. M. Charit.* (Ga.) 365.

Where the *cestui que trust* loaned trust money and obtained a judgment thereon in his own name, the execution and collection of the same will be enjoined at the instance of the trustee in order to protect the trust. *Reeser v. Reeser* (Pa.) 4 Cent. Rep. 51.

And an execution sale under a judgment against the husband, of property held in trust for the debtor and wife for life with remainder to their children will be enjoined as a cloud on the title. *McCann v. Taylor*, 10 Md. 418.

Or a sale of personal property held in trust for the wife, where the execution is against the husband. *Pawley v. Vogel*, 42 Mo. 291.

And where a widow takes the rents and profits of land under a will in trust for the children, a levy thereon under an execution against her will be enjoined. *Anderson v. Crist*, 113 Ind. 65.

A sale of property on an execution against a trustee individually will be enjoined at the instance of a purchaser from the trustee, where the trustee had no personal interest in the property. *Hollingsworth v. Trueblood*, 59 Ind. 542.

In *Linton v. Mosgrove*, 14 Fed. Rep. 543, it was held that a Federal court may enjoin the inequitable use of the judgment of a state court when the validity of the judgment is not thereby impaired, where complainant is the owner of the judgment

under a trust, and files a bill to have the same assigned to her, and executions and levies are being made in violation of the trust and in fraud of the *cestui que trust*.

But a trustee attempting to enjoin a sale of trust property on execution against the trustee personally must give particulars in regard to the judgment and execution, and also sufficient particulars in regard to the nature of the title, or the injunction will be denied. *Trueblood v. Hollingsworth*, 48 Ind. 532.

And a trustee under a naked trust cannot enjoin an execution sale levied upon property of a *cestui que trust* who is not a party to the suit. *Johnson v. Connecticut Bank*, 21 Conn. 148.

And the remedy of filing a notice of pendency of action, to protect a trust, to prevent a disposition of property having been exercised against a solvent assignee of judgments, it is sufficient, without enjoining such judgments or foreclosure sale. *Stevenson v. Fayerweather*, 21 How. Pr. 449.

XL In favor of or against executors and administrators.

a. English decisions.

1. To obtain equal distribution of assets.

The English rule appears to be, that where a creditor of the estate has not obtained his judgment at law prior to the decree for distribution, he will be restrained by injunction in order to protect the assets of the estate. In a few of the cases under this classification will be found some that had not proceeded to judgment, but are here inserted to show the development of the English rule. In some of the cases the form of the judgment controls. *Rouse v. Jones*, 1 Phill. Ch. 464, 14 L. J. Ch. N. S. 4; *Vernon v. Thellusson*, 1 Phill. Ch. 468, 14 L. J. Ch. N. S. 83, 9 Jur. 145, 7 Jur. 563; *Batcliffe v. Winch*, 16 Beav. 576, 17 Jur. 566, 23 L. J. Ch. 915; *Fielden v. Fielden*, 1 Sim. & Stu. 255; *Martin v. Martin*, 1 Ves. Sr. 211; *Kirby v. Barton*, 8 Beav. 45; *Price v. Evans*, 4 Sim. 614; *Lord v. Wormleighton*, Jac. 148.

And injunctions were allowed in some cases which do not show whether the judgment at law or decree for distribution of assets was obtained first. *Paxton v. Douglas*, 8 Ves. Jr. 530; *Kent v. Pickering*, 5 Sim. 569.

After an administrator permitted an interlocutory judgment to be obtained, and had it set aside, obtained a month's time, and allowed another to go, and obtained a decree for an account, an injunction was granted against proceeding at law, but the executor was required to pay into court and place with the accountant general nearly all the assets. It does not appear whether the decree or judgment was obtained first. *Paxton v. Douglas*, *supra*.

And a bill filed in the same court by an annuitant was stayed, where a decree had been pronounced for a general administration, although the decree in chancery was not drawn up. *Moore v. Prior*, 2 Younge & C. Exch. 375, 6 L. J. Exch. N. S. 74, 1 Jur. 512.

Some cases hold that a showing of the condition of the assets is a condition precedent to the granting of the injunction. *Macrae v. Smith*, 2 Kay & J. 411; *Vernon v. Thellusson* and *Paxton v. Douglas*, *supra*; *Gilpin v. Lady Southampton*, 18 Ves. Jr. 499.

Some cases refuse an injunction prior to a final decree of distribution. *Perry v. Phillips*, 10 Ves. Jr. 24; *Teague v. Richards*, 11 Sim. 44, 9 L. J. Ch. N. S. 293; *Rush v. Higga*, 4 Ves. Jr. 633; *Largan v. Bowen*, 1 Sch. & Lef. 294.

Other cases refuse an injunction against proceedings by creditors where the decree for distribution was made after judgment had been obtained by the creditor against the executor.

So, where the decree of administration and for 30 L. R. A.

distribution is obtained after the judgment against the executor, or levy, an injunction will not be granted. *Fowler v. Roberts*, 2 Giff. 223, 6 Jur. N. S. 1189, 8 Week. Rep. 492; *Ranken v. Harwood*, 10 Jur. 794, 2 Phill. Ch. 22, S. P. 5 Hare, 215, 15 L. J. Ch. N. S. 446; *Marriage v. Skiggs*, 4 De G. & J. 4, 5 Jur. N. R. 325, 28 L. J. Ch. 433; *Haly v. Barry*, L. R. 8 Ch. 452, 37 L. J. Ch. 723, 16 Week. Rep. 654, 18 L. T. N. S. 491; *Etheridge v. Womersley*, L. R. 29 Ch. Div. 557, 54 L. J. Ch. 965, 53 L. T. N. S. 280, 33 Week. Rep. 936; *Vincent v. Godson*, 3 De G. & S. 717.

But see *Egan v. Baldwin*, and *Clarke v. Earl Ormonde*, *infra*.

But in *Egan v. Baldwin*, 2 Molloy, 532, 1 Hogan, 190, 12 Cond. Eng. Ch. 608, execution on a judgment by default against an executor *de bonis propriis*, was enjoined, where a decree for administration was obtained after such judgment, on the ground that by the decree the court obtained possession of the assets, and will not permit the executor to be sent to gaol for not paying them out, and it was held that the form of the judgment was of no consequence, nor whether it was before or after the decree. (The authorities on this question are not discussed.)

In *Clarke v. Earl Ormonde*, Jac. 106, it was held that where a decree has been obtained for payment of creditors, it is in the nature of a judgment for all; and the court, therefore, will not permit any particular creditor, by proceeding at law, to disturb that administration of the assets which the court in the execution of the judgment for all the creditors will decree; and it was said that even if the creditor has got a judgment before the decree, though he may come in and prove as such, he must not take out execution.

It will be noted that the form of the judgment at law in connection with the time of obtaining the decree for distribution is the controlling point in some of the cases where an injunction is sought to prevent one creditor from obtaining a preference, and to have the estate distributed. A judgment *de bonis propriis* means that it is to be satisfied from the property of the executor or administrator, as in case of a *devastavit*, or where he files a false plea of *plene administravit*, and then the judgment is *de bonis testatoris*, *et si non*, *de bonis propriis*. A judgment *de bonis testatoris* is one against the goods of the decedent.

Injunctions were refused against proceedings on judgments *de bonis propriis*. *Brook v. Skinner*, 2 Meriv. 481, note; *Kent v. Pickering*, 5 Sim. 569; *Burles v. Popplewell*, 10 Sim. 383; *Lee v. Park*, 1 Keen, 714, 6 L. J. Ch. N. S. 93; *Etheridge v. Womersley*, *supra*; *Terrewest v. Featherby*, 2 Meriv. 489.

But see *Vernon v. Thellusson*; *Rouse v. Jones*; and *Morrice v. Bank of England*, *infra*.

So an injunction will not be granted against the enforcement of a judgment of a county court by imprisonment against a sole executrix personally, where the creditor obtained such judgment previous to the administration order, but the court ordered payment to such creditor by the receiver of the estate, without prejudice to the question whether the executrix should be allowed the payment. *Etheridge v. Womersley*, *supra*.

And in *Brook v. Skinner*, *supra*, it was held that if the plaintiff at law recovered a judgment against an executor *de bonis testatoris* an execution would not be allowed on such a judgment; but if a judgment was recovered *de bonis propriis*, the court could not restrain the execution. But this case was criticised in *Vernon v. Thellusson*, *infra*.

And where the executors pleaded, in an action of law, that there was a decree for administration, instead of applying for an injunction, and the plea was bad and judgment given for plaintiff, the court restrained the use of the judgment against the assets, but not against the administrator personally, on the ground that if a judgment is recovered de

bonis testatoris, et si non, de bonis propriis, the court would not protect the executor from personal liability. *Burles v. Popplewell, supra*.

And an injunction was granted restraining an execution against assets on a judgment *de bonis testatoris, et si non, de bonis propriis*, but not restraining proceedings against the executor personally, where a decree had been obtained for administration. *Kent v. Pickering, supra*.

And where a judgment had been obtained against an executor *de bonis testatoris, et si non, de bonis propriis*, by default, an injunction was refused on application of the executors, where no satisfactory account was given of the assets, although a decree was afterwards obtained for administration, but to which decree the judgment creditors were not parties, as the executors by allowing judgment by default admitted assets. *Lee v. Park, supra*.

In *Terwest v. Featherby, supra*, an injunction was refused against restraining a creditor from proceeding at law upon a verdict which would entitle him to a judgment *de bonis propriis* against an executor, as the judgment would be of no service if the creditor were delayed by a suit until it could be ascertained whether there are assets of the testator to answer his demands, which might not be until after all chance of recovering against the executor *de bonis propriis* is gone. This case was criticised and authority denied in *Vernon v. Thellusson, infra*.

In an action by a creditor against an heir who pleaded a false plea, an injunction was granted against an execution against the assets, at the instance of another judgment creditor, where the decree was prior to the judgment, but not from proceeding against the heir personally. *Price v. Evans, 4 Sim. 514*.

But in *Vernon v. Thellusson, 1 Phill. Ch. 406, 14 L. J. Ch. N. S. 83, 9 Jur. 145, 7 Jur. 503*, it was held that after a decree for administration an injunction will be granted against proceedings on a writ of *sci. fa.* against the executor, by a creditor having a judgment against decedent, although the executor had pleaded *plene administravit*. But a showing of the assets was required, and the authority of *Terwest v. Featherby* and *Brook v. Skinner, supra*, is denied.

And where a verdict had been obtained against an administrator on a plea of *plene administravit propter* and for costs *de bonis propriis*, and a decree for administration rendered pending the action, an injunction was granted against the creditor proceeding on the judgment on the payment of the costs by the administrator. *Lord v. Wormleighton, Jac. 148*.

After a decree for administration, proceedings against an heir, by a bond creditor of the estate, were enjoined, although the heir had pleaded at law *riens per descent*, and although, if such plea was false, the creditor would have been entitled to judgment *de bonis propriis*. *Rouse v. Jones, 1 Phill. Ch. 464, 14 L. J. Ch. N. S. 4*.

Or where the administrator had pleaded a false plea at law to gain time to apply for a decree of distribution. *Fielden v. Fielden, 1 Sim. & Stu. 255*.

In *Morrice v. Bank of England, Cas. L. Talb. 217*, affirmed in *2 Bro. P. C. 466*, where several judgments had been obtained against the executrix *de bonis propriis*, and also decrees for the payment of certain creditors, on a bill filed to have equal distribution of assets, it was held that a decree was of the same dignity as a judgment, and that a decree creditor had priority over a creditor who had not obtained a judgment, and a judgment *de bonis propriis* would be restrained, for, unless enjoined, the executrix would have to pay the same out of her own pocket, and a reference of the matter was made to a master to take an account and to pay off the decrees and judgments according to their priorities.

Where the judgment is *de bonis testatoris*, there is
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some conflict of decisions as to granting injunctions against proceedings under the same.

As, where the judgment was against the executor *de bonis testatoris*, and a decree for administration was immediately made in a creditor's suit for administration, the judgment connotes the executor upon the question of assets, where there is no showing made of any other liability by judgment, and an injunction was refused. *Vincent v. Godson, 8 De G. & S. 717*.

And an injunction was refused where a *fi. fa.* had been issued before the debtor died, and after his death a suggestion was entered on the record entitling the creditor to an execution against the executrix, obtaining a charging order *nisi* upon shares belonging to the debtor, although after the order *nisi* was entered, and on the same day, a decree was made for the administration of the estate, as the charging order, when made absolute, operates from the making of the order *nisi*. *Haly v. Barry, L. R. 8 Ch. 452, 37 L. J. Ch. 723, 16 Week. Rep. 654, 18 L. T. N. S. 491*.

In *Drewry v. Thacker, 8 Swanst. 546*, it is questioned whether on a bill filed for administration of assets the court will restrain proceedings on a judgment obtained by a creditor against a personal representative who had admitted assets and confessed judgment.

But injunctions were allowed against proceedings on judgments *de bonis testatoris*, in *Brook v. Skinner, 2 Meriv. 481*, note; *Burles v. Popplewell, 10 Sim. 888*; *Kent v. Pickering, 5 Sim. 569*; *Price v. Evans, 4 Sim. 514*.

In *Desborough v. Adlard, 2 Swanst. 234*, note, an injunction was refused against a judgment at law obtained on a plea of *ne unques executor* because this plea must needs be contrary to his own knowledge.

In *Cryer v. Goodhand*, and another case, referred to in *Robinson v. Bell, 2 Vern. 146*, verdicts obtained against executors on pleas of *ne unques executor* were set aside in equity where it was shown that the only assets were goods of very little value, as chimney backs or a few pots of ale.

2. Foreign administrators and executors.

The levy of an execution on lands in the hands of a foreign administrator was enjoined at the instance of an heir where no administrator had been appointed at the place where the injunction had been applied for. *Grant v. McDonald, 5 Grant, Ch. (U. C.) 468*.

And an injunction was granted against collecting a judgment in Scotland, against an heir, from personality in the hands of the executors, where the decedent was domiciled in England and the executors had obtained a decree in England for the administration of the assets, as it was absolutely necessary to have an account taken before the share of the heir can be ascertained. *Baillie v. Baillie, L. R. 5 Eq. 175*.

But in *Carron Iron Co. v. MacLaren, 5 H. L. Cas. 416*, reversing *MacLaren v. Stainton, 15 Eng. L. & Eq. 600, 23 L. J. Ch. 274, 18 Beav. 279*, an injunction was refused, where a Scotch corporation had agents in England, and a large stockholder died domiciled in England, where he was an agent for the company, leaving a will appointing executors in both countries, and the will was probated in England, and such of the executors as thought fit to apply were confirmed by the Scotch court, and an order for administration was made in England, and after such order proceedings were taken against the real and personal estate in Scotland, and it was questioned whether an injunction could have been enforced by simply giving notice to the company's agent in England.

And where a creditor in Scotland refused to discontinue his action there, on notice of a decree obtained in England for a settlement of the estate,

as his debt was barred in England by limitation, but not in Scotland, but offered to submit to the injunction so far as it went to restrain execution, he was required to pay the costs of the application. *Graham v. Maxwell*, 1 Maon. & G. 71, 1 Hall & Tw. 427, 18 L. J. Ch. N. S. 225, 13 Jur. 217.

S. Costs.

A creditor proceeding at law against an executor, after a decree, was allowed his costs previous to the notice of the decree, but not his costs of the motion to enjoin. *Anonymous*, 2 Sim. & Stu. 424. To the same effect, *Hayward v. Constable*, 3 Younge & C. Exch. 43; *Gardner v. Garrett*, 20 Beav. 460. See *Graham v. Maxwell*, 1 Maon. & G. 71, 1 Hall & Tw. 427, 18 L. J. Ch. N. S. 225, 13 Jur. 217.

Where an administrator did not rest on the decree of administration but appeared to the action at law, the court awarded the creditor the costs at law and the costs of the motion for injunction, and required the assets to be brought into court, and then allowed the injunction. *Turner v. Connor*, 15 Sim. 630.

And in *Jones v. Jones*, 5 Sim. 673, it was held the creditor was entitled to costs of the motion made by an executor after decree, to obtain an injunction against proceeding at law.

But after notice of a decree to account, a creditor proceeding at law against an executor is in contempt, and on motion for an injunction the creditor would be refused costs of the further proceedings at law, and the costs of the application. *Jones v. Brain*, 2 Younge & C. Ch. Cas. 170; *Curry v. Bowyer*, 3 Madd. 456.

b. American decisions.

1. To obtain equal distribution of assets.

Some courts have granted injunctions to protect an equal distribution of assets, and to prevent one creditor from obtaining an undue preference, by reason of his judgment against a personal representative. *Thompson v. Brown*, 4 Johns. Ch. 619; *Brooks v. Dent*, 4 Md. Ch. 473; *Haydon v. Goode*, 4 Hen. & M. 460; *Rogers v. King*, 3 Paige, 210; *Bollman v. Warner*, 38 S. C. 464; *Williams v. Benedict*, 49 U. S. 8 How. 107, 12 L. ed. 1007; *Lyles v. Halton*, 6 Gill & J. 122; *Miller v. Rice*, 1 Rand. (Va.) 433; *Pendleton v. Stuart*, 5 Munf. 377; *Pickett v. Stewart*, 1 Rand. (Va.) 478 (Appendix); *Royall v. Johnson*, 1 Rand. (Va.) 421 (*dictum*).

In *Re City Bank*, 10 Paige, 378, and in *McKay v. Green*, 3 Johns. Ch. 55, the question was not decided.

Some of the above cases were on the ground that, after a decree for an accounting against an executor or administrator and for disclosure of assets, an injunction will be granted to prevent the collection of claims by creditors at law. *Thompson v. Brown*; *Brooks v. Dent*, and *Rogers v. King*,—*supra*.

Other cases do not make this distinction, but protect the estate, as where the sale would endanger the collection of other claims not in the judgment, where a large part of the estate has been taken from the administrator without objection, and there are other debts. *Bollman v. Warner*, 38 S. C. 464.

Or where the judgment did not entitle the plaintiff to a prior lien under the laws of Mississippi. *Williams v. Benedict*, 49 U. S. 8 How. 107, 12 L. ed. 1007.

Or where the order allowing a claim was made without notice to the executor, and he had no remedy by appeal or certiorari, where the claim is attacked as fraudulent and without consideration. *Propst v. Meadows*, 18 Ill. 157.

So, a judgment in favor of a distributee of an estate was enjoined in part, on the ground that a suit had been filed against the executor for a large sum, and the distributee was liable for contribution. *Lyles v. Halton*, 6 Gill & J. 122.

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And an injunction was granted in favor of an heir who was also an administrator, against the collection of judgment on his paying out, as heir, a *pro rata* equal to what has already been paid to some bond creditors, and the injunction was then continued until assets were obtained sufficient, which could be shown by a *scire facias*. *Haydon v. Goode*, 4 Hen. & M. 460.

In *Re City Bank*, 10 Paige, 378, it was said that after final decree for distribution of a fund in the hands of personal representatives, for the benefit of all creditors, the court may enjoin a creditor from proceeding at law to enforce his claim after he has made his election to proceed in the chancery court under the decree.

In *McKay v. Green*, 3 Johns. Ch. 55, the question as to whether on a bill against a personal representative to account an injunction would be granted against creditors proceeding at law, is not decided.

Where judgments were confessed by an executor under the belief that there were ample assets, but owing to an unexpected depreciation the assets proved inadequate, and counsel had withdrawn from the case at the time of trial, an injunction was granted, and an account ordered of legal assets and priorities of debts. *Miller v. Rice*, 1 Rand. (Va.) 433. To the same effect, *Pendleton v. Stuart*, 5 Munf. 377.

Or where the executor was unable to plead at law owing to the state of the assets, where the judgment was obtained probably contrary to justice, without fault of the executor. *Pickett v. Stewart*, 1 Rand. (Va.) 478 (Appendix).

And where a showing was made that there had been sufficient assets to pay the debts, but that a large part had been taken from him by paramount title, an injunction was granted. *Royall v. Johnson*, 1 Rand. (Va.) 421.

But an injunction was refused against the enforcement of judgments against the administrator on the ground of depreciation of assets, which arose from the fact that the administrator had not used due diligence. *Weakley v. Gurley*, 60 Ala. 399.

Or for insufficiency of assets, where the judgment was entered on confession. *Brenner v. Alexander*, 15 Or. 349.

Or where no defense was made against the judgment. *Lafon v. Desessart*, 1 Mart. N. S. 71.

And anticipated further liabilities will not be sufficient to obtain an injunction in the absence of new matters arising since the judgment. *Brown v. Wilson*, 56 Ga. 534.

And a levy upon real estate of an estate will not be enjoined at the instance of an executor, where the time of settlement has long since expired, and where the delay would shield the property from the collection of this claim. *Johnson v. Connecticut Bank*, 21 Conn. 148.

And an execution sale for a mechanic's lien will not be enjoined on the ground that there are claims against the property which will depreciate the sale. *Robinson v. Thompson*, 30 Ga. 363.

And under Mont. Comp. Stat. 5th div. § 1379, providing that persons not made parties to a mechanics' lien action shall not be bound by such proceedings, an injunction to restrain a sale under a decree foreclosing a mechanics' lien will not lie at the suit of an administrator who claimed that the decedent was the owner and that the parties to the action never had any interest in the property. *McCormick v. Riddell*, 10 Mont. 467.

And an executor who had purchased land belonging to the estate is not entitled to an injunction against the sale of such land on judgments against the estate, on the ground that such judgments were irregularly obtained, as the remedy at law by writ of error prevents injunction; and it was held there was no error and the land should be sold. *Eyster's Appeal*, 55 Pa. 473.

lien that the property is his individually, an injunction will not be granted in favor of the former against an execution sale by the latter of property that might belong to the estate. *Ray v. Ray*, Coop. Ch. 284.

And an oral agreement not to hold the administrator personally will not be allowed to change the effect of subsequent judgments, or entitle the administrator to an injunction. *Weakley v. Gurley*, 60 Ala. 399.

4. Judgments in favor of administrators or executors.

The release of the sureties of an administratrix will not authorize an injunction against an execution on a debt of the succession, as she is entitled to collect the same until removed from office. *Norris v. Fristoe*, 8 La. Ann. 646.

And the heir of an estate is not entitled to an injunction against proceedings to collect a judgment which he claims belongs to the estate, and which judgment was transferred by the administratrix to another party before her final settlement, where no attempt is made to impeach the final settlement. *Grayson v. Wilson*, 27 Miss. 553.

5. Sale to pay debts.

An injunction will be granted against final process, or a sale of property of the estate to pay debts, where the complainant has a superior equity or such sale is unnecessary, but will not be granted where there are other remedies equally available.

A purchaser of land from heirs is entitled to an injunction against a sale under an order of the probate court to pay the debts, where the administrator had sufficient personal assets to pay all debts which were wasted. *Banks v. Speers* (Ala.) 16 So. Rep. 25.

And a purchaser of land at a sheriff's sale on a judgment against a decedent is entitled to an injunction against a sale subsequently ordered by the probate court of the same land on a debt against the estate barred by limitation. *Moody v. Harper*, 38 Miss. 599.

Or against a decree of a probate court granting the widow dower in the same land, where her claim of dower has been barred by limitation. *Ibid.*

And an injunction will be granted against a sale to pay debts under an order of probate court, where the administrator has been guilty of unreasonable delay for twelve years, and the right to appear and contest the order in the probate court will not prevent. *Gunby v. Brown*, 86 Mo. 253.

And will be granted against the sale of realty ordered by the county court, where the distributees come into chancery asking for an account, where alone it can be taken, and the propriety of the sale of the land determined and the rights of all the parties adjusted. *Finger v. Finger*, 64 N. C. 158.

So, the holder of a perfect deed made by decedent may have injunction against a sale of the property as the property of the vendor's succession, under an order of sale provoked by his administratrix. *Thompson v. Herring*, 45 La. Ann. 991.

And a sale of the estate ordered by a court of ordinary will be enjoined, where there are no debts, and the real estate can be divided in kind, although an appeal has been taken from a refusal of the ordinary to revoke the order of sale, and the appeal withdrawn on an alleged agreement to forego the sale of all but one lot, as Ga. Code, § 2216, 2443, provide that a sale of real estate shall not be ordered except when necessary to pay debts. *McCook v. Pond*, 72 Ga. 150.

Although an injunction will not be granted to a purchaser at a void probate sale against a suit in ejectment by the heirs, the execution of the judgment may be enjoined on the ground that his money has paid off debts of the estate, for which

he should have a lien on the land. *Hill v. Billingsly*, 53 Miss. 111.

But an injunction will not be granted against the distribution of an estate in a county court after a sale, where such court has jurisdiction to grant relief. *Parke v. Gilbert*, 1 Bart. 97.

And the sale of personal property to pay debts will not be enjoined where there is a remedy at law of trespass or trover. *Howell v. Howell*, 5 Ired. Eq. 258.

In order to restrain the execution of an order of sale to pay debts of an estate, the heir opposing must allege and also prove that the debts do not exist. *Lehman v. Worley*, 40 La. Ann. 620.

And an injunction against a judgment of a court of ordinary, granting the administrator leave to make a sale, will not be allowed without alleging some special reason. *Sanders v. Slaughter*, 39 Ga. 34.

Damages should not be awarded against an absent defendant or curator *ad hoc*, acting conscientiously, where an injunction is obtained by him against a sale under a sale bond taken by an administratrix, and the injunction is dissolved. *Cobb v. Richardson*, 30 La. Ann. 1228.

XII. In favor of assignee for creditors.

Where the lien of the execution is prior to the right of the assignee for creditors, an injunction will not be granted to prevent a sale, or where there is an adequate remedy at law, but will be granted where such remedy is necessary to protect the property for the creditors.

So, where the title does not pass to the assignee for creditors until the recording of the assignment, an execution issued against the assignor before the recording of the assignment will not be enjoined. *Forkner v. Shafer*, 56 Ind. 120; *New v. Kleissner*, Id. 118.

And under Cal. insolvent act, § 4, authorizing an order prohibiting the payment of debts and delivery of property belonging to a debtor for his use, an injunction will not be granted against the sale under an execution which was levied before insolvency proceedings were commenced. *Vermont Marble Co. v. San Francisco City & County Super. Ct.* 99 Cal. 579.

And Ind. Rev. Stat. § 2911, providing that a holder of a lien on assigned property must exhaust his lien before receiving any of the fund assigned for creditors, implies his right to make a sale, and a subsequent assignee is not entitled to an injunction against the same. *Ades v. Levi*, 137 Ind. 506.

And an injunction against a sale on execution against the assignor was refused on the ground of a remedy at law for damages or claim and delivery. *Chittenden v. Davidson*, 20 Jones & S. 421.

Or a remedy at law to recover the value of the goods from the sheriff. *Drewson v. American Surety Co.* 22 N. Y. Week. Dig. 562.

Where a judgment was rendered the day before an assignment for creditors by the debtor, and a levy was made after the assignment and set aside as contempt of court, the judgment was reversed on the ground that a creditor has a right to contest title by levy of execution. *Davis v. Michener*, 106 Pa. 385.

But, where judgment was obtained against the assignor after an assignment, an execution sale was enjoined as a cloud on title at the suit of the assignee, where the creditor assented to the assignment and the levy was not made on the interest of the debtor, but upon the whole property. *Wilhoit v. Cunningham*, 87 Cal. 453.

And under Md. act 1805, chap. 110, § 7, providing that the trustee in insolvency shall sell the property, and pay all judgments and liens, but no lien shall attach unless levy is made prior to insolvency proceedings, an injunction will be granted against sales on execution against the

debtor, in order to allow the trustee to administer the fund, and the lien will be protected. *Alexander v. Ghiselin*, 5 Gill, 138.

An injunction was granted against a judgment directed specifically against certain land, void because it was for a mechanic's lien, and the debtor had made an assignment for creditors before the suit was filed, and the assignee was not a party, as it will be a cloud on the title and the property is in the custody of the law. *Quinby v. Slipper*, 7 Wash. 473.

And sales under successive levies of executions were enjoined at the instance of an assignee for creditors where it was impossible to tell what part of the property was seized under each particular execution, as the New York statute of 1883, requiring the court to approve indemnifying bonds, which released the sheriff from all liability, rendered the remedy at law uncertain. *Newcombe v. Irving Nat. Bank*, 51 Hun, 220.

And a general creditor is entitled to an injunction against a levy by another creditor after the county court has acquired jurisdiction of an insolvent estate and as the county court cannot grant an injunction the circuit court may; and the statute requiring a bond as condition precedent to an injunction will not authorize a dissolution for want of a bond, as this case is not within the spirit of that statute, although it may be within the letter of the same; and failure to attach a copy of the sworn claim will not be cause for dissolution. *Scarlett v. Hicks*, 13 Fla. 314.

Where a judgment creditor levied on property in defiance of an assignment for creditors, and an injunction was obtained against the sale, the officer was held to be a necessary party to the injunction suit, and being a citizen of that state prevented a removal of the cause to the Federal court. *Nye v. Nightingale*, 6 R. I. 499.

As to injunctions in insolvency proceedings against suits in foreign states, see note to *Thorndike v. Thorndike* (Ill.) 21 L. R. A. 71.

XIII. In favor of or against lien creditors.

a. Mortgagees of chattels.

There is some conflict of authority as to the right of a chattel mortgagee to obtain an injunction against the sale of chattels, some cases affirming the right on the ground of preventing multiplicity of suits or to protect a trust, some denying the right where the lien is not superior to the lien of the execution, and some on the ground that there is a remedy of trespass or trover, and some deny the right on the particular statute involved.

A levy under a mortgage *à fa.*, on certain goods not the same as those described in the mortgage was enjoined, where the power to grant an injunction in such a case was not denied. *Lanier v. Adams*, 72 Ga. 145.

An injunction against a sale under an attachment of chattels will be granted at the instance of a chattel mortgagee who files a suit to foreclose his mortgage where there is a dispute as to the title, as if allowed to be sold the goods would be distributed to many persons, and multiplicity of suits will be prevented by injunction, and a receiver will be appointed. *Wiedemann v. Sann* (N. J.) 31 Atl. Rep. 211, distinguishing *Moore v. Diamant*, 41 N. J. Eq. 612. In that case a party claimed under a bill of sale and an injunction was refused, and the question was as to which person had the title. A bond was given by the claimant, and it was held that the rights of the parties could be determined by virtue of the bond. In this case a bond was offered by the auditor, but he proposed to sell the goods; and it is held that such a sale by the auditor would cause a sacrifice of the goods owing to a dispute of the title. The remedy of replevin was suggested as a ground for denying the injunction, but was not discussed.

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And the same rule was applied in *Stratton v. Packard* (N. J.) 13 Cent. Rep. 104.

An injunction in favor of a chattel mortgagee to prevent a sale of the goods to be made by an assignee for creditors of a mortgagor, under an order of another court, is not an illegal interference with the other court, where the mortgagee has priority, and the security will be impaired, as Ind. Rev. Stat., 1894, § 2911, provides that where property has been assigned to pay debts, the holder of a lien must exhaust the same before participating in the assets of the general fund, thus implying his right to disregard the assignment. *Ades v. Levi*, 137 Ind. 508.

But an injunction against an execution sale will not be granted where the lien of the same is superior to the chattel mortgage. *Warner v. Paine*, 3 Barb. Ch. 680.

And under Tex. Rev. Stat. § 2293, providing that chattels mortgaged may be levied on and sold subject to the mortgage, an execution sale of the same will not be enjoined. *George v. Dyer*, 1 Tex. App. Civ. Cas. (White & W.) 780.

And the remedy of a mortgagee by third opposition to claim the proceeds of sale, prevents an injunction against the sale for irregularities. *James v. Breaux*, 26 La. Ann. 245.

Or a remedy in trespass or trover. *Miller v. Crews*, 2 Leigh, 578.

Or where there is a remedy at law by an action of damages, although complainant might not be able to maintain replevin. *La Mothe v. Fink*, 3 Biss. 463.

So, a mortgagee of personal property foreclosing his mortgage and attempting to enjoin by another suit a sale on execution, or one ordered by a probate court, has a remedy at law for possession under his mortgage, in the absence of any showing of irreparable damages, and he might have had a receiver appointed in his foreclosure suit, and then obtained a restraining order against any interference, but he is not entitled to an injunction in a separate suit. *Stillwell v. Oliver*, 35 Ark. 184.

And an injunction will not be granted where complainant has only a lien by virtue of an encumbrance which is fraudulent, and he can require the sheriff to take an indemnifying bond. *Bowyer v. Creigh*, 3 Rand. (Va.) 25.

And a lien creditor cannot enjoin an execution sale of personal property where he would have a lien on the proceeds. *Rollins v. Hess*, 27 W. Va. 570.

b. Mortgages of real property.

An injunction will be granted to protect a mortgage on real estate against an execution sale, where extraneous evidence is necessary, or his lien is doubtful or in danger of being impaired. But where the lien of the mortgage will not be affected by the sale, or complainant is affected by notice of fraud, an injunction will not be granted.

A sale under an execution, about to be made without an appraisal as required by statute, will be enjoined at the instance of a junior mortgagee. *Robertson v. Travis*, 4 La. Ann. 151.

And where a creditor having a deed which is a mortgage conveyed the land back to his grantor and took a mortgage at the same time, he will not lose his lien, and a sale under the junior judgment as a cloud upon the title will be enjoined. *Christie v. Hale*, 46 Ill. 117.

So, if a purchase-money mortgage has a priority over a judgment lien, which can only be established by matters outside of the record, a sale under the judgment will be enjoined. *Plumb v. Bay*, 18 Kan. 415.

A purchase-money note under a title bond gives a vendor's lien in Mississippi, and the assignor of such note before a deed is made, is entitled to an injunction against a levy of an execution against the purchaser where a deed was afterwards made. *Parker v. Kelly*, 10 Smedes & M. 184.

And where a senior mortgagee takes a convey-

ance from the mortgagor to save costs, a sale at law of the same property under a junior judgment will be enjoined where the holder of the same claims that the lien of the former had been lost by merger, and the junior judgment creditor's lien will be restricted to the equity of redemption. *Richardson v. Hockenbush*, 85 Ill. 124.

And a party advancing money to a corporation to acquire title to land, and taking the title in himself for security of the money advanced, and levying upon that land for his debt, is entitled to an injunction against the payment of the proceeds to the holder of a senior execution against the company. *Gist v. Davis*, 2 Hill, Eq. 385, 20 Am. Dec. 89.

In *Mallory v. Dauber*, 58 Ky. 239, where a purchaser of land acquired a mortgage of \$15,000, for \$6,000, on the land and had it released, and obtained an injunction against a sale on execution which was inferior to the mortgage, he was only entitled to a lien of \$6,000 as against the judgment. The injunction should not have been granted, as Ky. Civil Code, § 285, provides that an injunction can only be granted against a judgment in the court rendering judgment; but having failed to dissolve the injunction, the supreme court will not reverse for that error alone, in order to allow a recovery of nominal damages.

And a sale under attachment will be enjoined at the instance of a party claiming to have a prior mortgage on the same land, and that said mortgage had been released without authority, and that the release was void, as it would be a cloud upon his title and his rights depend upon facts which must be established by evidence outside of the record. *Ivory v. Kempner*, 2 Tex. Civ. App. 474.

Under N. C. act 1893, chap. 6, providing for an action against a person claiming an interest in real property adverse to plaintiff, to determine the claims, an injunction against subsequent judgment creditors selling the land will be granted at the instance of a mortgagee, where the damages by a sale of part of the land by execution and the effect upon the sale under the mortgage would be irreparable. *British & American Mortg. Co. v. Long*, 118 N. C. 123.

And an injunction will be granted restraining the defendant from disposing of machinery, which a creditor bought on execution sale against the mortgagor, where an appeal is taken from a judgment holding it liable to execution sale, and the complainant is foreclosing a mortgage on a factory including the machinery. *Penn Mut. L. Ins. Co. v. Semple*, 38 N. J. Eq. 314.

A mortgagee will be restrained from selling the equity of redemption of mortgaged premises under judgments in satisfaction of the mortgage deed, as it would deter outside debtors from purchasing, by the confusion it would occasion as to the effect of the amount of the bid upon the amount of encumbrances. *Van Mater v. Conover*, 18 N. J. Eq. 38; *Severns v. Woolston*, 4 N. J. Eq. 220.

But, an injunction should not be granted to the owners of property against a sale on execution of boilers separate from the land, which are claimed to be fixtures, where the judgment was with vendor's privilege on the boilers, and the lien on the boilers had been determined in a judgment, and they can be removed without injury to the building. *Lapene v. McCann*, 28 La. Ann. 749.

And an injunction will not be granted against an execution sale, where plaintiffs in the injunction had canceled their mortgage on the property, and were not the owners of the property, for if their mortgage still continued their lien remained, and if they had no lien the sale could not injure them. *Smith v. Hoey*, 28 La. Ann. 95.

And a mortgagee will not be enjoined at the instance of the debtor from selling property of the debtor other than that covered by the mortgage, 30 L. R. A.

on an execution issued on the judgment. *Cobb v. Hynes*, 4 La. Ann. 150.

And an injunction will not be granted against an execution in favor of persons who have advanced the purchase money for property, unless upon a repayment of such money. *Griesinger v. Booth*, 13 Lanc. L. Rev. 259.

In Louisiana a party having a mortgage or privilege against the property cannot obtain an injunction against an execution sale, as La. Code Pr. art. 300, provides that the sheriff may be enjoined from paying to the seizing creditors the proceeds of the property seized. *Gill v. Her Husband*, 10 Rob. (La.) 28; *Vanbille v. Her Husband*, 5 Rob. (La.) 496; *Marrot v. Ferriere*, 18 La. Ann. 665.

And privileges or liens on property seized do not entitle an injunction against the sale of the property, as the sale will be made subject to all privileges. *Hebert v. Babin*, 6 Mart. N. S. 614.

And the same was held under La. Code Pr. Arts. 679-683, requiring that property exposed to sale by the sheriff shall be sold subject to all privileges and mortgages. *Casson v. Louisiana State Bank*, 7 Mart. N. S. 377; *Bludworth v. Lambeth*, 9 Rob. (La.) 256.

And a mortgagee is not entitled to an injunction, on the ground that an execution sale of the mortgaged property is being made irregularly without being subdivided, as he has a remedy by third opposition to claim the proceeds of sale. *James v. Breaux*, 26 La. Ann. 245.

In *Citizens' Bank v. Bailey*, 28 La. Ann. 771, it was held that a prior mortgagee would not be affected by a sale under a junior judgment. The statement of the case is that the sale was enjoined at the instance of the bank holding a prior mortgage, and that the judgment was affirmed; but it evidently is a mistake in the statement and from the opinion it must be taken that the case was affirmed after the injunction was refused.

The holder of a deed intended to be a mortgage is not entitled to an injunction against an execution sale against his grantor on the ground that the same is not a lien against him, for if so it is not a cloud upon his title, and the purchaser can acquire only the interest of the judgment debtor. *Purdy v. Irwin*, 18 Cal. 860.

And a mortgagee or grantee, who is liable for contribution to pay off a prior judgment on the land, is not entitled to an injunction against the sale of his property on an execution against his grantor, until the amount to be contributed by the defendant and other purchasers shall have been ascertained. *Massie v. Wilson*, 16 Iowa, 390.

And a mortgagee is not entitled to enjoin a sale on an execution under a junior judgment on the ground that the holder of the same claimed that it was prior to the mortgage; and the *dictum* in *Ruthven Bros. v. Mast*, *infra*, refusing an injunction because it was not alleged that the owners of the judgment claimed that they had any right to sell except subject to the prior lien of the mortgagee, does not affect this case. *Ramsdell v. Tama Water-Power Co.*, 84 Iowa, 484.

In *Ruthven Bros. v. Mast*, 55 Iowa, 715, a party acquiring a prior mortgage was refused an injunction against an execution sale against the mortgagor on the ground that the creditor had a right to sell the interest of the mortgagor in the property subject to the mortgage, and the complainants' lien would not be affected, and the complainants are not entitled to a decree requiring the sale to be made subject to their rights, as they do not allege that the creditors claimed to sell in any other way. See preceding case.

And one who is a party to a suit of foreclosure and a junior lienholder cannot enjoin a sale where he claims a former lien was satisfied, as he has a remedy by motion in the same court. *Ketchum v. Crippen*, 37 Cal. 223.

And a purchaser of the equity of redemption with notice, subject to a mortgage fraudulent as to creditors, is not entitled to an injunction against the execution of a judgment subsequently obtained against his grantor. *Farmers' Bank v. Douglass*, 11 Smodes & M. 469.

As to rights of purchaser under a mortgage foreclosure, see *supra*, XIII. d; *Austin v. Bowman*; *Weed v. Bowman*; *Sharpe v. Tatnall*; and *Reagan v. Van Evans*, *infra*.

c. Attachment creditors.

A party having a prior attachment is entitled to an injunction against a sale under a subsequent attachment or judgment that would deprive them of their lien. *Porter v. Pico*, 55 Cal. 165; *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635; *Erskine v. Staley*, 12 Leigh, 406; *Moore v. Holt*, 10 Gratt. 284.

And attaching creditors are entitled to an injunction against a sale under a subsequent execution until the priorities are determined. *Northfield Knife Co. v. Shapleigh*, *supra*.

Illinois attachment act, § 39, providing that the court may require the proceeds obtained in attachment to be paid into court, and to make all orders concerning the same which it shall deem just, changes the rule in that state that an attaching creditor has no right to obtain an injunction before judgment, and the proceeds of execution sales attached will be retained to try the priority of attachment claims over judgment liens. *Kuh, N. & F. Co. v. Oppenheim* (Ill.) 9 Nat. Corp. Rep. 187, 27 Chicago Legal News, 61.

A wife is entitled to an injunction against a sale of her property on attachment against her husband, where a bond was given by the husband which dissolved the attachment, and such sale would be a cloud on her title. *O'Hare v. Downing*, 130 Mass. 16.

But a sale under attachment of the wife's land for the debt of her husband will not be enjoined where it would not cloud her title, and extraneous evidence would not be necessary. *Rea v. Longstreet*, 54 Ala. 291.

And a sale under attachment will not be enjoined at the instance of a junior attaching creditor in the absence of some grounds of equitable relief. *Domee v. Stearns*, 30 Cal. 114.

d. Judgment creditors.

An injunction will be granted in favor of a judgment creditor or a purchaser thereunder, against a sale by another judgment creditor, where there is danger of the lien being impaired owing to a conflict of liens, or controversy as to the property affected, or where complainant's lien is superior. But if the lien of the judgment creditor will not be affected, or if his lien is inferior, or if his lien attaches to the proceeds of the sale, he will not be entitled to an injunction.

And so a sheriff's deed will be canceled and the holders enjoined from asserting title under it, at the instance of a party holding title that is superior under another sheriff's deed. *Lick v. Ray*, 43 Cal. 52.

The purchaser under a foreclosure sale of a mortgage which is prior to a judgment is entitled to have an execution levy under the judgment enjoined where there was no fraud. *Austin v. Bowman*, 31 Iowa, 277; *Weed v. Bowman*, 33 Iowa, 762.

And equity will restrain a sale of land on execution where such sale creates a cloud upon the title, although no title would pass thereby, where the owner purchased under a mortgage foreclosure, which sale extinguished the lien of the defendants in the equity suit. *Sharpe v. Tatnall*, 5 Del. Ch. 302.

And a purchaser at an execution sale under several judgments may have an injunction against a second execution levy under one of the same

judgments, which was fraudulent. *Ragland v. Cantrell*, 49 Ala. 294.

And in a similar case, where the holders of the executions agreed that the property should be sold at that sale and the priority of liens determined against the funds, an injunction was granted against other sales on such execution by parties to such agreement. *Reilly v. Miami Exporting Co.* 5 Ohio, 333.

And a cloud on title will be prevented by enjoining an execution sale, where plaintiff is the owner and in possession of land under a sale under attachment which is a prior lien over defendant's judgment. *Porter v. Pico*, 55 Cal. 165.

And will be granted in favor of a purchaser under a sale to enforce a prior vendor's lien, who is not a party to a subsequent suit of foreclosure; but this will not prevent the right to enforce the lien against the equity of redemption if the property is of sufficient value. *Reagan v. Van Evans*, 2 Tex. Civ. App. 35.

Where there is a conflict of liens of the executions arising from various levies, an injunction will be granted against a sale until the rights of all the parties can be adjusted, and priority is determined, in order to prevent a sacrifice of the property. *Albright v. Albright*, 33 N. C. 238.

So, an injunction will be granted in favor of a junior execution, against the removal of property under a prior execution, where no sale is made thereunder, in order to protect his lien. *Edgar v. Clevenger*, 2 N. J. Eq. 258.

And where it is uncertain whether the holder of an execution would take nothing or one fourth of the whole property, and there was an agreement to allow the property to be sold and paid off in a certain manner, which is violated, a sale on the judgment may be enjoined at the instance of another judgment creditor. *Phillips v. Walker*, 43 Ga. 55.

And an injunction will be granted against an execution sale of personal property at the instance of holders of senior executions where a levy on the latter could not be made because the constable holding the property refused to surrender the same, as a court of chancery will remove the obstacle. *Carrish v. Saunders*, 3 Humph. 432.

Where two judgments were rendered the same day, a purchaser under one may enjoin a subsequent sale under the other, where the holder of the latter lost his mechanic's privilege by permitting the sale without appraisal, under La. Rev. Code, §§ 3223, 3238. *Hoye v. Peterman*, 23 La. Ann. 290.

And an execution sale under a junior judgment will be enjoined at the instance of a purchaser of the land under a senior judgment, unless the holder of the junior judgment tenders into court the amount paid by the purchaser. *Barnes v. Dodge*, 7 Gill, 109.

And a purchaser under a judgment may enjoin a subsequent execution sale on a prior dormant judgment revived after his purchase on the ground of clouding his title. *Norton v. Beaver*, 5 Ohio, 178.

But an injunction will not be granted in behalf of a lien creditor levying on personalty, where the property is subsequently seized under a levy of another lien creditor, as the common-law remedy to obtain possession is ample, and it will be presumed that the court will protect the respective priority of the lien. *Endres v. Lloyd*, 53 Ga. 547.

The owner of a *fi. fa.*, where a claim has been interposed against his levy, is not entitled to an injunction against a sale under a junior levy, on the ground that it would cloud his title; and the statement in the bill that he is too poor to bid and that the purchaser would get a good title free from complainant's lien, shows that the sale should not be enjoined, for, if complainant's judgment is a lien on the land, it is a lien on the fund. *Sanders v. Foster*, 63 Ga. 232.

A sale of land under execution will not be enjoined at the instance of another judgment creditor where the title is in dispute, where both creditors stand *in pari statu*, and complainant has no superior right, although he alleges that he is unable to redeem from the other judgment for fear that it may subsequently be held void. *Union Iron Works v. Bassick Min. Co.* 10 Colo. 24.

Where attorneys having a lien in a decree for attorneys' fees, bought the land on an execution against the purchaser under the decree and obtained possession and sold their title, and their vendee brought a suit to enjoin the taking of possession under the decree, the demurrer to the petition should have been sustained, as the equity of the purchaser could not be subject to levy, and the lien of the attorneys could be worked out in the old suit, but the demurrer having been overruled the purchaser under the decree was not permitted to obtain possession until he discharged the lien debts of which the complainant was the owner. *Whitaker v. Cornett*, 14 Ky. L. Rep. 87.

An injunction will not be granted at the instance of the execution creditors against a sale of land by the sheriff holding several executions returnable to the same court, as the liens can be determined on distribution of the funds. *Wiley v. Bridgman*, 1 Head, 68.

Creditors having a priority of lien have no right to an injunction against a sale under a junior *f. fa.* where it would not affect their prior lien. *Union Bank v. Poulmey*, 8 Gill & J. 324.

The right to require sales under execution to be made on certain tracts or pieces of property so as to protect the priority of liens of each creditor will be protected by injunction. But where the injunction would prejudice the rights of the seizing creditor, or where there is adequate remedy at law, an injunction will not be granted.

Where a judgment debtor sells or mortgages his lands at different times to different parties, the prior purchasers are entitled to an injunction restraining an execution sale against the several tracts except according to the priorities and respective rights of each. But a purchaser under a mortgage foreclosure sale has not the same equity that the mortgagee had,—especially where the mortgaged property was more than sufficient to pay the mortgage debt; and, where the equity of redemption in such place was not sold until after other pieces were sold to others, such equity should be subjected to the general lien of a judgment against all before other tracts are sold. *Moore v. Trimmer*, 32 B. C. 511.

And if a creditor has a lien on two funds, and another creditor has a lien on but one of them, the former will be compelled to proceed against that fund on which the other has no lien. *Compton v. Pitman*, 49 Ga. 612.

But a junior encumbrancer who attempts to enjoin a sale before other property of the debtor is sold, and does not procure an appeal, but allows the sale to be made, cannot obtain relief in equity. *Baine v. Williams*, 10 Smodes & M. 112.

And the right to require a creditor having a lien on some land which has been sold by the debtor, to resort to the unsold part before selling the other, will not be extended so as to interfere with his lien or cause unreasonable delay. *Francis v. Herren*, 101 N. C. 497.

Or where the security is doubtful. *Evertson v. Booth*, 19 Johns. 486.

And a junior judgment creditor purchasing land under his judgment is not entitled to an injunction against an execution sale of the same on a senior execution; on the ground that a prior levy had been made on other land on the senior execution, when such prior levy had been released and it is not shown that the debtor owned such land or

had any other property subject to execution than that seized. *Wood v. Rice*, 68 Ind. 320.

e. Mechanic's Lien.

* Mechanic's liens will be protected by enjoining sales under other judgments where the mechanic's lien is superior and in danger of being impaired by such sale, and will be protected by refusing an injunction against a sale under the lien, where such lien has priority in time and in equity, or there is another remedy at law. But an injunction will be granted against a sale under a mechanic's lien where the same has been lost, or proper parties were not made in the suit.

So, where a mechanic's lien is settled by taking the property, assuming mortgages, and releasing the lien, an execution on a judgment in an action pending at the time of a settlement and inferior to the mechanic's lien, will be enjoined, where the holder of the same is attempting to sell the property, asserting that the conveyance made to the holder of the mechanic's lien was subject to his judgment. *Bowling v. Garrett*, 49 Kan. 504.

And a judgment establishing a mechanic's lien against land and the building, which has been foreclosed in the interest of mortgagees, and to give their claim superiority, will be enjoined at the instance of another mechanic's lien claimant having a judgment against the building or a surplus which might arise out of the land, where a sale under 1 N. J. Rev. p. 73, § 24, would make all the liens *pro rata* and on the sale the priority of complainant's lien would be destroyed. *Hazelhurst v. Sea Isle City Hotel Co.* (N. J.), 25 Atl. Rep. 201.

And mechanic's lien men are entitled to an injunction to restrain a junior judgment creditor from removing the building upon which they have a lien, where the owner is insolvent and security is insufficient. *Barber v. Reynolds*, 33 Cal. 497.

And a mechanic's lien was protected by refusing an injunction against a sale thereunder, where the administrator of the debtor urged that other claims pending against the estate would depreciate the sale. *Robinson v. Thompson*, 30 Ga. 933.

An execution and sale under a mechanic's lien against the owner will not be enjoined at the instance of a junior creditor having a lien on the interest of the lessee. *Winn v. Henderson*, 63 Ga. 365.

And an injunction was refused against a sale under a mechanic's lien, although it was claimed that the owner of the property was not a party to the suit, but Mont. Comp. Stat. 5th div. § 1379, provided that in such cases the owner would not be bound by such judgment. *McCormick v. Riddle*, 10 Mont. 467.

But, in *Quimby v. Slipper*, 7 Wash. 475, where an assignment for creditors was made prior to the filing of a suit for a mechanic's lien, and the assignee was not a party to such suit, an injunction was granted against the sale.

And the same was held where the owner of property had no notice of proceedings under a mechanic's lien against a lessee, and did not contract for improvements. *Houston's Appeal*, 6 W. N. C. 162.

A landlord may obtain an injunction against a sale of his property under a mechanic's lien filed against his tenant. *Ibid.*

A sale under a mechanic's lien will be enjoined at the instance of the owner not a party to the judgment. *Gates v. Ballou*, 56 Iowa, 741.

Or where the owner of the lien did not deny the allegations of the bill as to payment by the debtor. *Gates v. Ballou*, 54 Iowa, 435.

A mechanic losing his privilege by failure to comply with La. Rev. Code, §§ 3228, 3229, as to appraisalment, will be enjoined from enforcing a sale

at the instance of a purchaser. *Hoy v. Peterman*, 23 La. Ann. 280.

t. Landlord's Lien.

An injunction will be granted to protect a landlord's lien against an execution sale of the same property, where there is danger of the lien being lost.

Landlords' liens will be protected by enjoining distribution of proceeds of the property attached in a subordinate court, where such lien can only be protected in equity and is in danger of being lost, and the statutory remedy of attachment is only cumulative. *Carmen v. Alabama Nat. Bank*, 101 Ala. 189.

And an injunction against an execution sale is a proper remedy, where a landlord has a lien by distress warrant issued subsequent to the execution, but which has a priority. *Click v. Stewart*, 36 Tex. 280.

And where a landlord had a claim on part of the property, and a mortgage on the balance, an injunction was granted to prevent an execution sale of the property on a judgment against the tenant and mortgagor, who had only an equitable interest in the property, as an equitable estate in personal property cannot be sold under a *f. fa.* *Martin v. Jewell*, 37 Md. 580.

XIV. In favor of general creditors.

Where the judgment is not attacked, a creditor not having a lien cannot obtain an injunction against a sale under an execution.

So, creditors of an insolvent corporation cannot enjoin an execution sale on a judgment confessed, preferring a creditor, on the ground that property would be sold to more advantage by a receiver. *Fairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.* 161 Pa. 17.

And a factor holding a bill of lading without a privilege or special instruction cannot obtain an injunction to prevent an execution sale against the shipper, as he has a remedy against the proceeds. *Chaffraix v. Harper*, 26 La. Ann. 23.

And a building contractor who fails to record his contract is not entitled to an injunction against a sale under mortgage foreclosure, as he has a remedy by third opposition if he had a privilege. *Van Loan v. Heffner*, 30 La. Ann. 1213.

A mere ordinary creditor of an estate is not entitled to enjoin a sale under a judgment obtained against some of the heirs by others on a mortgage of their interest in the estate, as the remedy is by an action of the creditor against each of the heirs to the extent of assets received. *White v. Blanchard*, 19 La. Ann. 69.

General creditors of a firm are not entitled to an injunction to prevent a sale of firm property. *Young v. Frier*, 9 N. J. Eq. 465; *Mittnacht v. Smith*, 17 N. J. Eq. 259, 38 Am. Dec. 233; *Harvey v. First Nat. Bank*, 53 N. J. Eq. 697; *Greenwood v. Bradhead*, 8 Barb. 503. See *supra*, VII.

For Attachment creditors, see *supra*, XIII. c.

XV. Ejectment cases.

The possession of premises will generally be protected by injunction, where complainant was not a party or a privy to the action of ejectment, or had a superior equitable title, although there are some exceptions to this rule. The cases denying an injunction do so on the ground that complainant is not affected by the judgment in ejectment.

An injunction will be granted to prevent dispossession in ejectment where complainant was not a party or privy to such suit. *Charter Oak L. Ins. Co. v. Cummings*, 13 Mo. App. 76; *Banks v. Parker*, 80 N. C. 157; *Stewart v. Pace*, 30 Ark. 594; *Moulton v. McDermott*, 35 Cal. 600.

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Notwithstanding a remedy of damages against the sheriff. *Williamson v. Russell*, 18 W. Va. 612.

And the execution of a judgment in ejectment will be enjoined at the instance of the beneficial owner in possession, who had no notice of the suit and was not a party, as Mo. Rev. Stat. § 2247, provides that to entitle a recovery in ejectment the plaintiff must show that the defendant was in possession. *Charter Oak L. Ins. Co. v. Cummings*, 90 Mo. 267.

So, a purchaser under a title bond complying with his contract is entitled to an injunction against a judgment in ejectment in favor of a purchaser from an assignee for creditors of his vendor. *Stockton v. Briggs*, 5 Jones, Eq. 309.

And a writ of possession in ejectment against the husband will be restrained at the instance of his wife, not a party to the action, who claims the land in her own right. *Bushong v. Rector*, 32 W. Va. 311.

And a judgment in ejectment will be enjoined at the instance of a third party where the plaintiff in execution had purchased at a judicial sale with notice of superior equity in the third party. *Guthall v. Salsberry*, *Wright* (Ohio) 127.

The purchaser of a house overlapping another lot 2 feet, which was not known at the time of the purchase, is entitled to an injunction against executing a judgment in ejectment for the 2 feet of ground, until his equities and right to the land are determined. *Anglesy v. Colgan*, 44 N. J. Eq. 208.

And a judgment in ejectment will be enjoined at the suit of the defendant holding the equitable title, on a bill for specific performance. *Simms v. Guthrie*, 18 U. S. 9 Cranch, 19, 3 L. ed. 642.

A judgment dismissing a bill of complaint for an injunction as not a cloud upon title will not be *res judicata* in a subsequent action of ejectment between the parties and their privies. *Fulton v. Hanlow*, 20 Cal. 484.

But in *Jones v. Chiles*, 3 T. B. Mon. 341, it was held that if a writ of possession is sued out against complainant or his tenant when they have the superior title, and are not parties to the judgment, an injunction will not be granted, as the writ could not affect him.

And in *Tevis v. Ellis*, 25 Cal. 515, it was held that there is no occasion to restrain a writ of possession running against parties who are not in possession.

And Pa. act June 16, 1833, providing that the writ shall be stayed by giving bond to appear and plead to any action of ejectment, prevents an injunction to protect the party in possession against a judgment in ejectment in favor of a purchaser at execution sale. *Brady v. Weightman*, 8 Phila. 322.

After judgment in ejectment and notice of appeal, an injunction to restrain further proceedings by plaintiff until the determination of a partition suit, in which plaintiff was not a party, will not be granted. *Hammers v. Hanrick*, 60 Tex. 412.

The cases in regard to injunctions to protect an occupying claimant, incidental to ejectment proceedings, are not included in this note, being regarded as special proceedings in behalf of the occupying claimant.

XVI. Summary proceedings in forcible entry and detainer.

As a general rule an injunction will not be granted to prevent dispossession by summary proceedings, unless the complainant has no other remedy, or he was not made a party to the summary proceedings; but as to this latter exception, the cases in New York refuse an injunction under the peculiar statutes of that state except in a few cases of fraud or irreparable injury, or where the complainant would be without remedy.

A suit to reform a deed is not a ground for enjoining a judgment in forcible detainer, as the

question of title of land is not in controversy. *Murphree v. Bishop*, 79 Ala. 404.

An injunction against proceedings in an action of unlawful detainer, and to set aside an administrator's sale of land as a cloud on complainant's title as heirs on the ground of fraud and collusion, will not be granted where the party is not deceived or overreached and the fraud is not stated, and the purchaser is not insolvent, and there is a remedy at law. *Cobb v. Garner* (Ala.) 17 So. Rep. 47.

And a judgment for possession will not be restrained, notwithstanding complainant holds the legal title and the adverse party is insolvent. *Hamilton v. Adams*, 15 Ala. 598, 50 Am. Dec. 150.

And that the defendant intends to appeal, when no appeal has been taken, will not entitle him to an injunction. *Curd v. Farrar*, 47 Iowa, 504.

And an injunction will not be granted where the law directs the judgment to be executed notwithstanding an appeal, as an injunction will not be granted to take the place of an appeal. But it was said: "This decision must not be understood to deprive the citizen of the protection of the court, in any case where an interlocutory judgment works a grievance irreparable." *State v. Pitot*, 11 Mart. N. S. 535.

And where a tenant was turned out, by writ of restitution and a new tenant placed on the premises, the latter is not entitled to an injunction against an order of restitution obtained by the first tenant on a reversal of the case, as the second tenant is only an interloper. *Boinay v. Coats*, 17 Mich. 411.

And a remedy by supersedeas, after a tender of rent due and costs, will prevent an injunction against a judgment for possession by the landlord. *Flanneken v. Wright*, 64 Miss. 217.

And in an action to quiet title an injunction was refused against forcible proceedings against a tenant, where it was claimed that by fraud an improper description was inserted in the proceedings before the justice, but it was not shown how or when the substitution was made, and there is a remedy at law; besides it must be shown that there was a good defense, and that he was prevented from using the same by fraud, accident, or mistake, and was not negligent. *Brick v. Burr*, 47 N. J. Eq. 189.

And an injunction will not be granted against a judgment for writ of dispossession for failure to pay rent, as the payment of rent would prevent the necessity of asking for an injunction. *Hartnack v. James*, 8 Phila. 317.

But where the justice in a proceeding to dispossess tenants refused a recognizance to try title, the tenants were granted an injunction until the case was determined on certiorari. *Snyder v. Pullinger*, 3 W. N. C. 468.

And a person in quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process, growing out of litigation to which he was not a party. *Deans v. Bowden*, 20 Fla. 905; *Goodnough v. Shepard*, 23 Ill. 81.

An injunction restraining a writ of restitution in an action of forcible detainer will protect the possession, although the writ had been executed before service of injunction, where the possession had been regained by the petitioner in injunction. *Hillebrand v. Barton*, 89 Tex. 599.

A judgment in forcible entry and detainer against a railroad company for the road was enjoined, where, pending the action, an agreement was made by the parties that the plaintiff was entitled to so much money under a contract for the possession of the road until paid, and which sum was tendered after the judgment and before the cause was affirmed in the Supreme Court of the United States, although no fraud, accident, or mistake was shown, and after the agreement the railroad sold the same to another party who was not then a party to the suit of forcible entry and detainer. *Johnson v. St. Louis, L. M. & S. R. Co.* 141 U. S. 903 35 L. ed. 975.

The rule in New York.

Inasmuch as the New York cases depend entirely on the construction of the statutes and Code of Civil Procedure, these sections are given, substantially, and the dates of the decisions construing the same.

2 N. Y. Rev. Stat. 516, § 47, provided that the supreme court may award a certiorari for the purpose of examining any adjudication made on any application hereby authorized; but the proceedings on any such application shall not be stayed or suspended by such writ of certiorari, or any other writ or order of any court or officer.

But that statute was changed in 1880 by the present N. Y. Code Civ. Proc. § 2265, providing for a stay in summary proceedings only by, (1) an order on appeal; (2) an injunction order granted in an action against the petitioner; and such injunction shall not be granted before the final order in the special proceeding, except where an injunction would be granted in ejectment, brought by petitioner and upon like terms, or after the final order, —except in a case where an injunction would be granted to stay the execution of the final judgment in such action.

N. Y. Code Proc. § 219, provides that an injunction shall be granted where the plaintiff is entitled to the relief demanded, and such relief consists in preventing acts injurious to plaintiff. This is noted in the Code of 1867-8 as amended in 1849. This section is similar to N. Y. Code Civ. Proc. § 606 (1877), using the word "judgment" instead of "relief," and which is the same as the present code.

Under these several sections the rule in New York is, that an injunction will not be granted to prevent dispossession in summary proceedings, except in cases of fraud, surprise, or undue advantage, or where the defense is an equitable one over which the justice has no jurisdiction, the reasons being that the tenant can make a defense to the proceeding, or had a remedy by certiorari under the former act, or by appeal under the present code. *Smith v. Moffat*, 1 Barb. 65 (1847); *Hyatt v. Burr*, 8 How. Pr. 168 (1853); *Bokee v. Hamersley*, 16 How. Pr. 461 (1858); *Dulgan v. Hogan*, 16 How. Pr. 164, 1 Bosw. 645 (1858); *Marks v. Wilson*, 11 Abb. Pr. 87 (1860); *Seeback v. McDonald*, 11 Abb. Pr. 95, 21 How. Pr. 224 (1860); *Ward v. Kelsey*, 14 Abb. Pr. 106 (1861); *Roberts v. Mathews*, 18 Abb. Pr. 199 (1864); *Bean v. Pettingill*, 3 Abb. Pr. N. S. 58 (1866), affirmed 7 Robt. 7; *McGune v. Palmer*, 5 Robt. 607 (1866); *Aaron v. Baum*, 37 How. Pr. 237, 7 Robt. 849 (1868); *Marry v. James*, 37 How. Pr. 52, 2 Daly, 437 (1869); *McIntyre v. Hernandez*, 7 Abb. Pr. N. S. 214 (1869); *Sherman v. Wright*, 49 N. Y. 227 (1872); *Rapp v. Williams*, 1 Hun, 716 (1874); *Armstrong v. Cummings*, 20 Hun, 313 (1880); *Jessurun v. Mackie*, 24 Hun, 624 (1880); *Knox v. McDonald*, 25 Hun, 268 (1881); *Koster v. Van Schaick*, 11 Daly, 205 (1882); *Hausauer v. Dahlman*, 73 Hun, 607 (1892).

So, an injunction will be granted on the ground of fraud, surprise, or equitable defense. *Cure v. Crawford*, 5 How. Pr. 293, Code Rep. N. S. 18 (1860); *Forrester v. Wilson*, 1 Duer, 684 (1862); *Vallotton v. Seignett*, 2 Abb. Pr. 121 (1865); *Griffith v. Brown*, 23 How. Pr. 4 (1864); *Graham v. James*, 7 Robt. 468 (1868); *Crawford v. Kastner*, 26 Hun, 440 (1882).

And 2 N. Y. Rev. Stat. 516, § 47, is not repealed by N. Y. Code Proc. § 219. *Dulgan v. Hogan*; *Hyatt v. Burr*; *McGune v. Palmer*; and *Marks v. Wilson*, —*supra*. *Contra*, *Cure v. Crawford*, *infra*.

And N. Y. Code Civ. Proc. § 2265, is only a re-enactment of 2 N. Y. Rev. Stat. 516, § 47, instead of certiorari providing a remedy by appeal, and subdiv. 2

only provides an injunction as in ejectment. *Koster v. Van Schaick*, and *Knox v. McDonald*, *supra*.

So, the remedy by certiorari, under 2 N. Y. Rev. Stat. 516, § 47, prevents an injunction. *Armstrong v. Cummings*; *McIntyre v. Hernandez*; *Ward v. Kelsey*; *Marks v. Wilson*; *Duigan v. Hogan*; *Smith v. Moffat*; *Hyatt v. Burr*; and *Bokee v. Hamersley*,—*supra*.

And the remedy by appeal, under N. Y. Code Civ. Proc. § 2285, will prevent injunction against dispossession under summary proceedings. *Jessurun v. Mackie*, and *Koster v. Van Schaick*, *supra*.

And the remedy by writ of prohibition for want of jurisdiction prevents an injunction. *Ward v. Kelsey*, *supra*.

And an injunction will not be granted on the ground that repairs were not made. *Duigan v. Hogan*, *supra*.

Or that the tenant was entitled to pay for his fixtures. *Smith v. Moffat*, *supra*.

And the landlord cannot obtain an injunction against the dispossession of his tenant by another party, where such landlord was not a party to such proceedings. *Aaron v. Baum*, and *Marry v. James*, *supra*.

Or, where complainant is an assignee for creditors and has not accepted the terms of the lease, an injunction will not be granted. *Bokee v. Hamersley*, *supra*.

And an injunction will not be granted after the party has been dispossessed. *Roberts v. Mathews*, and *Seebach v. McDonald*, *supra*.

Or, where the matters set up in the injunction suit have been fully tried in the summary proceedings. *McIntyre v. Hernandez*; *Knox v. McDonald*; and *Seebach v. McDonald*,—*supra*.

An injunction will not be granted on the ground that complainant desired to use the evidence of the city judge presiding in summary proceedings. *Marry v. James*, *supra*.

And will not be granted because of defects in preliminary papers. *Bokee v. Hamersley*, and *Armstrong v. Cummings*, *supra*.

Or that a guardian *ad litem* was not appointed. *Jessurun v. Mackie*, *supra*.

And that plaintiff is in possession under a parol lease will not justify an injunction, as such is a defense in the summary proceedings. *McGuire v. Palmer*, *supra*.

And the same applies to a defense that the lease was extended. *Rapp v. Williams*; *Knox v. McDonald*; *Hausauer v. Dahlman*; and *Bean v. Pettigill*,—*supra*. But see *Graham v. James*, *infra*, and cases following, as to suit for specific performance.

In *Sherman v. Wright*, 49 N. Y. 227 (1873), which was an injunction to prevent proceedings by a landlord to remove a tenant, it was held that 2 N. Y. Rev. Stat. 516, § 47, prohibited staying proceedings by any writ or order of any court or officer, and where there is no charge of fraud or want of jurisdiction as in other cases, an injunction will not be granted. In this case, which was a suit for specific performance, complainant claimed a lease made by one assuming to act as guardian, but conceded that his title was defective, and he did not show that it was to the best interest of the infant that the contract should be specifically enforced, and his legal right must be determined in the proceedings to remove him.

But in *Graham v. James*, 7 Robt. 468 (1868), it was held that a tenant could not defend an action of summary proceedings on the equitable ground that he was entitled to a new lease, and on such claim, asserted in an action for specific performance, an injunction was granted against removal of the tenant by summary proceedings. But see *Rapp v. Williams*, *supra*, and cases following, as to defense simply that the lease was extended.

And in *Crawford v. Kastner*, 26 Hun, 440 (1882), and 30 L. R. A.

injunction was granted against dispossession of a tenant, where he brought suit for specific performance of a lease for a term of four years with the privilege of six years more, as equitable defenses are not available before a justice, and the question of the right of extension was an issue of law which the justice was not competent to determine for want of jurisdiction. (The provisions of the code are not referred to.)

And under 2 N. Y. Rev. Stat. 512, art. 2, providing for forfeiture and summary dispossession on desertion of premises by the tenant, and allowing no defense if any rent is unpaid, a tenant, who has been compelled to abandon the premises owing to its dilapidated condition and the failure of the landlord to keep his covenant to repair, may obtain an injunction against such judgment in an action of specific performance to compel the landlord to repair, and to set off the damages for breach of such covenant against the rent; and 2 N. Y. Rev. Stat. 47-49, relating to certiorari, does not give an adequate remedy in a case of this kind. *Valloton v. Beignett*, 2 Abb. Pr. 121 (1855).

Where time was not given the tenant to resist application for judgment of ejectment under summary proceedings by the officer delaying service of summons until too late to prevent issuance of a warrant, an injunction was granted where diligence was shown, and this on the ground of fraud or surprise. *Griffith v. Brown*, 28 How. Pr. 4 (1864).

In *Cure v. Crawford*, 5 How. Pr. 238, Code Rep. N. S. 18, the same was substantially held to be the rule under similar circumstances. But this case also held that N. Y. Code Proc. § 219, providing for an injunction in any case which would produce injury to the plaintiff, repeals 2 N. Y. Rev. Stat. 516, § 47, as to this effect of the code section. This case is in direct conflict with the other New York cases—*Duigan v. Hogan*, *supra*, and cases following.

In *Forrester v. Wilson*, 1 Duer, 624 (1852), an injunction was granted against a warrant of dispossession on the ground of surprise and equitable set-off, on the tenant tendering all the rent due, and it was granted on the ground that the magistrate by the issuing of the warrant was *functus officio*, and that the plaintiff had no other remedy.

English cases of landlord and tenant.

Where a landlord neglected to defend in ejectment and his tenant attorned to the plaintiff in that judgment, an injunction was granted in favor of the landlord to prevent his former tenant from setting up his lease from his former landlord as a defense in an action of ejectment to be brought by his landlord in order to prevent a recovery of possession. *Baker v. Mellish*, 10 Ves. Jr. 544.

In *Beasley v. Darcy*, 2 Sch. & Lef. 408, note, an injunction was granted against a judgment in ejectment where the defendant brought an action of account and had an offset against the rent, although the rent had not been tendered under 4 Geo. I., chap. 5, as the amount was not ascertained.

But in *O'Mahoney v. Dickson*, 2 Sch. & Lef. 400, it was held that after an act of ejectment by the landlord, the tenant cannot bring an action for injunction or to regain possession, and for an accounting without a tender of the rent as required by 4 Geo. I., chap. 5, providing that a bill must be filed in six months, and a tender of the rent made, distinguishing *Beasley v. Darcy*, *supra*, on the ground that in that case it was not a question as to how much rent was due, but a collateral demand nearly equal to the rent which could not be set up in ejectment, but was ground for equitable relief; but in this case the whole question was, What was due for rent?

A waiver of forfeiture on the part of the landlord as to his lessee is not such a waiver to the sub-lessee as will authorize an injunction against a

judgment in ejectment against a sublessee. *Hillier v. Parkinson*, 9 L. J. Ch. 166.

XVII. Jurisdiction of courts.

a. To protect third party.

In the absence of a prohibitory statute it has been generally held that a court of another county or a court of concurrent jurisdiction has the power to enjoin a sale of property upon an execution against a third party, although this is regarded as an exception to the rule that one court should not enjoin proceedings on a judgment of another court. Where the statute prohibiting the exercise of such jurisdiction is mandatory, it must be followed. But in Louisiana where the levy is made in the same parish in which the judgment was rendered, the remedy should be sought in the same court in which judgment was rendered.

A court of concurrent jurisdiction or a court of another county may enjoin a sale of property of a third party, on process against another person. *Pixley v. Huggins*, 15 Cal. 127; *Lawes v. Chinn*, 4 Mart. N. S. 838; *Stroud v. Humble*, 1 La. Ann. 810; *Arenstein v. Weber*, 21 La. Ann. 199; *Hobgood v. Brown*, 2 La. Ann. 828.

Although the plaintiff in the execution does not live in the parish of the injunction suit. *Coleman v. Brown*, 16 La. Ann. 110.

In *Van Ratoliff v. Call*, 72 Tex. 491, it was held that Tex. Rev. Stat. subd. 15, arts. 1198, 2880, providing that suits to enjoin judgments must be in the county where judgment was rendered, and that injunction writs in such cases shall be returnable to the court rendering judgment, does not apply to injunctions to protect the property of a third person. In this case a transcript of the judgment was recorded in the county where the land was situated and was an apparent cloud on the title. It was said that where the execution of the judgment generally is sought to be prevented, or where the writ is granted to stay—that is to stop—the execution of a judgment, the statute is imperative, and is susceptible of but one construction; that is, that the writ should be returned or the suit brought in the county where the judgment was rendered. But the statute does not apply to cases where a levy was made on property of a third party.

But in *George v. Dyer*, 1 Tex. App. Civ. Cas. (White & W.) 780, under the same sections it was held that an injunction against an execution issued from a county court of another county was properly granted by the county court in the county where it is sought to be enforced, but should be returnable to the county from whence the execution issued. This was a suit by a chattel mortgagee.

And a bill filed by a third party for an injunction against the execution of a writ of possession on foreclosure suit issued from another county, which is void by lapse of time because the return day had passed, is not defective in that it is an injunction against the execution of a judgment, but it is an injunction against a trespass by the sheriff and is not an attack on the judgment. *Reagan v. Van Evans*, 2 Tex. Civ. App. 35.

In *Davis v. Clark*, 26 Ind. 426, 39 Am. Dec. 471, it was held that where it is not sought to enjoin the prosecution of an action in the court of common pleas nor the execution of a judgment in that court, nor to determine the validity or enjoin the execution of final process issued thereon, but simply to enjoin the sheriff from selling the lands of the plaintiff under an execution against another party to which it is claimed they are not subject, and to prevent a cloud being thereby cast upon the plaintiff's title, the circuit court has jurisdiction to enjoin a sale on a judgment in the court of common pleas; distinguishing *Indiana & L. R. Co. v. Williams*, 22 Ind. 198, as in that case the suit was one attacking the execution of a judgment and to protect the sale of one kind of property before another kind

had been sold, and was a suit by one of the defendants.

Davis v. Clark, *supra*, was distinguished in *Plunkett v. Black*, 117 Ind. 14, as in the former case it was a cloud on the title of land of a third person not a party to the suit, and it was not a suit to enjoin the judgment or process, but the levy.

An injunction may be granted by one court against an assignee for creditors making a sale under the order of another court of chattels which are mortgaged, and the statute in regard to assignments recognizes the priority of the mortgage lien, as the statute does not impose on the court where the assignment was made exclusive jurisdiction, and the lien will be protected as though it were an execution sale. *Ades v. Levi*, 187 Ind. 506.

In *Davis v. Bonar*, 15 Iowa, 171, it was held that the district court may enjoin an execution sale levied upon real property at the instance of a purchaser, where the execution is issued from the supreme court, where a proper showing is made, although the supreme court is in another county, as the proceedings are not pending in another county. See *Lockwood v. Kitteringham*, *infra*.

But in *Oger v. Daunoy*, 7 Mart. N. S. 656, where the injunction was sought in the same parish from which the execution issued to enjoin the levy on the property of a third person, it was held that, being in the same parish, it would not be enjoined, as the exception to the general rule which allows an injunction against an execution levy in another county is where a necessity exists to prevent an immediate injury and where such relief could not be had in the court issuing the execution, and therefore it was refused; but the court had jurisdiction to retain the case on the prayer on the alternative judgment for the property or its value.

And in *Borne v. Porter*, 4 Rob. (La.) 57, it was held that the district court was without authority to arrest by injunction process issued from the parish court, but the defendants levying under different writs were entitled to a severance of their defense. The case does not show whether the district and parish courts were in the same parish or not, or what was the cause of action in the injunction suit.

In *Lockwood v. Kitteringham*, 42 Iowa, 257, it was held that, to restrain the enforcement of a judgment, the remedy by injunction must be pursued in the county and court where the judgment was rendered, when it is sought to restrain the sale of property of a third person.

In this case the judgment was made a special lien against specific property to enforce a mechanic's lien, and the injunction was to restrain the enforcement of the judgment by special execution and is not like a case under a general execution, where property of a third party is seized, as in such cases the injunction is not against the judgment. See *Davis v. Bonar*, *supra*.

As to injunction from other courts, see *Mallory v. Dauber*, *infra*.

b. Exempt property.

The court of one county may enjoin a sale of exempt property, on an execution issued from another county, but not where the decree is attacked, nor, in Missouri, where there is a simple remedy by statute available in the court rendering judgment.

An injunction may be granted in any county in Kansas where an execution is attempted to be levied upon exempt property. *Naill v. Kansas Farmer's F. Ins. Co.*, 47 Kan. 223.

And the district court of Texas may enjoin a sale on execution of exempt property under a judgment from a justice's court without regard to the amount involved; and having obtained jurisdiction, it is authorized to retain cognizance of the suit for

all necessary purposes. *Stein v. Frieberg*, 64 Tex. 271.

And a county court of Texas may enjoin a sale of exempt property under an execution issued from the district court under Tex. Const. 1876, art. 5, § 16, giving the county court jurisdiction to issue injunctions, and giving concurrent jurisdiction with the district court where the amount in controversy does not exceed \$1,000. *Anderson v. Larremore*, 1 Tex. App. Civ. Cas. (White & W.) § 947.

Where an injunction stays the process of a sale of homestead property and also questions the validity and regularity of the writ, which was specific, the writ of injunction must be returned to the court from which the order of sale issued, and not to the court of any other county granting the injunction. *Seligson v. Collins*, 64 Tex. 314.

But the statute in such a case was held not to apply to an injunction granted in favor of a purchaser of a homestead from the debtor where the judgment was not attacked. *Van Ratscliff v. Call*, 12 Tex. 491.

But where a husband and wife brought a suit to enjoin a decree of foreclosure of a homestead on the ground that the wife was not a party to such decree where she died pending the injunction suit, it was held that the suit to enjoin should have been in the court rendering the decree, and that although the mortgage was void, the homestead right did not vest in the husband, and the injunction was refused. *Bevalk v. Kraemer*, 8 Cal. 66, 68 Am. Dec. 804.

And in Missouri an injunction cannot be issued by one court to prevent a levy on exempt homestead property, on an execution issued from another court, as Mo. Rev. Stat. § 2405, provides that the writ may be set aside or quashed by the court which issued it. *Mellier v. Bartlett*, 39 Mo. 184.

c. Other cases.

An injunction, at the instance of the defendant, against an execution sale or final process, is seldom granted except in the court in which the judgment was rendered.

The court of one county should not grant an injunction against an execution issued from another county, unless the complainant is a third party, and in this case the objections to the execution as to discharge in bankruptcy and delay in issuing execution could only be tried by the record. *Winnie v. Grayson*, 3 Tex. 429.

A county court cannot enjoin a sale on an execution against complainant from a justice amounting to \$125, although the property levied on is worth \$400, as the original amount in controversy determines the jurisdiction of the county court. *Wheeler & Wilson Mfg. Co. v. Whitener*, 2 Tex. App. Civ. Cas. (Willson) § 5.

In *Wheeler & Wilson Mfg. Co. v. Collins*, 1 Tex. App. Civ. Cas. (White & W.) § 132, where "a justice of the peace of H. county rendered a judgment and issued execution thereon to W. county, and the county judge of the latter county granted an injunction restraining the collection of the execution, . . . he had no jurisdiction of the subject-matter, and no authority to grant the injunction." The case does not state the cause for injunction.

And an inferior court has no jurisdiction to enjoin an execution against complainant issued from a superior court, or to enjoin a judgment of another circuit court of concurrent jurisdiction. (The cause of action in the injunction suit is not stated.) *Rosbell v. Maxwell*, Hempst. 25.

2 Ind. Rev. Stat. (Garvin & Hord, pp. 23, 181), providing that injunctions may be granted by the circuit court and courts of the common pleas in their respective counties, simply confers jurisdiction, and does not allow one of these courts to enjoin proceedings or process of the other at the suit of the defendant, and a sale on a vendi. exp. 30 L. R. A.

should not be enjoined on the ground that real estate was being sold instead of personally. *Indiana & I. R. Co. v. Williams*, 23 Ind. 193.

And under Ky. Civ. Code, § 225, providing that an injunction to stay proceedings on a judgment shall not be granted in any other court than that in which the judgment was rendered, a circuit court has no jurisdiction to enjoin the sale under an execution issued from a justice of the peace; and this section controls, although the injunction was only asked to prevent the levy on that particular property, but, was a suit by the defendant in the judgment. *Chesapeake, O. & S. W. R. Co. v. Reazor*, 34 Ky. 389; *McConnell v. Rawe* (Ky.) 18 W. Rep. 582.

And this section applies to all parties, whether they were parties to the judgment or not. *Mallory v. Dauber*, 33 Ky. 399.

In *Arthurs v. Villere*, 43 La. Ann. 414, it was held that no doubt there exist exceptional cases in which an injunction may be granted by a court, not that which rendered the judgment about to be executed; but in none of these cases has the defendant in the suit ever been recognized the right to claim such relief from a forum, which was not that which exercised jurisdiction over him, and condemned him. He cannot be sentenced by one jurisdiction and be absolved by another. It is useless to enumerate those exceptional cases. It is enough to observe that injunctions in such instances have been allowed, as a rule, only to third parties, not connected with the suit and residing within the jurisdiction of the sister court issuing the process. And La. Code Pr. art. 617, provides that the execution of a judgment belongs to the courts by which the cause has been tried, and La. Code Pr. art. 629, provides that it is for the court which has rendered judgment to take cognizance of the manner of its execution. But see next case.

But in *Copley v. Edwards*, 5 La. Ann. 647, it was held that where the execution contains erroneous taxation of costs, and complainant pleads partial payment, the court of the parish where an execution is sought to be enforced may enjoin the same.

And in *Brown v. Brown*, 30 La. Ann. 506, it was held that a parish court in which a succession has been opened, having control of the property, has jurisdiction to enjoin a nominal administrator from collecting a judgment belonging to the estate under a judgment of the district court, as the attack is not on the validity of the judgment, but the right and power to act as an administrator, on the ground that there was no order, advertisement, commission, oath, or inventory. This injunction proceeding seems to have been sued out in aid of a suit for amotion or destitution, as it is called by the plaintiff, if such it can be styled, and to prevent the defendant from attempting to possess himself of a large amount of property until he shall have given bond as administrator.

In *Wood v. Hughes* (Ind.) 32 N. E. Rep. 594, it was held that the jurisdiction of an appeal from an order enjoining the levy of an execution upon real estate is not to the appellate court, but to the supreme court of Indiana. The case does not show what was the cause assigned for injunction.

d. Federal and state courts.

It is a well-recognized rule that state courts will not enjoin sales under process from the Federal courts and vice versa; but where a suit is brought in the state court and removed to the Federal court, this rule does not apply. But in one case a territorial court enjoined an execution from a Federal court attempted to be enforced beyond the jurisdiction of the Federal court.

The Federal courts cannot enjoin a sale of the property of one person on an execution issued out of a state court against the property of another. *Daly v. The Sheriff*, 1 Woods, C. C. 175. To the same effect, *Hamilton v. Walsh*, 23 Fed.

Rep. 420; Domestic & Foreign Missionary Soc. v. Hineman, 13 Fed. Rep. 161.

And the same rule was applied where bondholders of a railroad attempted to enjoin a sale of rolling stock on an execution from a state court. *Ruggles v. Simonton*, 3 Blm. 325.

And in *American Asso. v. Hurst*, 7 C. C. A. 506, 59 Fed. Rep. 1, it was held that a sale of land under an execution issued from a court of equity in Kentucky on a sale bond is a "proceeding," under U. S. Rev. Stat. § 720, prohibiting an injunction in the Federal court against a proceeding in the state court; denying the authority of *Cropper v. Coburn*, *infra*, as such case was in effect overruled by *Freeman v. Howe*, 65 U. S. 24 How. 458, 16 L. ed. 750.

So, a Federal court has no power to enjoin a levy made on lands which are situated in the foreign state and beyond its territorial jurisdiction, on the ground that it has appointed a receiver of such property under insolvency proceedings, and the statute does not prohibit a citizen from obtaining a preference in another state, and the person so enjoined is not a party or privy to the litigation in which the receiver was appointed. *Schindelholz v. Cullum*, 55 Fed. Rep. 885.

And a third party cannot obtain an injunction in a state court against the sale of his property on an execution issued from a Federal court. *Brooks v. Montgomery*, 23 La. Ann. 450.

Where an injunction is granted in a state court against an execution or attachment sale, and is transferred to the Federal court, the injunction remains in force, as U. S. Rev. Stat. § 646, provides that an injunction granted before a removal of a cause shall continue in force. *Perry v. Sharpe*, 8 Fed. Rep. 15.

Prior to this statute, in *Diggs v. Wolcott*, 8 U. S. 4 Cranch, 179, 2 L. ed. 597, it was held that where a suit to enjoin proceedings in a state court was removed to a Federal court, the latter could not grant an injunction.

After an injunction preventing the disposition of property in a foreign state, a subsequent injunction against another person, not a party to the original action, from enforcing a sale under execution in a foreign country (Mexico), cannot be obtained after an execution sale and purchase by a third party. *Mexican Ore Co. v. Mexican Guadalupe Min. Co.* 47 Fed. Rep. 861.

In *Cropper v. Coburn*, 2 Curt. C. C. 465, it was held that the act of Congress March 2, 1793, providing that an injunction will not be granted to stay proceedings in a state court, does not apply to an injunction against the sale of the property of a third person on an attachment against another, as the attachment on *meane* process is not a proceeding.

But the authority of this case has been denied in *Daly v. The Sheriff*, 1 Woods, C. C. 176, and *American Asso. v. Hurst*, *supra*, and in effect was overruled in *Freeman v. Howe*, 65 U. S. 24 How. 458, 16 L. ed. 750, which was a suit in replevin followed by *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 890.

And in *Needles v. Frost* (Okla.) 35 Pac. Rep. 574, it was held that the levy and sale under execution from the Federal court for the Indian territory will be enjoined by a territorial court, where the levy is made in Oklahoma and the Federal court issuing such execution had no jurisdiction in Oklahoma; and this is not an interference with the process of the Federal court, as such execution is void, as judgments have no extraterritorial force.

And the Federal court may enjoin the inequitable use of judgments and executions in a state court, at the instance of a *cestui que trust*, who files a bill claiming that such judgments are trust property and asking that the same be assigned to her; and this does not conflict with U. S. Rev. Stat. § 720, prohibiting the Federal court from enjoining proceedings in a state court. *Linton v. Mosgrove*, 14 Fed. Rep. 542.

And in *Watson v. Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 686, which was a suit to prevent interference with possession of a church, the defendants pleaded that they claimed possession under a decree of a state court, and that the marshal of the state court was in charge of the property. It was held that the Federal decisions are conclusive against any injunction from the Federal court forbidding the defendants to take possession of property which the unexecuted decree of the chancery court requires the marshal to deliver to them. Yet as the bill prays for other and further relief, which the circuit court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery court, the Federal court had a right to hear the case and grant that relief. The possession of the marshal is a substitute for the possession of the defendants, and the decree recognizes the right of the defendants under the marshal; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the decree of the chancery court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of the plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

A levy and sale under process from the state court will be enjoined by the state court where there was a levy previously made on the same property under a judgment in the Federal court. *Hall v. Boyd*, 62 Ga. 454.

XVIII. Remedy at law.

a. Personal property.

It is well recognized that where there is a plain and adequate remedy at law, courts of equity will not interfere, by injunction, to prevent a sale on execution of personal property or proceedings on final process. There are exceptions to this rule, however, for which see *supra*, I. *Exempt personal property*; VI. *Railroad and quasi public corporation property*; VII. *Partnership property*; VIII. *Property owned by third parties*; b. *Personal property*; I. *Slaves*; j. *Wife's personal property*.

So, the remedy at law against an unlawful seizure of the personal property of a third person under an execution prevents an injunction against the same. *Hall v. Davis*, 5 J. J. Marsh. 290; *Hammond v. St. John*, 4 Yerg. 107.

Unless it be of a peculiar character, as slaves. *Beatty v. Smith*, 28 Medes & M. 567.

The remedy by third opposition in Louisiana (which is similar to interposition of claim by third party) prevents an injunction against a foreclosure sale of land. *Van Loan v. Heffner*, 30 La. Ann. 1213.

And the remedy at law of action of claim and delivery will prevent an injunction against an execution sale. *Richards v. Kirkpatrick*, 53 Cal. 433; *Chittenden v. Davidson*, 20 Jones & S. 421.

And the right of trial of claim of title under Ala. Code, § 2567-2569, prevents an injunction against an execution sale of personal property. *Gerald v. McKenzie*, 27 Ala. 166.

And the remedy at law under N. C. C. P. § 177, subsec. 4, to try claim of title, prevents an injunction. *Baxter v. Baxter*, 77 N. C. 118.

And the remedy of affidavit and claim bond prevents an injunction. *Ferguson v. Herring*, 40 Tex. 126.

But this rule does not apply to a mortgagee, *George v. Dyer*, 1 Tex. App. Civ. Cas. (White & W.) 470.

In *Baker v. Rinehard*, 11 W. Va. 238, it was held that the statutory remedy by giving a suspending bond or a forthcoming bond by the claimant and a trial by jury thereon prevents an injunction against an execution sale of personal property belonging to a third party. But see *Cropper v. Coburn*, 2 Curt. C. C. 466.

The remedy by an action of damages for unlawful seizure of goods will prevent an injunction. *Chittenden v. Davidson*, *supra*; *Lewis v. Levy*, 16 Md. 55; *Freeland v. Reynolds*, 16 Md. 416; *Drewson v. American Surety Co.* 23 N. Y. Week. Dig. 522; *Frazier v. White*, 49 Md. 1.

In *Bowyer v. Craigh*, 3 Rand. (Va.) 25, it was held that the remedy at law by requiring the sheriff to take an indemnifying bond before a sale of personal property on which there is a lien or suit for the specific property will prevent an injunction in favor of a lienholder. But see *Daly v. The Sheriff*, *infra*.

And a remedy at law giving a lien on the proceeds of an execution sale, in favor of a senior execution, will prevent an injunction against a sale of land under a junior execution. *Sanders v. Foster*, 66 Ga. 222; *Wiley v. Bridgman*, 1 Head, 68.

So, the remedy of motion to quash prevents an injunction against an execution sale. *Nelson v. Griffey*, 131 Pa. 273, *Reversing 37 Pittsb. L. J.* 65; *Beard v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197; *Palmer v. Gardiner*, 77 Ill. 143; *Williams v. Wright*, 9 Humph. 493; *Jacks v. Bigham*, 36 Ark. 481; *Robinson v. Chesseldine*, 5 Ill. 332.

And Mo. Rev. Stat. § 2406, providing that the judge of the court out of which the execution issued may quash the same prevents an injunction. *Meiller v. Bartlett*, 80 Mo. 134.

And *Gantt's* (Ark.) Dig. § 2619, providing for quashing an execution, gives a remedy at law against an execution issued against a person individually when it should be as administrator, and will bar an injunction against an execution levy. *King v. Clay*, 34 Ark. 291.

And the remedy at law to set aside a sale and stay the proceedings prevents an injunction against the sale. *Fabs v. Roberts*, 54 Ill. 122; *Robinson v. Chesseldine*, *supra*; *Walker v. Gurley*, 83 N. C. 429; *La Crosse & M. Packet Co. v. Reynolds*, 12 Minn. 213; *Logan v. Lucas*, 59 Ill. 287; *Luco v. Brown*, 73 Cal. 3; *Jacks v. Bigham*, *supra*. But *contra* was held in *Buffum v. Foster*, 77 Hun. 27.

The remedy in the court rendering the judgment, to stay the sale,—prevents a court of chancery from granting the same relief. *Piggott v. Addicks*, 3 G. Greene, 427, 56 Am. Dec. 547; *Beard v. Foreman*, 1 Ill. 385, 12 Am. Dec. 197.

An administrator's sale will not be restrained for insufficiency of advertisement as there is a remedy in the orphans' court to have the proceedings corrected. *Parker v. Allen* (N. J.) 3 Cent. Rep. 476.

And the remedy by a motion, before the justice of the peace, to correct an execution to make it conform to the judgment, will prevent an injunction against an execution sale. *Martin v. Pifer*, 56 Ind. 245.

And the better practice is to file a motion in the case in which judgment is rendered for a return of the execution, where a judgment is superseded on error, before the sale, rather than to enjoin the sale. *Jaedicke v. Patrie*, 15 Kan. 257.

And the remedy of supersedeas prevents an injunction. *Williams v. Wright*, 9 Humph. 493.

And in *Robinson v. Yon*, 8 Fla. 250, it was held that the remedy in the court rendering judgment, to recall an execution, precludes enjoining an execution sale made at a time unauthorized. But see *Krinke v. Parish*, *infra*.

And the remedy by suit for possession of personal

property analogous to replevin, trover, debt, trespass, or case, bars an injunction against an execution sale. *Stillwell v. Oliver*, 35 Ark. 184; *Endres v. Lloyd*, 56 Ga. 547; *Lovette v. Longmire*, 14 Ark. 389.

The remedy of trespass, trover, detinue, or replevin after sale, prevents an injunction against an execution sale of personal property. *Du Pre v. Williams*, 5 Jones, Eq. 96.

And the remedy at law of trespass or trover will prevent an injunction against an execution sale of personal property. *Davidson v. Floyd*, 15 Fla. 697; *Miller v. Crews*, 3 Leigh, 578; *Kendrick v. Arnold*, 4 Bibb, 235; *Howell v. Howell*, 5 Ired. Eq. 258; *Johnson v. Connecticut Bank*, 21 Conn. 143. But see *Cropper v. Coburn*, *infra*.

And in Kentucky the remedy of trover, or trespass, or detinue, will prevent an injunction against an execution sale of slaves owned by a third person. *Neameth v. Bowler*, 3 Bibb, 487.

And in *Allen v. Freeland*, 3 Rand. (Va.) 170, it was held that the remedy of detinue prevents an injunction against a sale of slaves on the execution against a third party,—especially where the title of the claimant is fraudulent. But see *supra*, VIII. 1.

So, the remedy at law, of replevin, prevents an injunction against an execution sale of personal property. *Frazier v. White*, 49 Md. 1; *Bouldin v. Alexander*, 7 T. B. Mon. 426; *Young v. Young*, 9 B. Mon. 66; *Allen v. Winsteadly*, 135 Ind. 105; *Bryan v. Long*, 14 Fla. 366. But see *Central Trust Co. v. Moran*, *infra*.

But in *Amis v. Myers*, 37 U. S. 16 How. 422, 14 L. ed. 1029, it was held that a clear and adequate remedy at law was held not to defeat the remedy of an injunction against a levy of execution on slaves, and the court says this is an exceptional case, and is not to be a precedent.

And a remedy at law under Mass. Rev. Stat. chap. 90, §§ 73-75, by giving bond to an officer to prevent a levy of an attachment, does not apply to a levy against firm property on a writ against an individual member of the firm. *Cropper v. Coburn*, 2 Curt. C. C. 466.

And in *Daly v. The Sheriff*, 1 Woods, C. C. 175, it was said that an action on an indemnifying bond given to the sheriff under a state statute, or an action of trespass against the sheriff, is not such an adequate and complete remedy at law as would oust the Federal court of equity of jurisdiction to restrain the sale of the property of a third person under an execution. But the Federal court cannot restrain the execution of process from a state court; denying authority of *Cropper v. Coburn*, *supra*, on the last proposition.

And a remedy at law to have an execution recalled will not bar an injunction against levy and sale on an execution issued on a dormant judgment. *Krinke v. Parish*, 9 Ohio, C. C. 141, 2 Ohio Dec. 85.

And the remedy of trespass or trover is not adequate where partnership property is levied on for a debt of one of the firm. *Cropper v. Coburn*, *supra*.

And the remedy of replevin or damages is inadequate to protect mortgagees of the rolling stock of a railroad from an execution sale, where the statute prevents a severance of the property, and the mortgagees are not entitled to the possession. *Central Trust Co. v. Moran*, 56 Minn. 183, 29 L. R. A. 212.

b. Real property.

In regard to the remedies at law preventing an injunction against the sale of real property on execution, the cases below suggesting such remedies must be examined in connection with the long line of authorities for and against injunctions *supra*, VIII. b, c, and X, and XV., as the cases given below are simply suggestive rather than de-

claratory as to the uniformity in denying injunctions where another remedy exists. In fact it may be said that nearly all the cases that deny injunctive relief against execution sales of real property do so on the ground that where complainant has a good title the sale will not prejudice him, and the remedy of defending an action of ejectment in such cases bars the right of injunction.

The remedy of an action to quiet title prevents an injunction against an execution sale that is void. *Drake v. Jones*, 27 Mo. 428.

And the failure to exercise the remedy at law by caveat against a grant of title, and by redemption, prevents an injunction against proceedings to complete a void sheriff's sale. *Lafferty v. Conn*, 3 Sneed, 221.

And the remedy at law by setting up ownership and right to redeem prevents an injunction against a judgment to recover possession. *York Mfg. Co. v. Cutts*, 18 Me. 204.

And a remedy at law to contest title prevents an injunction against a sale under mechanic's lien. *Coughron v. Swift*, 13 Ill. 414.

And the remedy by ejectment bars an injunction in favor of an executor against an execution sale of real estate for the debts of an heir. *Johnson v. Connecticut Bank*, 21 Conn. 148.

In *Roman Catholic Archbishop v. Shipman*, 60 Cal. 580, where an injunction was refused against the sale of real property belonging to a third party, as extrinsic evidence was not necessary to protect the title, it was suggested that there was a remedy against the enforcement of the judgment by asking the court rendering judgment to refuse a writ of *fi. fa.*, or by superseding it, or by an original action to enjoin for matters subsequent to the judgment, or to have adverse claim determined under Cal. Code Civ. Proc. § 738.

But in *Williamson v. Russell*, 18 Va. 612, it was held that the remedy at law of damages against a sheriff for ejecting a person not a party to a suit under a writ of *fi. fa.* will not prevent an injunction against execution of a writ.

XIX. Irregularities.

a. Execution.

1. Condition precedent.

Irregularities in the proceedings prior to the issuing of the execution will not be ground for injunction, unless a mandatory statute is violated.

So, where a defendant fails to appeal, or join in the appeal taken by the plaintiff, and thereby acquiesces in the judgment, he cannot after affirmation obtain an injunction, although a *fi. fa.* was issued before the judgment of the supreme court was recorded in the court below. *Savolè v. Thibodaux*, 20 La. Ann. 51.

And irregularity in quashing a forthcoming bond will not be ground for enjoining an execution on the original judgment against the surety who did not sign the forthcoming bond, as there is a remedy in the court issuing the execution to supersede the same. *Thomas v. Tappan*, Freem. Ch. (Miss.) 472.

And an injunction will not be granted against an execution sale on an execution sale bond, for irregularities in the affidavit on which execution issued, where the judgment was destroyed by burning the court-house, as La. act March 18, 1880, authorizing an injunction in certain cases, does not apply to an injunction against an execution on a twelve-months' bond. *Wafer v. Wafer*, 7 La. Ann. 542.

And the remedy at law to restrain an execution for irregularities in the proceedings will prevent an injunction against the same at the instance of a purchaser. *Wagner v. Pegues*, 10 S. C. N. S. 259.

An order of seizure and sale issued without the production of the complete evidence required by law will not authorize an injunction, as this is §0 L. R. A.

not one of the grounds, under La. Code Pr. art. 739, providing eight grounds for arresting the sale under a seizure; and there is also a remedy by appeal. *Dupre v. Anderson*, 45 La. Ann. 1134.

And that an execution on a forfeited *fi. fa.* bond was issued without the sanction of the court is not ground for enjoining the same. *Bryan v. Knight*, 1 Tex. 180.

And a *fi. fa.* on a replevin bond will not be enjoined on the ground that the same was issued without precept where the creditor has ratified the act of the clerk. *Clarkson v. White*, 4 J. J. Marsh. 529, 20 Am. Dec. 229. But see *Berry v. Nichols*, *infra*.

In *Berry v. Nichols*, 96 Ind. 287, the bill of complaint alleging that the writ of vendi. exp. issued without a precept was sufficient to set aside the sale, as Ind. Rev. Stat. 1881, § 741, provides that a vendi. exp. can only issue on a precept; but a sale should not be perpetually enjoined; and the real estate should not be released from the lien of the judgment.

And in *Bryan v. Knight*, *supra*, it was said that if a bond in *fi. fa.* was not taken in conformity to the law, and was not such an one as an execution could issue upon, it might be ground for injunction.

2. Form.

An injunction will not be granted against an execution sale on account of the form of the execution, or variance in the same, as the remedy in the court issuing the same is generally adequate and sufficient. (See further, *Party*, *infra*.)

So, an irregularity in the form of an execution will not be ground for an injunction, as there is a remedy in the court issuing the execution. *Trieste v. Enslin* (Ala.) 17 So. Rep. 356.

And the variance between the names in the execution and judgment, where the names are stated in the judgment roll, will not authorize an injunction against the judgment or execution levy on land at the instance of a third party. *Hill v. Gordon*, 45 Fed. Rep. 276.

And that the execution did not conform to the judgment will not be ground for enjoining the sale, as there is a remedy in the court issuing execution by motion for correction. *Martin v. Piter*, 96 Ind. 245.

In an action by defendant to quiet title after an execution sale, and to enjoin the purchasers, on the ground that the order of sale was not a true copy of the original and that the real estate was not sold on a *fi. fa.* issued on the judgment, it was held, under 2 Ind. Rev. Stat. 1876, p. 223, providing that a sheriff's return entered on the execution docket shall be a record, that the truth of such record cannot be impeached without a direct proceeding against the officer. *Fry v. Gallaspie*, 61 Ind. 478.

And executions will not be adjudged void which are valid upon their face, where no attempt has been made to set aside or quash the same. *Beard v. Foreman*, 1 Ill. 308, 12 Am. Dec. 197.

A sale on execution of personal property of the surety on a coast bond will not be enjoined, although the execution is void on its face, and although the justice had no authority to issue the same, as there is a remedy at law to compel the justice to try the question made by affidavit of illegality, and the justice can be compelled to hear and try such claim. *Wordehoff v. Evers*, 18 Fla. 389.

And an execution not under seal will not be ground for enjoining the same. *Jlisaun v. Stebbins*, 41 Wis. 235.

3. Time.

Injunctions will not be granted on account of premature issuance of a writ of seizure, execution, or delay in issuing the same.

So, premature issuance of a writ of seizure and

sale will not authorize an injunction, as a new writ will immediately lie under the same order. *Williams v. Douglass*, 47 La. Ann. 1377; *Dayton v. Commercial Bank*, 6 Rob. (La.) 17.

So, an injunction will not be granted against an execution as having prematurely issued under the stay law, where complainant does not bring himself within the terms of the stay law. *Windisch v. Gussett*, 30 Tex. 744.

And delay in issuing an execution will not be ground for enjoining an execution sale, as against a purchaser for value, as no one but the defendant can object to irregularity in an execution. *Wagner v. Pegues*, 10 S. C. N. S. 259.

4. Party.

Injunctions have been granted where execution is improperly issued against stockholders, and sometimes the death of the plaintiff has been cause for injunctions where the executions ignored that fact; but on this point there is some conflict of authority. To obtain an injunction for irregularity as to the party named in the execution, the complainant must be in danger of injury, or else it will not be granted.

An injunction was granted to prevent a creditor having a judgment against a banking company from enforcing it as against an alleged shareholder whose relation as such to the company had long ceased to exist, though technically he was still a shareholder. *Bargate v. Shortridge*, 5 H. L. Cas. 297, 24 L. J. Ch. 457.

Where an execution was issued against stockholders individually on a judgment against the corporation, and there is no adjudication that certain persons were members, the same will be enjoined, as the execution should follow the judgment and run against the corporation, with a clause that it be levied on the property of the members and leave it to the officer to determine if they are members. *Hampson v. Weara*, 4 Iowa, 18, 66 Am. Dec. 116. See also *Stout v. La Follette*, 64 Ind. 365, *supra*, XI. b. 1, as to levy on stock; *Weber v. Bullock*, 19 Colo. 214; and *Anderson v. Riddle*, 10 Mo. 23, *supra*, VIII. b.

Where the plaintiff named in execution is dead the sale should be enjoined. *Dailey v. Wynn*, 33 Tex. 614.

So, where there is no indorsement on the execution as required by Iowa Rev. § 8264, providing that after death of the plaintiff an execution may be issued, but the clerk must indorse the death and the names of the personal representatives on the execution, an injunction will be granted. *Meek v. Bunker*, 38 Iowa, 169.

But in *Rooks v. Williams*, 13 La. Ann. 374, an injunction was refused where a *fi. fa.* was issued in the name of the decedent instead of in the name of the administrator, as relief could be obtained by paying the debt to the administrator.

And where an execution was issued in the name of an executor of the deceased partner instead of in the name of the surviving partner, proceedings thereon will not be enjoined at the instance of the debtor who does not tender into court the money, where he claims that a third party is asserting an attachment against the same. *Hastings v. Cropper*, 3 Del. Ch. 165.

An assignment of the right in a seizure to a third party, without notice to the defendant, will not be ground for enjoining the sale, where no tender is made of the amount due. *Walker v. Gillavaso*, 26 La. Ann. 42.

But the assignor of a mortgage and judgment will be restrained at the instance of his assignee, from issuing process thereon for the use of his assignee, where such assignor has not the authority to take such proceedings, although he may have the power of attorney to collect the same to be paid by him to his assignee, but not the power to sue

out process, where the sale would destroy the lien of complainant. *Lealey v. Shock*, 3 Houst. (Del.) 180.

A defendant who does not appeal cannot obtain an injunction against the execution on the ground that it also included in it the names of the parties and their sureties appealing. *Kendrick v. Rice*, 18 Tex. 254.

Fees paid to counsel in prosecuting an injunction against an illegal seizure because the defendant was dead when suit was filed and was named in the writ cannot be recovered by the plaintiff of the defendant where the injunction is allowed. *Hill v. Noe*, 4 La. Ann. 304.

5. Excessive.

There is some difference in the cases in regard to injunctions for excessive executions owing to the facts in each case. It seems that an injunction will not be generally granted against the excess unless the balance is tendered, or where the excess is small, or where there is a remedy in the court issuing execution, and will not be granted on account of there being several executions issued.

Where a credit was allowed in the judgment, but not in the body of the *fi. fa.*, but was indorsed on the back of it, with a certificate by the clerk under a seal of court, an injunction should not be granted against the sale or the execution. *Howly v. Kemp*, 2 La. Ann. 340.

And that an execution is excessive in the amount of \$10 will not be ground for enjoining the same. *Jilson v. Stebbins*, 41 Wis. 235.

And an execution against a surety on a claim bond in excess of the penalty will not be enjoined as there is a remedy in the court from which the execution is issued. *Trieste v. Enslin* (Ala.) 17 So. Rep. 356.

An execution issued for more than the amount due will not authorize an injunction against the whole of the execution. *Rowly v. Kemp*, *supra*.

And under La. act 1855, § 4, p. 324, limiting an injunction against a *fi. fa.* for subsequent payment to the amount pleaded, the same rule applies to mistake in issuing writs of *fi. fa.*, and the right to enjoin is limited to the amount occasioned by the error of the officer, and does not extend to the whole judgment. *Barrow v. Robichaux*, 14 La. Ann. 203.

And an execution for a greater amount than due will not be enjoined, where the amount admitted to be due is not tendered. *Eaton v. Markley*, 123 Ind. 123.

But in *Harper v. Terry*, 16 La. Ann. 216, it was said that if a *fi. fa.* issues for more than is due upon the judgment, the remedy is by injunction against the sale, under La. Rev. Stat. p. 246, §§ 3, 4.

A sale will not be enjoined because made under several writs, or because several writs on the same judgment are issued at the same time.

The improper issue of a second execution will not authorize an injunction against the sale, as the remedy is in the court issuing it. *Gregory v. Ford*, 14 Cal. 138, 73 Am. Dec. 639.

And the same was held where two executions were issued for the same debt to different counties at the same time. *Elliott v. Elmore*, 16 Ohio, 27.

And was refused against an execution sale made under three different writs, two in the name of different parties, one being a writ of *fi. fa.*, as the objection is without force. *Walker v. Villavaso*, 26 La. Ann. 43.

b. Levy.

1. Excessive.

That a levy is excessive will not be ground for enjoining the sale, and that hard times will prevent a fair sale will not be ground for injunction, although an injunction was allowed in one case.

An injunction will not be granted against ex-

cessive levy, where the bill is filed by unsecured creditors, and the judgments are not attacked. *Dodd v. Solomons*, 98 Ga. 314.

Or where the property did not bring the amount of the judgment and the sale was fair. *Allarood v. Cook*, 92 Ga. 670.

And an injunction will not be granted for excessive levy, as La. Code Pr. arts. 652, 653, provide a remedy by reduction. *Dabbs v. Hemken*, 3 Rob. (La.) 123; *Lambeth v. Sentell*, 83 La. Ann. 691; *Hefner v. Hesse*, 29 La. Ann. 149.

And an excessive levy of an execution upon realty will not be enjoined, as there is a remedy by motion to quash the same, if any injury could result. *Palmer v. Gardiner*, 77 Ill. 143.

So, an excessive levy on real property is not of itself a cause for injunction against the sale,—especially where the debtor does not offer personal property to the officer sufficient to satisfy the execution. *Cook v. De la Garza*, 13 Tex. 431.

And a levy will not be enjoined as excessive, and as made without noticing growing crops of great value, where such levy was made in small divisions so as to sell in parcels, and complainant had gathered and pocketed proceeds of the growing crop. *Saffold v. Foster*, 75 Ga. 238.

And that the levy was excessive, and the property capable of being subdivided, where the evidence is conflicting, will not be cause for injunction. *Brunner v. Royal*, 89 Ga. 776.

Hard times is not a ground for enjoining execution and sale, as this is no reason why it should not be sold for what it would bring to pay a debt justly due, and reduced to judgment and proceeding under final process. *Winn v. Henderson*, 63 Ga. 385; *Poullain v. English*, 57 Ga. 492. But see *Ex parte Grimbail*, *infra*.

In *Ex parte Grimbail*, T. U. P. Charit. (Ga.) 183, an injunction was granted to stay an execution sale for five months, on depositing with the sheriff sufficient property, the valuation to be ascertained by the price three months preceding the embargo act, as such act produced a national calamity of depression and it would have been ruinous and against conscience to allow a sale to be forced at that time, and a hardship and oppressive. The later cases immediately *supra* overrule this decision in effect, but do not refer to it.

2. Mode, manner, and description.

Irregularities in the mode of levy, or description of the property seized, have generally been held insufficient grounds for injunction, where the description is sufficiently accurate to easily identify the land. *Bogges v. Lowrey*, 78 Ga. 539.

And so with personal property levied upon, where the defendant knew what property was seized. *Deville v. Hayes*, 23 La. Ann. 550.

And the failure of the sheriff to take personal property into his possession will not authorize the debtor to enjoin the sale, as, if not seized, the debtor would have no ground of complaint. *Ibid.*; *Gusman v. De Poret*, 88 La. Ann. 333.

And an injunction against the sale of slaves was not granted on the ground that one of the slaves was not in the county or in the possession of the sheriff, and that such a sale would be at a ruinous price, where it was the fault of the plaintiff that the sheriff had not taken possession. *Calderwood v. Trent*, 9 Rob. (La.) 227.

And a surety on a forthcoming bond cannot obtain an injunction against an execution thereon on the ground of irregularity in the levy of the execution for which the bond was given, where the levy was made by the sheriff coming into a store with the execution, and the debtor supposed that both parties considered that the levy was made on the goods, and the debtor recognized the levy. *Baine v. Williams*, 10 Smedes & M. 113.

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3. Notice.

If no notice of the levy is given as required by statute, an injunction will be granted, but if the objection is that the notice was defective on account of time, an injunction will not be granted.

A temporary injunction was granted where the plaintiff in the injunction had no notice of any levy until after the sale. *Brunner v. Royal*, 89 Ga. 776.

And under La. Code Pr. arts. 654, 655, requiring notice of seizure to be given to the defendant in execution three days prior to the advertisement, the failure to give such notice will render the sale void, and an injunction will be granted against making the sale. *Lapene v. McCan*, 28 La. Ann. 749.

And under La. Code Pr. arts. 575, 624, providing for notice of judgment to be served on the defendant, an execution of a writ of *f. fa.* will be enjoined, where such notice is not given. *Greene v. Johnson*, 21 La. Ann. 484.

And an injunction will be granted against a mortgage sale, where the notice of order of seizure and sale was not served upon the tutrix before she was confirmed, she being a necessary party in executory proceedings on the mortgage. *O'Hara v. Folwell*, 28 La. Ann. 370.

But irregularity in giving plaintiff three days' notice of seizure of his land, instead of five as required by law, will not authorize an injunction, where another seizure can be made immediately by taking out an alias order. *Morgan v. Whitesides Curator*, 14 La. 277.

c. Sale.

1. Notice and advertisement.

Irregularities in notices and advertisements seldom entitle the complainant to an injunction, as such irregularities usually are not prejudicial, and there is a remedy in the court from which the process or order of sale issued. But an injunction was granted where the advertisement was published in a Sunday paper.

Irregularities in the proceeding of the sheriff in not giving proper notice of the sale will not authorize an injunction preventing a writ of possession. *Wilson v. Miller*, 30 Md. 82, 96 Am. Dec. 568.

And where a waiver of an advertisement is made by the debtor, an attempt to withdraw such waiver will not authorize an injunction, where the advertisement is dispensed with. *Borron v. Solibellos*, 28 La. Ann. 365.

And that a sale of property seized on an execution was advertised before the expiration of the three days allowed for a notice of seizure, will not authorize an injunction against the sale, where more than the necessary delay between the seizure and sale was allowed. *Dabbs v. Hemken*, 3 Rob. (La.) 123.

So, an execution sale will not be enjoined, because the advertisements were all posted in the same village, and not in three different points in the parish, where the ground for injunction is that they were not made by a duly authorized officer, and that the description was indefinite. *Dorsey v. Hills*, 4 La. Ann. 103.

And a sale made under an order of the orphans' court to pay debts of deceased will not be enjoined on the ground that the advertisements are uncertain or insufficient, and the orphans' court has full power to correct the same. *Parker v. Allen* (N. J.) 3 Cent. Rep. 475.

And a slight variance between the description of the property advertised, and that in the notice of seizure, which is not misleading, will not authorize an injunction against the sale. *Dabbs v. Hemken*, 3 Rob. (La.) 123.

So, the error in advertising a sale for cash, having been corrected in a subsequent advertisement, will

act authorize an injunction against the sale. *McMicken v. Morgan*, 9 La. Ann. 208.

Insufficiency in description in an execution sale of the interest of the debtor in the land will not authorize an injunction, as, if the description is insufficient, there will be no sale, and the party complaining will not be prejudiced, and if there is a good sale, it should not be enjoined. *Henderson v. Hoy*, 26 La. Ann. 159.

And insufficiency of advertisement will not authorize an injunction against an administrator's sale, as there is a remedy in the court where the proceedings are pending. *Parker v. Allen* (N. J.) 3 Cent. Rep. 476.

And an injunction will not be granted to restrain an execution sale on account of insufficiency in advertising the quality of animals, where the proof does not establish this fact. *Dorsey v. Hills*, 4 La. Ann. 106.

And an assignor of a mortgage cannot enjoin a judgment against him or set aside the sale in favor of the assignee for the deficiency, where the master failed to give the assignee personal notice of the sale as he had promised, and he was thereby prevented from bidding on the property, as the negligence of the master acting as his agent is not sufficient reason to deprive the purchaser of the benefit of his purchase. *Crumpton v. Baldwin*, 42 Ill. 168.

A sale under foreclosure will not be enjoined at the instance of defendant on the assumption that the sheriff and district court will subsequently misinterpret a new statute in regard to redemption. *Gordon v. Bodwell* (Kan.) 36 Pac. Rep. 1044.

But under Ind. Rev. Stat. 1881, § 2000, prohibiting labor on Sunday, an advertisement of sheriff's sale in a Sunday newspaper is void, and such sale may be enjoined. *Shaw v. Williams*, 67 Ind. 153, 44 Am. Rep. 766.

In *Clement v. Oakley*, 2 Rob. (La.) 90, it was said that an injunction is the proper remedy to arrest an order of seizure, for alteration in the property by subdivision and changes in names of streets and squares, on the ground that the seizure notices and advertisements were defective.

On dissolution of an injunction against the execution of a deed under a fl. fa. on account of the advertisement of the sale, a judgment should not be rendered against the complainant for the amount of the judgment at law. *McDonald v. Cook*, 11 Mo. 633.

2. Appraisement.

The failure to make an appraisement required by law will generally be sufficient ground for an injunction; but this was refused where the defendant was not prejudiced and had a remedy in the court rendering judgment.

A sale "without appraisement" will be enjoined where the clerk improperly indorsed on the execution "without appraisement," when the indorsement should have been the reverse. *Robinson v. Perry*, 4 Tex. 373.

And a junior mortgagee may have an injunction against the execution of a fl. fa. on the ground that the sheriff was about to sell the mortgaged property without an appraisement as required by law, which would cause loss to the mortgagee. *Robertson v. Travis*, 4 La. Ann. 151.

So, where no notice to appoint appraisers or appraisement was ever made, as contemplated by law, and the said property was adjudicated for a sum below two thirds of its value. *Drouet v. LaCroix*, 28 La. Ann. 123.

But in *Walker v. Villavaso*, 28 La. Ann. 43, it was held that where no legal notice of appraisement was made or served, but the plaintiff had the benefit of this objection, if it existed, and it could be remedied in future proceedings, an injunction against the sale was denied. (This was the fourth injunction against the sale.)

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And the same was held in *Robinson v. Chessel-dine*, 5 Ill. 334, as there was a remedy by motion to set aside or quash the execution, and if complainant was entitled to have an appraisement, the court on proper application could have an order to that effect indorsed on the execution.

3. Costs.

An injunction was allowed against a resale by an administrator for failure to pay the bid and costs, where the purchaser contested the commissions and expenses only, but offered to submit the same to the county court which ordered the sale and offered to pay all that would be required. *Huddleston v. Kempner*, 87 Tex. 372, affirming 28 S. W. Rep. 236.

In an injunction against an execution because containing erroneous costs, it is error to enjoin any that are not attacked, and it is error to refer the taxing to an auditor, as this is the province of the court; and judgment damages, and interest should not be rendered in the injunction suit as the statute relating to damages excludes costs. *Lockart v. Stuckler*, 49 Tex. 763.

4. Time, place, and manner.

Irregularities as to time, place, and manner of making a sale have usually been held insufficient to entitle an injunction.

An injunction will not be granted to restrain a sale not made upon one of the particular days designated by statute, as Fla. act 1844 provides for relief in the court rendering judgment to stay the same and control process. *Robinson v. Yon*, 8 Fla. 350.

An order for injunction against a sale under execution is not effectual until the execution of the bond required by the order, where it was claimed that the sheriff had agreed to an adjournment of the sale while an injunction was being obtained against the sale of an equity of redemption, but such sale could not have been prevented on account of other executions. *Pell v. Lander*, 8 B. Mon. 554.

And an injunction will not be granted against a sale of fixtures at the court-house, under a mortgage foreclosure, as La. Code Pr. art. 603, providing for the sale of movables at the place where seized, does not apply. *Walker v. Villavaso*, 28 La. Ann. 42.

And an injunction against completion of a sheriff's sale on the ground that the sale was made in entirety will not be granted on conflicting evidence; besides, the sheriff has discrimination as regards the mode of making sales. *Holmes v. Steele*, 28 N. J. Eq. 173.

Or where different lots of land have been sold *en masse* greatly below their value. *Ballance v. Loomis*, 23 Ill. 83.

And the same was held under Colo. Gen. Laws, chap. 63, § 1416, providing that property if susceptible of division shall be sold in such quantities as shall be necessary to satisfy the execution and costs, where the property was sold four different times during the year and in no instance did it bring more than the debt and costs, and there was an offer to sell the property separately and no bids were received. *White v. Crow*, 110 U. S. 163, 23 L. ed. 113.

A sale of land specifically pledged for the debt in judgment will not be enjoined in order to have it surveyed and subdivided, where the debtor had ample time to have the same done before judgment so as to sell each tract separately. *Reeves v. Boiles*, 95 Ga. 402.

And the failure of the debtor to resist the manner of sale will prevent an injunction against permitting the purchaser to use the property pending an action to annul the sale, where pews in a church are sold as ground rents in a lump. *City Bank v. McIntyre*, 8 Rob. (La.) 467.

An execution sale of the undivided one half of a

plantation will not be enjoined for failure to divide the same into lots, as provided for in the Constitution, where it could not be divided into lots. *Borron v. Solibello*, 28 La. Ann. 868.

And an injunction will not be granted against the completion of a sheriff's sale on the ground of misunderstanding in reference to a matter of law on the part of the bystanders as to whether or not a building on the ground must come down, or that the sheriff refused to adjourn the sale, or that the bidder was an agent of the buyer and thus bought the property at a lower price. *Skilman v. Holcomb*, 12 N. J. Eq. 131.

5. Officer.

Irregularities in regard to the authority of the officer making the sale are generally regarded as insufficient to obtain an injunction.

That a new court commissioner was not reappointed on division of the state of Virginia to complete a sale made in West Virginia, under a decree in force when the state was formed, will not be ground for enjoining the sale, as such commissioners are not public officers. *Shields v. McClung*, 6 W. Va. 79.

And an injunction will not be granted against a sale of land under execution, on the ground that the party making the sale is a deputy of a sheriff who has absconded, but the fact has not been judicially determined. *Ballance v. Loomis*, 22 Ill. 82.

And an heir is not a proper party to object that a second master in foreclosure to make a sale was appointed without notice to the administrator, when such an heir is not a party, or necessary party, in the foreclosure proceedings. *Merritt v. Daffin*, 24 Fla. 320.

And an execution sale will not be enjoined on the ground that the officer levying styles himself a special-deputy sheriff. *Miller v. Clements*, 54 Tex. 351.

As to making officer a party, see *infra*, XX. c.

XX. Effect of injunction on executions, sales, and final process.

a. Release of errors.

An injunction against a sale under execution which does not attack a judgment is not a release of errors. *Fahs v. Roberts*, 54 Ill. 192.

In matters prior to and including the judgment. *St. Louis, A. & T. H. R. Co. v. Todd*, 40 Ill. 89.

b. Release of lien.

As to the effect of injunctions on execution sales and final process some of the cases base the decision on the question of the return of the officer, and hold that a return "stayed by injunction" releases the levy and lien. *Blabee v. Hall*, 8 Ohio, 448; *Taggart v. Hill*, *infra*; *Keith v. Wilson*, 3 Met. (Ky.) 201.

And the same was said to be the rule in *Eldridge v. Chambers*, 8 B. Mon. 411; *Davies v. Myers*, 13 B. Mon. 511; *Newlin v. Murray*, *infra*.

Where there are several executions in the hands of the officer, and the senior execution is stayed by injunction, and he sells on the junior execution, he must apply the money to that execution. *Newlin v. Murray*, 63 N. C. 566; *Conway v. Jett*, 3 Yerg. 481, 24 Am. Dec. 590.

But not where the injunction is dissolved before the day of the sale. *Duckett v. Dalrymple*, 1 Rich. L. 148.

But where the kind of property levied upon is discussed in the opinion, the weight of authority is that an injunction releases the lien of a levy upon personal property. *Overton v. Perkins*, Mart. & Y. 387.

And in *McCamy v. Lawson*, 3 Head, 256; *Rocco v. Parczyk*, 9 Lea, 388; *Miller v. Estill*, 8 Yerg. 452; and *Porter v. Cooke*, Peck (Tenn.) 30,—it was said that an injunction releases the lien of a levy of a *f. fa.* on personal property.

And the plaintiff has no claim on the sheriff for 30 L. R. A.

releasing goods, where there is an injunction against the sale. *Taggart v. Hill*, 2 Hayw. (N. C.) 81, N. C. Conf. Rep. 164.

In *Ross v. Poythress*, 1 Wash. (Va.) 120, the court declined to express an opinion as to the effect of an injunction obtained upon an execution against goods and chattels after seizure, saying that it was probably settled by Va. act 1791, which, directing a restitution of the money levied, would seem to include inferior cases, and to extend, by an equitable construction, to the restitution of goods seized on execution, and not sold.

But in *Pettingill v. Moss*, 3 Minn. 222, it was held that where a levy on personal property has been enjoined, the sheriff may complete the sale after dissolution of the injunction.

And in *Flowers v. Fletcher*, Sneed (Ky.) 225, it was said that where an execution has been levied, or even the money made, but not paid to the plaintiff, if the defendant obtains an injunction, the property is to be restored or the money returned to the defendant by the sheriff. The distinction as to the kind of property levied on is not discussed.

If an injunction is obtained after execution executed, and the goods are in the hands of the sheriff, and he sells them without process, he will be ordered to pay the proceeds into court. *Franklyn v. Thomas*, 3 Meriv. 225.

And in *Hawshaw v. Parkins*, 2 Swanst. 539, it was said that after an execution issued against the goods and an injunction then issued, the sheriff might proceed to sell; but the court will in special cases stay the money in his hands.

And in *Conway v. Jett*, 3 Yerg. 481, 24 Am. Dec. 590, where the sheriff was sought to be held liable for not selling under other executions that came to his hands after an injunction was granted against an execution levied on negroes, it was held that the injunction does not release the levy so as to subject the property to other executions, unless the order of the judge requires security to be given in the injunction suit.

And where personal property had been levied on, it was held that under Miss. act 1824, giving to judgment creditors a lien from the time of entry of judgment, an injunction against an execution levy does not displace the lien, but its execution is simply restrained until dissolution of the injunction. *Smith v. Everly*, 4 How. (Miss.) 178.

Where the question as to the effect of the injunction on the lien was discussed with reference to the kind of property, the weight of authority is that, where the property levied on is real estate, the lien is not divested by the injunction. *Overton v. Perkins*, Mart. & Y. 387; *Porter v. Cooke*, Peck (Tenn.) 30; *Miller v. Estill*, 8 Yerg. 452 (Haywood, J.); *Pettingill v. Moss*, 3 Minn. 222; *Knox v. Randall*, 24 Minn. 479; *Lynn v. Gridley*, Walk. (Miss.) 548, 12 Am. Dec. 591; *Anderson v. Tydings*, 8 Md. 427; *Gibbes v. Mitchell*, 2 Bay, 120; *Boyd v. Harris*, 1 Md. Ch. 466.

In *Rocco v. Parczyk*, 9 Lea, 388, and *McCamy v. Lawson*, 3 Head, 256, it was said that the lien of a levy on real estate was not discharged by an injunction.

There are some cases in regard to the effect of an injunction on final process, which do not discuss the distinction as to a levy on real or personal property, and some of the cases do not disclose the kind of property levied upon, and there is such a conflict that it is difficult to state clearly a rule that should control in such cases.

A *sci. fa.* is not necessary to obtain a writ of *h. fa.* where the execution of the same has been stayed by injunction, and not more than a year has elapsed since the affirmance by the court of appeals of the decree of dissolution. *Nolan v. Seekright*, 6 Munf. 185.

And in *Gibbes v. Mitchell*, 2 Bay, 120, it was held that an injunction does not release the lien of a levy, and after dissolution the sheriff may proceed

to sell after a year and a day without a sci. fa., or even after he is out of office. (The levy in this case was on negroes.)

And in *Hefner v. Hesse*, 29 La. Ann. 149, it was said that the injunction merely suspended the executions, and it may be that they have as much force on dissolution as they had on the day they were issued. This case does not refer to *Dugat v. Babin*, *infra*.

And where the defendant had caused the delay by an injunction, an execution will not be set aside because sued out above a year after the judgment without a sci. fa. to revive it. *Micbel v. Cue*, 2 Burr. 660. But the converse was held in *Booth v. Booth*, 1 Salk. 323.

And in *Miller v. Estill*, 8 Yerg. 452, it was said that the general lien of a judgment is defeated when enjoined and a levy is not made in twelve months, as against a purchaser.

And in *Lockridge v. Biggerstaff*, 2 Duv. 281, 87 Am. Dec. 496, it was held that an injunction arrests the execution of a fi. fa. though levied, and discharges the lien notwithstanding the injunction is wrongfully sued out. The creditor should sue out a new fi. fa. on dissolution of the injunction and not a vendi. exp. (The kind of property is not stated.)

Under La. Code Pr. art. 700, providing that so long as the injunction continues the limit for making returns does not affect the right enjoined, as it is doubtful whether a sheriff can make a sale on the writ after the injunction against the same has been dissolved. *Dugat v. Babin*, 8 Mart. N. S. 391. But see *Hefner v. Hesse*, 29 La. Ann. 149.

A sale under an execution cannot be made after the return day of the same, although the sale has been prevented by an injunction which has been dissolved, as Ill. Rev. Stat. chap. 7, providing that the time that an officer is restrained from making a sale shall not be considered, does not apply to § 8 of the same chapter which provides that executions shall be returnable ninety days after date. *Welker v. Hinze*, 16 Ill. App. 323.

And under Miss. act Feb. 24, 1844, Hutch. Code, 232, providing that the lien of a judgment shall cease within two years from the passage of the act, where an execution levied on land was restrained for more than two years after the passage of that act on a judgment rendered prior thereto, there being no saving clause in the act, the lien of the judgment was gone. *Kilpatrick v. Byme*, 25 Miss. 571.

An order of sale differs from an ordinary execution, and an injunction against the sale under the latter where the validity of process is not questioned does not suspend the process, but the sheriff may sell other property; but he cannot do this under an order of sale which is enjoined. *Seligson v. Collins*, 64 Tex. 314.

The execution of an order of sale cannot be arrested except by injunction. *State v. Judge of 2d Dist. Ct.* 30 La. Ann. 238.

In *Anonymous*, 6 Mod. 120, where the holder for a term of years was kept out of possession by reason of his judgment and execution in ejectment having been enjoined, a motion to renew the term on account of the injunction was denied. (Holt, Ch. J., said he considered there wanted a clock over against the hall-gate.)

Md. act 1799, chap. 79, § 10, requiring the sheriff to restore possession of property levied upon where the sale is enjoined, does not require him to return the money instead of the property, where the sale was completed before the injunction issued; and the county court cannot require such return before the injunction is made perpetual. *Dail v. Travessa*, 8 Gill, 41.

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c. Officer.

An officer who disregards the injunction and proceeds with the sale is a trespasser, if he has knowledge that an injunction has been granted. There is some conflict of authorities as to whether he should be made a party defendant in the injunction suit.

An officer is a trespasser if he has knowledge of an injunction against a sale, and proceeds to make the sale, even if not served with notice. *Turner v. Gatewood*, 8 B. Mon. 613; *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 139; *Stinson v. McMurray*, 8 Humph. 330.

And where an injunction had been granted against proceedings at law, and exception was taken to special bail, and the sheriff ruled to produce the body of the defendant, it was a contempt of the injunction. *Bullen v. Ovey*, 16 Ves. Jr. 141.

But where a sheriff's sale was restrained until the further order of the court in a collateral case, and the report of the referee dismissed the complaint for the injunction, and the sheriff made the sale, it was held that the sheriff was entitled to fees, as the report of the referee under N. Y. Code Civ. Proc. § 1223, stands as a decision of the court. *Van Gelder v. Van Gelder*, 26 Hun, 356.

Some cases hold that the sheriff need not be made a party in a suit to enjoin an execution sale of property of a third party. *Holmes v. Chester*, 23 N. J. Eq. 79. See this case *infra*.

And the same was held in a suit to enjoin proceedings on a judgment. *Ashton v. Parkinson*, 8 Phila. 338.

And the same was held where it was claimed that the sale was unfair. *Brooks v. Lewis*, 13 N. J. Eq. 214.

And the same was held in a suit to enjoin the sale of exempt property. *Stout v. McNeill*, 95 N. C. 1; *Montgomery v. Whitworth*, 1 Tenn. Ch. 174.

But in *North v. Peters*, 138 U. S. 271, 34 L. ed. 936; *Olin v. Hungerford*, 10 Ohio, 268; and *Blanton v. Hall*, 2 Helsk. 424,—which were suits to enjoin the sale of property of a third party, it was held that the sheriff was a necessary party.

And in *Burpee v. Smith*, Walk. Ch. (Mich.) 327; *Edney v. King*, 4 Ired. Eq. 466; and *Lackay v. Curtis*, 6 Ired. Eq. 199,—which suits attacked the judgments and executions, it was held that the sheriff was a necessary party.

And in *Spotswood v. Higgenbotham*, 6 Munf. 314, where the sheriff took a bail bond and to this non *est factum* was pleaded, it was held that the sheriff was a necessary party to a suit to enjoin proceedings on the same.

Holmes v. Chester, *supra*, states that a sheriff is not a necessary party; citing *Vernon v. Blackerly*, 2 Atk. 147; *Farquharson v. Pitcher*, 2 Russ. Ch. 87; *Joy v. Wirtz*, 1 Wash. C. C. 517.

But in *Farquharson v. Pitcher* the bill for injunction was against the creditor and the sheriff, and the bill was demurred to as multifarious and the demurrer was overruled,—the object of the bill being to prevent the defendants in the equity suit from proceeding against the sheriff, and also to prevent the sheriff from paying the money to the defendants in the equity suit.

In *Joy v. Wirtz*, *supra*, the suit was not for injunction, and there was no question about the sheriff; the suit was to set aside a release.

And *Vernon v. Blackerly*, *supra*, was a suit for an annuity, and the question was whether the commissioner for building the church should be made a party.

In *North v. Peters*, *supra*, the court says: "In a case where the officer has exceeded his authority, he may be proceeded against either by an action for damages, if such remedy be sufficient, or by a writ of injunction to restrain the continued wrong-

doing; and it is not essential that the plaintiffs in the writs be joined as parties defendant, where, as in this case, it does not appear, either from the pleadings or the proofs, that they advised or directed the sheriff to seize the particular property, as the property of their judgment debtor." This seems to be the true rule.

In *Buffandeau v. Edmondson*, *supra*, where the sheriff was sued for damages in making a sale that was enjoined, and the sheriff was not a party to the injunction suit, it was said: "Being a mere ministerial office with no interest in the subject in controversy, and acting in the execution of the process as the agent of the plaintiff in the writ, we are by no means convinced that he was a necessary party to the proceedings."

And in *Nye v. Nightingale*, 6 R. I. 420, it was held that where the injunction was against the sheriff and the levying creditor, and a petition for the removal of the cause to the Federal court was filed, the sheriff was such a necessary party that his citizenship prevented a removal of the case.

And in *Buffandeau v. Edmondson*, 17 Cal. 436, 79 Am. Dec. 130, as to whether it is necessary to make a sheriff a party in a suit to enjoin an execution sale is not determined.

Plaintiffs in an execution need not answer the bill in a suit to enjoin the officer from making a sale, where they do not participate in the acts of the officer, and his answer of justification is sufficient. *Beard v. Foreman*, 1 Ill. 303, 12 Am. Dec. 197.

Where a levy is made on property of a third person, which property is not described in the writ or order of sale, the sheriff assumes responsibility; and it would seem that in such a case he should be made a party defendant in the injunction suit. But if the property is described in the order of sale an injunction against the plaintiff therein with notice to the sheriff ought to be effectual without making him a party defendant in an injunction suit. This distinction does not appear to be clearly made in these cases—and the text-books do not solve the question nor fully show the conflict in the decisions.

d. Limitation.

While there seems to be some conflict of authorities as to the injunction suspending the statute of limitations, the plaintiff in the action at law is entitled to an injunction to prevent the defendant from pleading the statute as a bar to further proceedings.

A party obtaining an injunction against an execution sale cannot thereafter claim that the lien of the judgment is barred by the statute of limitations when the loss of the lien is occasioned by injunction. *Work v. Harper*, 31 F. Mis. 109, 66 Am. Dec. 549; *Wilkinson v. Flowers*, 37 Mis. 579.

Where a judgment has been enjoined until the bar of the statute of limitations applies, an injunction will be granted to restrain the defendant at law from pleading the statute of limitations. *Marshall v. Minter*, 43 Mis. 606; *Sugg v. Thrasher*, 30 Mis. 136; *Davis v. Hoopes*, 33 Mis. 173.

In *Robertson v. Alford*, 13 Smedes & M. 503, it was held that an injunction against suits at law, under a statute providing for such injunction in a suit of quo warranto against a bank does not suspend the statute of limitations. It was suggested that no punishment for contempt would be imposed by a chancellor if it was necessary to sue to prevent a statutory bar.

In *Barker v. Millard*, 16 Wend. 572, it was said that an injunction against proceedings at law does not suspend the statute, but the contrary is implied, as the party to a suit in chancery has often applied to that court to restrain the defendant from setting up the statute in an action at law.

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XXI. Effect of time upon injunctions, executions, and judgments.

a. Injunctions and executions.

Hart, (Tex.) Dir. art. 1599, limiting the time within which an injunction may be had against judgments to six months, does not apply to injunctions against executions. *Clegg v. Varnell*, 18 Tex. 294.

Or where the cause arises after judgment. *Williams v. Bradbury*, 9 Tex. 487; *Beardley v. Hall*, Id. 119.

And an injunction will be granted against a sale on an execution which issued after more than twelve months from the date of a previous execution. *Watson v. Newsham*, 17 Tex. 487.

But will not be enjoined in such a case where there is no showing that an intervening execution had not issued. *Jordan v. Corley*, 42 Tex. 234.

And an execution will not be enjoined after six months' time where delay is not excused in such a case. *Pillow v. Thompson*, 20 Tex. 206; *Doss v. Miller*, 6 Tex. 383.

Tex. Rev. Stat. art. 2375, providing for enjoining judgments after a year has elapsed, where delay has been caused by fraud, does not apply to a judgment taken in a foreclosure upon a homestead after a release thereof had been placed on record on account of mistake in the mortgage, where there was no act done or promise made at the time of or after the judgment, but complainant is entitled to a reformation of the judgment omitting the homestead. *Williams v. Lumpkin*, 36 Tex. 641.

Under *Minn. Gen. Stat. chap. 63, § 202*, prohibiting an execution from issuing more than ten years from entry of judgment, such an execution is void and will not be enjoined, as it is not a cloud on title. *Hanson v. Johnson*, 20 Minn. 194. To the same effect, *Givens v. Campbell*, 20 Iowa, 79.

A defense made on an answer to a summons issued to renew an execution, that notice in the ordinary case had never been served, and an appearance was unauthorized, will prevent an injunction against the execution and judgment. *Jackson v. Patrick*, 10 S. C. N. S. 197.

But under *Ill. Rev. Laws 1833, § 370*, providing that if an execution is taken out within one year the judgment shall be a lien on land for seven years, where a purchaser bought after judgment, and an execution was levied four years after the judgment, and a vend. exp. was issued more than eleven years after the judgment, it ceased to be a lien, and a sale thereunder was enjoined at the instance of the purchaser. *Riggin v. Mulligan*, 9 Ill. 50.

And the defendant in a judgment of foreclosure is entitled to injunction against proceedings upon the execution where no process to enforce the decree was issued until more than five years after its entry. And *California Pr. act, § 300*, prohibiting an execution after five years, applies to foreclosures. *Stout v. Maoy*, 22 Cal. 647.

b. Dormant judgments.

Generally injunctions will be granted against executions on dormant judgments, if complainant shows that he is prejudiced thereby. *Krinke v. Parish*, 9 Ohio C. C. 141, 2 Ohio Dec. 85; *Horner v. Marshall*, 5 Munf. 406; *Davison v. Mackay*, 22 Or. 247; *Trevino v. Stillman*, 48 Tex. 561; *Bule v. Crouch*, 37 Tex. 53; *North v. Swing*, 24 Tex. 193. But see *Seymour v. Hill*, *infra*.

In *Krinke v. Parish*, *supra*, an execution issued on a dormant judgment was enjoined, although such execution might have been recalled on motion.

But injunctions were refused in other cases on questions of pleading and practice, as where the plaintiffs in the judgment are not made parties. *Howell v. Foster*, 122 Ill. 276.

Or where complainant does not show that he has any property. *Tittsworth v. Cook*, 49 Ill. App. 307. Or where there is a remedy by motion. *Mayo v. Bryte*, 47 Cal. 685.

In *Seymour v. Hill*, 67 Tex. 385, under Tex. Rev. Stat. art. 2874, no injunction shall be granted to stay a judgment, except so much as complainant may show himself equitably entitled to be relieved against and costs; it was held error to enjoin an execution on a dormant judgment which is unpaid. (This case says that this question was not made in the prior Texas cases.)

In *Coward v. Chastain*, 99 N. C. 443, it was held that an execution sale under a dormant judgment, which is also barred by lapse of time, will not be enjoined, as the sale would pass no title; but it was said that if the evidence of the lapse of time had been before the lower court, an injunction would have been granted by it.

And in *Pursell v. Deal*, 16 Or. 295, a purchaser of land against which was a dormant judgment, was

refused an injunction against an execution which issued under leave of court obtained under Or. Code, § 56, providing for publication service if a cause of action exists, or the defendant is a proper party to an action relating to real property; and the creditor took advantage of the first clause of this section. An injunction will not be granted for irregularity in the exercise of process.

A judgment for slander will be enjoined where, at the time of the alleged slander and at the time of the judgment, the defendant was insane, where such judgment had lain dormant for eight years and the plaintiff had declared his intention never to demand the judgment, although no written release was executed. *Horner v. Marshall*, 5 Munf. 465.

An execution on a dormant judgment will be enjoined, but the same may be revived in the injunction suit. *Trevino v. Stillman*, 45 Tex. 561; *North v. Swing*, 24 Tex. 196. I. T.

GEORGIA SUPREME COURT.

GILLIS *et al.*, *Piffs. in Err.*,
v.

John GILLIS *et al.*

(.....Ga.....)

*1. Construing together sections 2414 and 2415 of the Code, which relate to the execution and attestation of wills, the true meaning of the phrase "provided he can swear to the same," as used in section 2415, with reference to the competency of an illiterate or infirm witness, is that such a witness is competent to attest by his mark if, at the time of attesting, he is under no legal disability to testify as a witness; and it is not essential to his competency as an attesting witness to a will that he should be able to swear to or identify his mark at the time the will is offered for probate.

2. Where, upon the trial of an issue of *devisavit vel non*, a subscribing witness to the will, from want of memory or other cause, is unable or unwilling to testify to its attestation by himself or by the other subscribing witnesses, or to the execution of the will by the testator, or to the fact that the testator was mentally capable of making a will, or where a subscribing witness in his evidence denies the existence of any of these facts, the same may be proved by any competent witness having knowledge thereof, although the latter was not a subscribing witness to the will.

3. The law of mutual wills was not involved in the present case; the evidence warranted the verdict; and there was no error in denying a new trial.

(March 11, 1896.)

ERROR to the Superior Court for Emanuel County to review a judgment admitting to probate the will of Sarah Gillis, deceased. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by LUMPKIN, J.

NOTE.—For signature by mark in general, see note to *Re Guilfoyle* (Cal.) 23 L. R. A. 370, 80 L. R. A.

Messrs. Williams & Smith, Hines & Felder, and A. H. Davis for plaintiffs in error.

Messrs. Cain & Polbill, A. Herrington, T. M. Saffold, H. R. Daniel, and Evans & Evans for defendants in error.

Lumpkin, J., delivered the opinion of the court:

The nominated executors of the alleged last will of Sarah Gillis propounded the same for probate, and a caveat was filed by some of her heirs at law. On the trial in the superior court, to which court the case had been carried by appeal, there was a verdict for the propounders, and the caveators bring up for review a judgment overruling their motion for a new trial. Besides the general grounds that the verdict was contrary to law and the evidence, and that the court erred in refusing to grant a nonsuit, the motion contained special grounds raising certain questions, the nature of which is disclosed by the headnotes and this opinion.

The paper purporting to be the will was executed by the testatrix on the 13th day of March, 1878. It bears the names of four witnesses, but it was conceded that the last of them signed his name some time after the execution of the paper by the testatrix and its attestation by other witnesses, and it does not appear that he signed in her presence. The appearance, therefore, of the name of this witness upon the paper counts for nothing in determining the question of the legality of its execution. Accordingly, the fact that he signed will be ignored altogether and it will be understood that, in speaking of the subscribing witnesses to the paper, reference to the other three only is intended. One of these signed by making her mark. Another died before the testatrix. The usual and formal attestation clause was used. The paper was offered for probate soon after the death of the testatrix, and about twenty years after its execution and attestation. At the

time of probate the two subscribing witnesses then in life were produced. The one who wrote his own name proved the due execution of the paper as a will. The signature of the deceased witness was shown to be in his handwriting. The illiterate witness testified that she had no recollection of attesting the will, and could not swear to the making of her mark. At the same time, however, she did not expressly swear that she did not attest by her mark the paper pro-
 posed.

1. The first and leading question is, Was the paper legally attested as a will? The execution and attestation of written wills in this state, as to both real and personal property, is provided for in sections 2414 and 2415 of the Code. Section 2414 reads as follows: "All wills (except nuncupative wills) disposing of realty or personalty, must be in writing, signed by the party making the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the testator by three or more competent witnesses." Section 2415 declares that "a witness may attest by his mark, provided he can swear to the same; but one witness cannot subscribe the name of another, even in his presence and by his direction." Section 2414 was codified from 29 Car. II. chap. 8, § 5, known as the "Statute of Frauds," in reference to devises of real property (Cobb's Dig. p. 1128; *Huff v. Huff*, 41 Ga. 701), and from an act of January 21, 1852 (Acts 1851-52, p. 104), which prescribes that wills bequeathing personal property shall be executed as are wills devising real property. The statute of frauds and our own act of 1852 each uses the word "credible," and section 2414 of the Code uses the word "competent," as to the three or more witnesses required to attest a will. These two words are, as here used, synonymous. *Hall v. Hall*, 18 Ga. 40. They mean, in this connection, witnesses who are competent at the time of attestation to testify in a court of justice. Thus, in one of the earlier English decisions, it was said: "The true time for his credibility is the time of attestation; otherwise, a subsequent infamy, which the testator knows nothing of, would avoid his will." *Holdfast v. Dowling*, 2 Strange, 1253. In *Sears v. Dillingham*, 12 Mass. 358, the court, after stating that an executor was not a competent witness to prove the execution of a will, said: "But a will to which such an executor is a subscribing witness may be proved by the testimony of the other witnesses; he having been a credible witness, within the statute, at the time of his attestation, and having become incompetent only by accepting the trust." In *Patten v. Tallman*, 27 Me. 17, it was said: "The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation." So very pertinent, in this connection, is the text of Schouler on Wills, that we make an extended extract: "Upon common-law principle, the qualification or disqualification of a witness is usually raised with reference

to the time when he is called upon to testify. Nor is competency at that date to be left unconsidered; as where, for instance, a witness who subscribed while in sound mind has become insane by the time the probate of the will is at issue, in which case, of course, his testimony cannot be taken. But his incompetency at this latter date does not defeat the will, whose attestation and subscription was a sort of testifying, such as the peculiar transaction called for. To surround himself with a specified number of witnesses at that time competent, was all that any testator could do, in compliance with the statute requirements; and, what was then a proper execution in all respects taking place, a will was produced whose validity could never be impeached for informality. Hence the rule, which reason should now pronounce the universal one, so far as the question remains a material one at all, that the competency of witnesses, like that of the testator, is tested by one's status at the time when the will was executed. If, therefore, a sufficient number of witnesses attest and subscribe properly who at that date are competent, the will remains valid, although death or supervening disability may render any or all of them incapable in fact of testifying by the time the will is offered for probate. In other words, the inconvenience of this last situation is purely casual and incidental, and without direct prejudice to the will itself, which might, indeed, be established on mere proof of handwriting, where the instrument appeared on its face genuine and formal." Section 851. See also section 350, and Jarman, Wills (Rand. & T.'s ed.) p. 225; *Higgins v. Carlton*, 28 Md. 115, 93 Am. Dec. 666, and note on page 680; *Hawes v. Humphrey*, 9 Pick. 850, 20 Am. Dec. 481, and note on page 488; *Amory v. Fellowes*, 5 Mass. 219; *Carlton v. Carlton*, 40 N. H. 14; *Re Holt's Will*, 56 Minn. 33, 23 L. R. A. 481.

A witness who signs by his mark, if so capable of testifying, is just as competent a witness under the statute of frauds, our act of 1852, and section 2414 of the Code, as one likewise capable of testifying who writes his own name. This is settled by an unbroken line of authorities. *Harrison v. Harrison*, 8 Ves. Jr. 185; *Addy v. Griz*, Id. 504; *Davies v. Davies*, 9 Q. B. 648; *Bailey v. Bailey*, 35 Ala. 687; *Garrett v. Heslin*, 93 Ala. 615; *Horton v. Johnson*, 18 Ga. 397; *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419; *Lord v. Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Compton v. Milton*, 12 N. J. L. 81; *Morris v. Kniffin*, 37 Barb. 336; *Pridgen v. Pridgen*, 13 Ired. L. 260; *Simmons v. Leonard*, 91 Tenn. 183; *Jesse v. Parker*, 6 Gratt. 57, 53 Am. Dec. 102; 4 Kent, Com. 8th ed. 575; 10 Bacon, Abr. 491; Wms. Exrs. 3d Am. ed. 79; Beach, Wills, § 41; 1 Jarman, Wills (Rand. & T.'s ed.) 212, 214; Schouler, Wills, 331; 1 Am. & Eng. Enc. Law, p. 941. And, indeed, our code expressly declares that 'signature' or 'subscription' includes the mark of an illiterate or infirm person." Section 5. The mark is the signature of the witness. Century, Dict. word *Signature*, 14 Am. & Eng. Enc.

Law, p. 457, word *Mark*; Anderson, Law Dict. words *Mark* and *Signature*.

The subscription of a witness, whether in his own handwriting or by his mark, does not, of course, *ipso facto* make such witness incompetent because at the time of attestation he may be disqualified by law from testifying in a court of justice on account of infancy, imbecility, crime, or for other causes. But for the proviso in section 2415 of our Code, it cannot be reasonably doubted that the true test for determining the competency of any witness to the execution of a will in this state would certainly be whether or not the witness, at the time of attestation, would be disqualified from testifying in a court of justice. The rule as to witnesses generally, unless changed by that proviso, is beyond question applicable to "markmen." Did the words "provided he can swear to the same," referring to a witness unable to write his name, and who attests by his mark, change the rule? Omitting from the section the words just quoted, the mark of the witness, he being legally capable of testifying when he made it, would be good without any further condition. Suppose he should die or become blind or insane; corruptly refuse to testify to what he knew; forget or be inaccessible; and, for any of these reasons, did not, at the time of probate, in fact swear to the mark, but the other two witnesses did swear that he made it, and proved all other essential facts. Must the will fail? The proviso is new. After very diligent search and inquiry, we have been unable to discover even a trace of it in any book other than our Code, where it appears for the first and only time. Can it be possible that it was intended to revolutionize the law on the subject, and make the validity of a will depend upon the life, the eyesight, the continued sanity, the integrity, the memory, or the accessibility of witnesses? No court should so hold unless constrained by the plainest language to do so. We do not feel so constrained in the present instance. To construe section 2415 as contended for would be to open the door for endangering or destroying all wills. It would be contrary to the old law, and not in harmony with the spirit of the Code. Such an unwise and dangerous innovation should come in language able to withstand the severest verbal criticism. If it be expressed in doubtful phrase, construction may turn aside the danger. See *Walker v. Hunter*, 17 Ga. 409; *Deupree v. Deupree*, 45 Ga. 441-448. If the test of the legal competency of the witnesses is to be applied only at the time of probate, a will might be defeated in many ways. If the witness had died before that time, he could not possibly swear to his mark. If he had become blind he could not see the mark, and therefore could not swear to it. He might remember all the circumstances and know that he did make his mark to a will which was properly executed, but, without the aid of his lost vision, he could not swear to it. If he had lost his mind, he could swear to nothing. If he falsely testified that he could not swear to the mark, he would thus defeat the will, and with small risk, for it is always difficult to convict any

person of perjury, and hardly possible to do so when the alleged false evidence relates to a mental state of the witness himself. If he had honestly forgotten or could not really identify the mark as his own, the same result would follow. If he was inaccessible or his whereabouts unknown, the mark would remain unsworn to by him.

Surely, neither the original codifiers nor the general assembly can be supposed ever to have contemplated the defeat of a will in any of these ways. If the time for applying the test of competency as to an illiterate witness is when the will is offered for probate, it necessarily follows that, in order to make the subscription of such a witness valid, he must then swear to his mark, or else he does not count at all as a witness to the will. Accordingly, counsel for the plaintiffs in error contended that as the illiterate witness in this case, on account of her failure of memory, could not and did not swear to her mark, her attestation amounted to nothing, and consequently there were but two legal witnesses to the will, and it was therefore void. We cannot think this contention is sound. It goes beyond even the letter of the section under construction. It assumes that the compilers of our Code made a new law, and did not codify an old law. It "builds, like the martlet, on the outward wall." It leads to patent absurdities. It ignores the fact that sections 2414 and 2415 are *in pari materia*, and must be construed together. It adopts, from two constructions, the one that defeats, rather than the one that upholds, the real purpose of the law. It overlooks the rule that, if the language of any part of section 2415 is devoid of sense, it may be eliminated by the court altogether. It makes the competency of the witness at the time of attestation dependent on his memory or will, or other contingency, at the time of probate. It departs from established authorities, which are laws themselves, the overturning of which would unsettle property rights. It would enable a contestant to defeat a will by successfully tampering with a witness before the trial. And it does not include or suppose the possibility of an illiterate or infirm witness, if in existence, being voluntarily beyond the process of the court, or his whereabouts being unknown, at the time of probate, nor of the death or insanity of such witness before that time. "The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience, or injustice. The legislature may be supposed to intend all of these, but it can scarcely be supposed to intend its own stultification. Accordingly, it has been said that, when to follow the words of an enactment would lead to an absurdity as its consequences, that constitutes sufficient authority to the interpreter to depart from them." Endlich, Interpretation of Statutes, § 264. And see also section 295. Moreover, "in making it requisite to the validity of a will that there should be attesting witnesses who shall subscribe their names to the writing, the law has a threefold purpose: The identification of the paper,

the protection of the testator from deception and fraud, and the ascertainment of his testamentary capacity." Beach, Wills, § 89. The three reasons here specified are fulfilled by having three competent witnesses who are not disqualified at the time of attestation from testifying in a court of justice. Therefore, if an illiterate or infirm person, who is requested by a testator to attest his will, is not so disqualified, he is a competent witness to the will, because he is then competent to testify on the three points mentioned, as well as on any others relating to the factum or validity of the will. Whatever evils may exist in having illiterate or infirm persons, who are otherwise competent, attest wills by their marks, it is shown by a uniform current of decisions, and by the opinion of all text-writers, that the sages of the law, from the earliest times to the present, have upheld the attestation of wills by such witnesses making marks for their signatures, and they have never set forth a reason for any change in the law. In the well-considered case of *Pridgen v. Pridgen*, *supra*, Nash, J., delivering the opinion of the court, says: To subscribe is to set one's hand to a writing. If, then, the statute is on the part of the testator, in this particular, complied with by making his mark, why is it not satisfied by the witnesses' making their mark? The inconvenience and danger of defeating wills by allowing witnesses to attest whom who cannot write have been strongly urged in the argument. On the other hand, many evils might grow out of a rule confining the attestation to those only who can write." *A fortiori*, how many evils would exist, as already shown, if the contention of the caveators in this case should be upheld.

There is no act of our legislature or decision of our supreme court before the adoption of our Code that ever changed, or attempted to change, the old law as to witnesses attesting wills by their marks; and there is at least one case decided by this court before the Code went into effect which is in harmony with and upholds the law. See *Horton v. Johnson*, 18 Ga. 397. How, then, can it be said that the compilers of our Code intended to incorporate into it any other than the prevailing rule of law? It is not to be presumed that they, learned in the law, would, except in rare instances, themselves make a rule of law, when they were only empowered to codify existing laws of force in this state. See act Dec. 9, 1858; *Mechanics' Bank v. Heard*, 37 Ga. 412; *Phillips v. Solomon*, 42 Ga. 195, 196; *Gardner v. Moore*, 51 Ga. 269; *Atlanta v. Gate City Gaslight Co.* 71 Ga. 106, 119, 120; *McDaniel v. Gate City Gaslight Co.* 79 Ga. 55. At any rate, "the Code is not to be construed as changing the old law, unless the change be very apparent" (*Gardner v. Moore*, and *Atlanta v. Gate City Gaslight Co.* *supra*); or, "unless the intent to change be clear," as stated in *Phillips v. Solomon*, *supra*. It is therefore reasonable to conclude that the codifiers did not intend to create a new rule in Georgia as to the attestation of wills by illiterate or infirm persons, which would, in the manner above pointed out, so seriously affect the validity of wills so attested. It

is hardly probable that they would have inserted the words "provided he can swear to the same" if they had supposed they would receive the construction now contended for by the plaintiffs in error. In our opinion, the true interpretation of section 2415 is found by construing it with section 2414. They are *in pari materia*. Indeed, they cannot be separated, because they relate to the same subject-matter. The rule of law applying to statutes that are *in pari materia* is that, "where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs." Endlich, Interpretation of Statutes, § 48, and note thereto, where many authorities are collated. This rule applies with peculiar force to sections of our Code relating to the same subject-matter, and which were codified at the same time, because they must be construed, if possible, to harmonize with each other. *Bealle v. Southern Bank*, 57 Ga. 274; *Thomason v. Fannin*, 54 Ga. 363. As was said in the latter case: "If a fair construction can be adopted to prevent such a contradiction by one section of the other, it should be done." Section 2415, read with section 2414, shows that an illiterate or infirm person may attest a will by his mark. Standing by itself, it does not show what the witness is to attest. The whole section is evidently codified from the case of *Horton v. Johnson*, 18 Ga. 396, which holds that, if another witness signs the name of an illiterate witness, it is an illegal subscription, unless the illiterate witness affixes his mark; and from the case of *Hall v. Hall*, *id.* 40, in which it was decided that any witness to a will is competent, provided at the time of attestation he is not disqualified from testifying in a court of justice. This is made plain when section 2415 is construed with section 2414, which, as already stated, is codified from section 5 of the statute of frauds and our act of 1852, which place all witnesses, learned and unlearned, vigorous or infirm, upon the same footing, and render them competent witnesses to a will if by law they are not, at the time of attestation, disqualified from testifying in a court of justice.

It was argued that as section 2414 of the Code distinctly declared, in effect, that all the witnesses to a will must be "competent,"—*i. e.* capable of testifying,—and by its terms necessarily embraced witnesses who could not write their names, the words "provided he can swear to the same," used in the next section with reference to a witness attesting by his mark, would be merely tautological, if regarded simply as repeating the necessity for competency already plainly and unequivocally required. The force of this position cannot fairly be ignored. In it lies the main strength of the argument on the other side of the question, for it gives much plausibility to the contention that the purpose of the words last quoted was to limit, to some extent, the competency of infirm or illiterate

witnesses, by requiring that they should possess at least one other qualification than mere legal capacity to testify, viz., the ability to swear to their marks. It would be unreasonable, if not absurd, to construe the words "can swear" as meaning that the witnesses must have the requisite memory and the keen physical perception which would enable him, after the lapse of weeks, months, and years, to distinguish and identify a mere cross mark or other ordinary device representing his signature. This would certainly be very difficult, if not altogether impossible, if the mark had no peculiarities. It is much more reasonable to refer the question of ability to swear to the mark, not to recollection or accuracy of vision, but to legal capacity to testify. Synonymous with the word "can," in the connection in which it is used in the proviso under consideration, are the expressions "is able to," "has the power to," "has the ability to," "is competent to," "has the capacity to;" or, negatively speaking, "is not unable to," "has not the lack of power to," "has not the inability to," "is not incompetent to," "lacks not the capacity to." Surely, something must be supplied to this proviso by inference in order to give it sense or meaning. We must thus supply the means from which the witness "can" swear, etc. Is it by reason of his retentive memory or any other inherent power, or by reason of a power which does not spring from his own physical or mental capacities as a person in a natural state, but is conferred upon him by law as a member of society? It would not be straining to substitute the synonymous phrase "is competent to" for the word "can," so that the proviso would read: "Provided he is competent to swear to the same." Had the codifiers used this language, certainly it could not be said that the competency they had in view was his ability by reason of memory, rather than his ability to stand the tests which the law applies to all persons alike in passing upon their fitness to testify as witnesses. It is because of the overwhelming and destructive force of natural laws that the only requirement which human law can exact is that the witness must, at the time of attesting, be able to stand the test of competency prescribed in all cases; and it matters not whether he afterwards loses that competency or not. Illiterate or infirm witnesses simply stand upon the same footing as all others. Illiteracy or infirmity will not count against them, but they must, in other respects, come up to the legal standard of competency by which those who wield the pen are measured. We do not mean to insist that the suggestions just made eliminate the tautology. They cannot, for it is there if the words "provided he can swear to the same" mean what we think they do. But granting they are tautological, or even meaningless and utterly useless, if the foregoing argument is worth anything at all, it establishes the conclusion that it is safer and better to thus treat them than to give them a meaning not only out of harmony with all the law, but leading to consequences which the codifiers—we may almost say with certainty—did not anticipate.

80 L. R. A.

In the argument here, our attention was called to the case of *Thompson v. Davitte*, 59 Ga. 472, as somewhat in point, because it there appeared that an attesting witness, when called upon to prove the execution of a will, stated his unwillingness to swear positively to a mark purporting to be made by him, although he said he thought he made it. That case has, however, afforded us no aid in reaching our present decision, for the only point there was whether a mere statement by a witness of his belief could be regarded as affirmative evidence, and no construction of section 2415 of the Code was then attempted. Indeed, so far as we have been able to ascertain, this court has never before been called upon to construe that section. The correctness of the views upon this question we have above expressed are, we think, confirmed by other considerations, which belong more properly to the next division of this opinion.

2. Error was assigned upon the admission in evidence of the paper propounded, over the objection that there was not sufficient evidence from the subscribing witnesses as to its execution, and also upon admitting the testimony of Mary Gillie as to the execution of the paper by the testatrix and its attestation by the subscribing witnesses, over the objection that she, not being herself a subscribing witness, was incompetent to testify as to these matters. It is well settled that the subscribing witnesses to a will must, if practicable, be called and examined, but the fate of a will does not depend entirely upon their testimony. Upon the trial of an application to prove a will in solemn form, they are, all of them, unless accounted for, indispensably necessary witnesses; but the testimony, even as to the *factum* of execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all or any number of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be. The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses (*Deupree v. Deupree*, 45 Ga. 442, 448; *Jackson v. Le Grange*, 19 Johns. 386, 10 Am. Dec. 237; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 667; *Remsen v. Brinckerhoff*, 26 Wend. 825, 37 Am. Dec. 260, note; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 442, and note; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Brown v. Clark*, 77 N. Y. 369; *Beach, Wills*, § 39, and cases cited in note 19); or by their even denying their signatures to the will altogether, when such denial is overcome by other competent evidence (*Pear-*

son v. Wightman, 1 Mill, Const. 886, 19 Am. Dec. 686; *Re Higgins*, 94 N. Y. 554; *Hall v. Hall*, 18 Ga. 45; *Gardner v. Grannis*, 57 Ga. 555).

In *Deupree v. Deupree*, *supra*, decided in the year 1873, McCay, J., delivering the opinion of the court, said: "There is no question as to the general rule that on the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires." And, on page 448, he says: "How many wills do not come up for probate until many years after the execution of them. Sometimes the witnesses can only recognize their own handwriting; sometimes they only remember the fact that the testator signed, and perhaps only that they signed. Who was present, and all other details, have passed from memory. To say that under such circumstances the will is not to be probated would be a death blow to wills." And in *Pearson v. Wightman*, cited above, Cheves, J., said: "Where subscribing witnesses cannot be produced [or, if found] they deny their signatures, or otherwise fail to prove the due execution of the will, circumstantial evidence may be adduced to supply this deficiency. . . . It would be of terrible consequence if such evidence were not admissible, for how often and how easily might witnesses be tampered with to deny their own attestation?" The facts in the case of *Pate v. Joe*, 8 J. J. Marsh. 118, which are sufficiently stated in the case of *Jauncey v. Thorne*, *supra*, are very similar to the facts in the case at bar. In that case one of the witnesses (a woman) did not write her own name. As the decision says: "She was examined as a witness several years after the occurrence, but could recollect nothing of the circumstances except that Pate was sick, and rode in their [her and her husband's] wagon, and was left on the road." But her negative evidence was overcome by the affirmative testimony of the other subscribing witnesses, and the court held that the will was duly executed and attested. "The most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice where, from lapse of time or otherwise, it might be impossible to give any positive evidence on the subject." *Jauncey v. Thorne*, *supra*. And see *Peck v. Cary*, 87 N. Y. 9, 84 Am. Dec. 220, and note; *Higgins v. Carlton*, 28 Md. 115, 93 Am. Dec. 666.

There is nothing in section 2424 of the Code, upon the probate of wills in solemn form, which, rightly construed, conflicts with the law as declared in this opinion. This section does not require that the subscribing witnesses "in existence and within the jurisdiction of the court" shall each swear, at the time of probate, to their own subscriptions, and to the signature and testamentary capacity of the testator, in order to make a will valid; for thus construing the section would lead to obvious and glaring wrongs and absurdities. It simply means that they must be produced for the purpose of testifying to these facts, if competent. This section of the Code must be taken, not literally,

but in accordance with common sense and the usual rules of construction, as was done by this court in *Kitchens v. Kitchens*, 89 Ga. 171-178, 99 Am. Dec. 453, in construing section 2896 of the Code then in force, which was the same as section 2481 of the present Code. There it is plainly declared that, in the case of a lost will, the copy must be clearly proved by the subscribing witness; yet the court held that, while the subscribing witness must prove the execution of the lost will, other witnesses might prove its contents. The main reason of the rule for calling all witnesses in a proceeding for probate in solemn form is to give the other party an opportunity of cross-examining them; and, while the law requires a will to be attested by three witnesses, it does not necessarily mean that all three must concur in their testimony to prove it on probate. To do this would make the validity of the will depend upon the memory and good faith of the witnesses, and not upon that reasonable proof the law demands in other cases. *Nelson v. McGiffert*, 8 Barb. Ch. 158, 49 Am. Dec. 170, 174, note; *Jesse v. Parker*, 6 Gratt. 57, 52 Am. Dec. 103; *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419. Section 2424 does not, when considered in connection with the well-established law on the subject of the attestation and proof of wills, as already shown, prevent the probate of a will on account of defect of memory, or even perjury, of a subscribing witness, when the deficiency is supplied by other evidence, because the general rules of evidence and the force and effect of legal evidence were not intended to be disregarded in probating wills even in solemn form. This is shown by construing together the act of December 18, 1859 (Acts 1859, pp. 83-85), and the cases of *Brown v. Anderson*, 18 Ga. 177, and *Hall v. Hall*, 18 Ga. 40, from which section 2424 is evidently codified, and by considering the fact that, when a will is propounded for proof in solemn form, "the issue, and the only issue, is *devisavit vel non*,"—did he devise or not? *Wetter v. Habersham*, 60 Ga. 194. If each subscribing witness were compelled to testify alike, there might be no issue to pass upon.

8. The only remaining question to be disposed of requires very brief mention or notice. The motion for a new trial complains that the court erred "in not charging the jury the law in regard to mutual wills," and alleges that the verdict is "contrary to the law and evidence in this, to wit: the evidence showed that the will offered for probate was one of several mutual wills, and there was no evidence to show that the other mutual wills were not revoked or destroyed." Although there was some evidence of an agreement between the testatrix and others to make mutual wills, it does not appear that it was ever insisted upon or carried out, or that the caveators had any concern in it. Moreover, it was incumbent on them to show affirmatively the revocation of the dependent wills, if any there were. Code, § 2897. So the law of mutual wills was not involved in this case.

Judgment affirmed.

KANSAS SUPREME COURT.

Granville P. AIKMAN

v.

W. C. EDWARDS, Secretary of State.

(.....Kan.....)

*1. The legislature of this state has the power, under the Constitution, to transfer all of the counties comprising a judicial district into another, and thereby to abolish such district before the expiration of the term of office of the judge of the district so abolished.

2. Chapter 106 of the Laws of 1895, entitled "An Act Relating to Judicial Districts, Defining the Boundaries of the 5th, 8th, 9th, 13th, 19th, 24th, 31st, and 32d Judicial Districts, and Providing for Holding Terms of Court therein, and Defining Certain Duties of the Trial Court in the 19th Judicial District, and Repealing All Acts and Parts of Acts in Conflict with This Act," does not violate section 16 of article 2 of the Constitution. It does not include more than one subject, the title expresses the subject of the act, and it does not amend sections of prior acts not contained in the new act.

3. A two-thirds vote of the members of each House of the legislature is not required on the passage of an act to abolish a judicial district. The vote of a constitutional majority is sufficient.

4. A failure on the part of the presiding officers to sign a bill within two days after its passage does not defeat the act, nor in any manner impair its validity, if it be thereafter duly authenticated and approved by the governor.

(November 9, 1895.)

APPPLICATION for a writ of mandamus to compel defendant to file petitioner's nomination for the office of judge of the Twenty-sixth Judicial District for which he alleged he had been regularly nominated. *Denied.*

The fact. are stated in the opinion.

Messrs. G. P. Aikman, D. M. Valentine, and John H. Milligan, for plaintiff: The judge of a district court is a constitutional officer.

Const. art. 3, §§ 1, 5, 11; *State v. Thoman*, 10 Kan. 191; *Black, Const. L. §§ 94, 95*; *State v. Friedley*, 185 Ind. 119, 21 L. R. A. 684; *Throop, Pub. Off. § 20*.

No court has ever upheld a legislative enactment that attempted to destroy, abridge, or impinge upon the vested rights of a constitutional officer.

Black, Const. L. § 94; *State v. Noble*, 118 Ind. 868, 4 L. R. A. 101; 1 Bryce, *American Commonwealth*, 429; *Wright v. Deftrees*, 8 Ind. 298.

The Constitution says: "A district judge who shall hold his office for a term of four years."

State v. Thoman, supra; *People v. Maynard*,

*Headnotes by ALLEN, J.

NOTE. In connection with the above case, see *State v. Friedley* (Ind.) 21 L. R. A. 684, as presenting a case closely similar in which the decision was against the statute.

80 L. R. A.

14 Ill. 419; *State v. Noble, supra*; *Shoults v. McPheeters*, 79 Ind. 378; *Gregory v. State*, 94 Ind. 884, 48 Am. Rep. 162; *Little v. State*, 90 Ind. 838, 46 Am. Rep. 324; *Fressley v. Lamb*, 105 Ind. 171.

A judge of the district court is neither a state, county, nor township officer.

State v. Friedley, 185 Ind. 119, 21 L. R. A. 684; *State v. Tucker*, 46 Ind. 859.

That a judge is a constitutional officer and he has a vested right in the office was *stare decisis*.

State v. Tucker, and *State v. Noble, supra*; *Howard v. State*, 10 Ind. 99; *Moser v. Long*, 64 Ind. 189; *State v. Johnston*, 101 Ind. 223; *Hoke v. Henderson*, 4 Dev. L. 1, 25 Am. Dec. 677; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 802; *People v. McKinney*, 52 N. Y. 874; 7 Lawson, *Rights, Rem. & Pr. ¶ 3797*; *Love v. Com. 3 Met. (Ky.) 237*; *Com. v. Gamble*, 62 Pa. 848, 1 Am. Rep. 422; *People v. Dubois*, 23 Ill. 547; *State v. Messmore*, 14 Wis. 164.

The intention was that judicial officers should not be disturbed for any cause except malfeasance in office, and according to the well-recognized canons of statutory construction, the court is warranted in taking notice of the intention of the framers of the Constitution.

Cooley, Const. Lim. p. 68; *Sutherland, Stat. Constr. §§ 284-287*; *Provy v. Stover*, 11 Kan. 235; *Com. v. Gamble, Love v. Com., State v. Messmore*, and *People v. Dubois, supra*.

The legislature cannot remove an officer where the tenure of his office is fixed by the Constitution, and the same result cannot be effected indirectly by transferring the office to another or by abbreviating the term.

Throop, Pub. Off. § 20; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 802; *People v. McKinney*, 52 N. Y. 874; *People v. Batchelor*, 22 N. Y. 128; *State v. Thoman*, 10 Kan. 191; *Black, Const. L. § 98*; *King v. Hunter*, 65 N. C. 608, 6 Am. Rep. 754; *Ex parte Meredith*, 83 Gratt. 119, 86 Am. Rep. 771; *Keys v. Mason*, 3 Sneed, 6; *People v. Burbank*, 12 Cal. 878; *State v. Wright*, 7 Ohio St. 834; *State v. Aikew*, 48 Ark. 82; *State v. Floyd*, 9 Ark. 813; 12 Am. & Eng. Enc. Law, p. 18, entitled *Tenure of office of judge*; *Cooley, Const. Lim. 4th ed. p. 76*, and note, p. 836, and note, *Peters v. Board of State Censors*, 17 Kan. 365.

All the authorities make a clear distinction between a constitutional and legislative office.

Leavenworth County Comrs. v. State, 5 Kan. 668; 12 Am. & Eng. Enc. Law, p. 18; *Lease v. Fredborn*, 52 Kan. 760; *State v. Mitchell*, 50 Kan. 289; *Cooley, Const. Lim. p. 836*, note 2.

You cannot do by indirection that which cannot be done directly.

A public office is defined to be "a right to exercise a public function or employment and take the fees and emoluments belonging to it."

2 *Bouvier, Law Dict.* 255; 7 *Bacon, Abr.* 279, 7 *Lawson, Rights, Rem. & Pr. § 3797*.

The term of office embraces the idea of tenure, duration, emoluments, and duties.

United States v. Hartwell, 78 U. S. 6 Wall. 885, 18 L. ed. 830.

The legislature cannot remove an officer

where the tenure of his office is fixed by the Constitution; and it has also been said that the same result cannot be effected indirectly by transferring the office to another or by abbreviating the term.

Throop, Pub. Off. § 20; *People v. Van Gaskin*, 5 Mont. 352; *State v. Davis*, 44 Mo. 129.

A law limiting the term of office of a constitutional officer is void.

Leavenworth County Comrs. v. State, Com. v. Gamble, People v. Dubois, State v. Messmore, and State v. Friedley, supra; Reid v. Smoulder, 128 Pa. 324, 5 L. R. A. 517; *State v. Benedict*, 15 Minn. 198; *People v. Albertson*, 55 N. Y. 50.

Taking away the territory of an official takes away his office.

Re Hinkle, 81 Kan. 712; *Re Wood*, 84 Kan. 648; *Crozier v. Lyons*, 72 Iowa, 401.

If Judge Shinn has no district or court over which to preside, he is not a judge of any kind.

State Const. art. 3, § 18; *Harvey v. Rush County Comrs.* 32 Kan. 162.

If the legislature has such power, the judiciary would not be an independent and co-ordinate branch of the government, but would be wholly dependent upon the legislative department.

State v. Noble, 118 Ind. 366, 4 L. R. A. 101; 1 Bryce, *American Commonwealth*, 81; *Leavenworth County Comrs. v. State*, 5 Kan. 689; *State v. Thoman*, 10 Kan. 191.

A two-thirds vote of the members present of each House is necessary to create or abolish a judicial district.

Const. art. 3, § 14; *Sedgwick County Comrs. v. Bailey*, 13 Kan. 610.

If more than one subject is named in the title of the bill it is clearly void.

Missouri P. R. Co. v. Wyandotte, 44 Kan. 32; *State v. Bankers' & M. Mut. Ben. Assn.* 28 Kan. 499; *St. Louis v. Tiesel*, 42 Mo. 592; *Mewherter v. Price*, 11 Ind. 199.

The constitutional provision which says that all acts and bills passed by the Senate and House of Representatives shall be signed by the presiding officer means something and is mandatory.

Cooley, Const. Lim. p. 94; *People v. Lawrence*, 36 Barb. 177; *Brown v. Goben*, 129 Ind. 113; *State v. Edgerton School Board*, 76 Wis. 177, 7 L. R. A. 330; *Varney v. Justice*, 86 Ky. 596; *Jones v. Hutchinson*, 43 Ala. 721.

The authentication of an act must be by signature; and one which, though passed, is not signed nor enrolled, is void.

State v. Kieseewetter, 45 Ohio St. 254; *Burroughs*, Pub. Secur. 426; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State v. Mead*, 71 Mo. 266; *Annapolis v. Harwood*, 32 Md. 471; *State v. Young*, 32 N. J. L. 29; *Sherman v. Story*, 30 Cal. 253, 39 Am. Dec. 93.

When the Constitution requires every bill passed to be signed by the presiding officer of the respective Houses, it is mandatory and cannot be dispensed with.

Sutherland, Stat. Constr. p. 51; *Pacific Railroad v. The Governor*, 23 Mo. 364, 66 Am. Dec. 673; *Speer v. Allegheny & M. Pl. Road Co.* 22 Pa. 376; Cooley, Const. Lim. 183.

30 L. R. A.

Mr. F. B. Dawes, Attorney General, for defendant:

The fact that the act of the legislature, the validity of which is questioned in this suit, was not signed by the lieutenant governor and speaker of the House of Representatives until more than two days after it had finally passed both the Senate and House of Representatives, does not make the act invalid.

Leavenworth County Comrs. v. Higginbotham, 17 Kan. 62.

The title of this act is sufficiently broad to include everything contained in such act.

Woodruff v. Baldwin, 28 Kan. 491; *State v. Barrett*, 27 Kan. 317; *Oherokae County Comrs. v. State*, 36 Kan. 337; *State v. Bush*, 45 Kan. 140; *Re Sanders*, 58 Kan. 191, 23 L. R. A. 608.

While this law practically amends or modifies prior laws in reference to certain judicial districts, yet it is an independent statute, complete in itself, and as such does not violate the provisions of the last subdivision of section 16, article 3, of the Constitution.

Sutherland, Stat. Constr. 173, and authorities cited; *State v. Cross*, 88 Kan. 696.

Where the constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other and clear ground upon which the court may rest its judgment and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it.

Cooley, Const. Lim. 196; *Ex parte Randolph*, 2 Brock. 447; *Free v. Ford*, 6 N. Y. 178; *Cumberland & O. R. Co. v. Washington County Ct.* 10 Bush, 564; *White v. Scott*, 4 Barb. 56; *Mobile & O. R. Co. v. State*, 29 Ala. 573; *Davis v. Wilson*, 11 Kan. 74.

No one, except the judges of the districts whose terms would be affected, would have a right to question the validity of this act.

Cooley, Const. Lim. 197; *People v. Benselaer & S. R. Co.* 15 Wend. 118, 30 Am. Dec. 33; *Sinclair v. Jackson*, 8 Cow. 543; *Smith v. McCarthy*, 56 Pa. 359; *Antoni v. Wright*, 23 Gratt. 357; *Marshall v. Donovan*, 10 Bush, 681; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Hingham & I. Bridge & Turnp. Co. v. Norfolk County*, 6 Allen, 358; *Dejarnett v. Haynes*, 23 Miss. 600; *Heyward v. New York*, 8 Barb. 486; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Williamson v. Carlton*, 51 Me. 449; *State v. Rich*, 20 Mo. 393; *Jones v. Black*, 43 Ala. 540.

The power given by the Constitution to the legislature to increase the number of judicial districts would also include the power to abolish.

There can be no question that the Constitution does not, either directly or impliedly, prohibit the legislature from so doing, and such being the case, they have the power.

People v. Draper, 15 N. Y. 532; *Thorp v. Rutland & B. R. Co.* 27 Vt. 140, 63 Am. Dec. 625; Cooley, Const. Lim. 107; *Adams v. Howe*, 14 Mass. 340, 7 Am. Dec. 216; *People v. Rucker*, 5 Colo. 455; *Leggett v. Hunter*, 19 N. Y. 445; *Cochran v. Van Surlay*, 20 Wend. 365,

89 Am. Dec. 570; *People v. Morrell*, 21 Wend. 563; *Sears v. Cottrell*, 5 Mich. 251; *Beauchamp v. State*, 6 Blackf. 299; *People v. Wright*, 70 Ill. 388; *State v. Reid*, 1 Ala. 612, 35 Am. Dec. 44; *Andrews v. State*, 8 Heisk. 165, 8 Am. Rep. 8; *Lewis & Nelson's Appeal*, 67 Pa. 153; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.

Cooley, Const. Lim. 192; 8 Am. & Eng. Enc. Law, p. 674; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164; *People v. New York O. R. Co.* 24 Barb. 123; *Tyler v. People*, 8 Mich. 320; *Inkster v. Carver*, 16 Mich. 484; *Flint River S. B. Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Atchison v. Bartholow*, 4 Kan. 124; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 313, 6 L. ed. 606; *Oberokee County Comrs. v. State*, 36 Kan. 387.

The fact that the legislature passed this act is a conclusive presumption, so far as this court is concerned, of the wisdom and need of such a law.

People v. Draper, 15 N. Y. 533; *Re Hinkle*, 81 Kan. 713; *Division of Howard County*, 15 Kan. 194; *Hagerty v. Arnold*, 18 Kan. 367; *Re Wood*, 34 Kan. 648; *State v. Askeu*, 48 Ark. 83; *Van Buren County Supers. v. Mattox*, 30 Ark. 566; *State v. Gaines*, 2 Lea, 316.

The fact that this law passed by the legislature in response to the demands of the people, that the number of judicial districts be diminished, results incidentally in lessening the term of some judges for a short time and their salary by such law being reserved to them for the full term, will not be sufficient reason for declaring such law unconstitutional.

State v. Ranson, 78 Mo. 78; *State v. McGowey*, 92 Mo. 423; *Hagerty v. Arnold*, *supra*.

Allen, J., delivered the opinion of the court:

It is alleged in the alternative writ of mandamus issued in this case that the plaintiff was, on the 17th day of September, 1895, duly and legally nominated to the office of district judge by the Republican judicial convention held at the city of Eldorado, in Butler county, for the 26th judicial district, including the counties of Butler and Greenwood; that a certificate of such nomination in due form was signed by the chairman and secretary of said convention, and presented to the defendant, secretary of state, with the request that he file the same; that the defendant refused to comply with this request on the ground that Butler and Greenwood counties were, by act of the last legislature, transferred to the 18th judicial district. The writ commands the secretary of state to file the certificate of nomination or show cause. The attorney general appears on behalf of the defendant, and moves to quash the writ, because it does not state a cause of action against the defendant.

Chapter 106 of the Laws of 1895, entitled "An Act Relating to Judicial Districts, Defining the Boundaries of the 5th, 8th, 9th, 18th, 19th, 24th, 31st, and 32d Judicial Dis-

tricts, and Providing for Holding Terms of Court therein, and Defining Certain Duties of the Trial Court in the 19th Judicial District, and Repealing All Acts and Parts of Acts in Conflict with This Act," provides in section 7 that "the counties of Chautauqua, Elk, Greenwood, and Butler shall constitute the 18th judicial district." Prior to the passage of this act the 26th judicial district included only the counties of Butler and Greenwood, and by transferring these to the 18th district the 26th is abolished because it is left without territory. By changes in the boundaries of other districts the 25th, 27th, and 28th districts are also abolished. Chapter 99 of the Laws of 1895 abolishes the 14th district in the same manner, and at the same session of the legislature the Shawnee county circuit court was also abolished.

1. The validity of chapter 106 is challenged by the plaintiff on various grounds. First. It is contended with great earnestness that the office of judge of the district court is a constitutional office, which it is beyond the power of the legislature to abolish; that this act, by its terms, takes effect on the 15th day of October, 1895, while the term of office of the Honorable O. W. Shinn, the present judge of the 26th judicial district, will not expire until the second Monday in January, 1896; that the Constitution protects the district judge in his office for the full term of four years, and that the legislature cannot directly abridge his term, nor indirectly accomplish the same result by destroying his district. It is contended that the judicial department is co-ordinate with and independent of the legislative, and that, if the right of the legislature to destroy a judicial district, and thereby legislate a judge out of office, is recognized, the independence of the judiciary is destroyed, and the legislative will become dominant over the judicial department of the government. In support of this contention it must be conceded that cases closely in point, decided by eminent courts, are cited. Among the strongest may be mentioned *Com. v. Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *State v. Friedley*, 185 Ind. 119, 21 L. R. A. 634; *People v. Dubois*, 23 Ill. 547; and *State v. Mesmore*, 14 Wis. 177. We have carefully weighed and considered these authorities, and recognize their full force. While the reasoning of the courts in these cases is applicable to the one now under consideration, we may remark that in each of the cases mentioned the court had under consideration an act of the legislature which would deprive a single judge only of his office, if valid. In this case the legislature had under consideration the rearrangement of the judicial districts covering a large part of the state. Notwithstanding our great respect for the tribunals by which these cases were decided, and the force of the reasoning by which their decisions are supported, we are constrained to give a different construction to the provisions of our own Constitution. The provisions in article 8 of that instrument, so far as they affect the matter under consideration, are as follows:

"Sec. 1. The judicial power of this state shall be vested in a supreme court, dis-

tract courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law. And all courts of record shall have a seal to be used in the authentication of all process."

"Sec. 5. The state shall be divided into five judicial districts, in each of which there shall be elected by the electors thereof a district judge who shall hold his office for the term of four years. District courts shall be held at such times and places as may be provided by law.

"Sec. 6. The district courts shall have such jurisdiction in their respective districts as may be provided by law.

"Sec. 7. There shall be elected in each organized county a clerk of the district court, who shall hold his office two years, and whose duties shall be prescribed by law.

"Sec. 8. There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound mind, as may be prescribed by law, and shall have jurisdiction in cases of habeas corpus. This court shall consist of one judge who shall be elected by the qualified voters of the county, and hold his office two years. He shall be his own clerk, and shall hold court at such times, and receive for compensation such fees, as may be prescribed by law.

"Sec. 9. Two justices of the peace shall be elected in each township, whose term of office shall be two years, and whose powers and duties shall be prescribed by law. The number of justices of the peace may be increased in any township by law."

"Sec. 14. Provision may be made by law for the increase of the number of judicial districts whenever two thirds of the members of each House shall concur. Such districts shall be formed of compact territory and bounded by county lines, and such increase shall not vacate the office of any judge.

"Sec. 15. Justices of the supreme court and judges of the district courts may be removed from office by resolution of both Houses if two thirds of the members of each house concur, but no such removal shall be made except upon complaint, the substance of which shall be entered upon the journal, nor until the party charged shall have had notice and opportunity to be heard."

The legislature of 1887 created the 25th, 26th, 27th, 28th, and 29th judicial districts, and the legislature of 1889 created the 30th, 31st, 32d, 33rd, 34th, and 35th districts. The acts creating these districts were passed at a time when the development of the resources of the state and the increase in its population were expected to continue with the same rapidity as in the preceding years. Subsequent events have shown that this increase was extravagant and unnecessary, and there came an exceptionally strong demand from the people that some of these needless offices be abolished. The act of the legislature of 1895 now under consideration was passed in compliance with this demand. The question we now have to consider is whether this purpose has been accomplished without

any violation of constitutional restrictions. The argument on behalf of the plaintiff, and the reasoning of the courts in the authorities sustaining his contention, may, perhaps, be divided into two main propositions: One, that it was the general purpose of the framers of the Constitution to protect the judicial department from legislative interference; the other, that they intended to insure to the judge a tenure of office for the full term for which he was elected; the one being necessary for the preservation of the independence and integrity of the judicial branch of the government in the administration of justice between litigants, and the other to preserve the individual right of the judge to his office. That the Constitution intends to secure the judiciary as an independent co-ordinate branch of the government is conceded on all hands, and that the district courts are an important part of the judicial system is beyond question. It is contended that, because the Constitution provides for district courts, and fixes the term of the judges, and prescribes the mode of their removal from office, their position is fixed, and is as safe from legislative interference as that of the justices of this court; that both are constitutional officers, in exactly the same sense, and to exactly the same extent. But it will be noticed that under the provisions of the Constitution above quoted the judicial power is vested, not merely in supreme and district courts, but in probate courts, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may see fit to create. Probate judges and justices of the peace are constitutional officers, whose terms are fixed at two years by that instrument. The only provision of the Constitution which can be construed as giving superior protection to district judges over probate judges and justices of the peace is that providing for the removal from office of justices of the supreme court and judges of the district courts. The number of the justices of the supreme court, as well as the duration of their terms of office, is definitely fixed by the terms of the Constitution. Their original jurisdiction is fixed by the Constitution itself, and is coextensive with the state. Their appellate jurisdiction alone is subject to legislative discretion. The case of district judges and justices of the peace is different in this important particular: that the number of judicial districts, and therefore the number of district judges, as well as the number of counties and townships, and of probate judges and justices of the peace, depend on legislative discretion. The Constitution requires a probate judge in each county, but leaves the number of counties into which the state shall be divided to be determined by the legislature, with the single restriction that no county shall include an area of less than 482 square miles. It provides that two justices of the peace shall be elected in each township, but leaves the establishment of townships entirely to the legislature. If the contention of the plaintiff is sound, it follows as a logical sequence that the legislature cannot abolish a township or county at a time when it will have the effect to shorten the

term of office of a justice of the peace, a probate judge, or, indeed, a clerk of the district court.

We think prior decisions of this court have construed our Constitution and announced the principles decisive of this case. In the case of *Division of Howard County*, 15 Kan. 94, it was held that "the legislature has the power to abolish counties and county organizations whenever it becomes necessary for them to do so in changing county lines or in creating new counties." *Re Hinkle*, 81 Kan. 712, decides: "The legislature has the power to abolish or destroy a municipal township, and when the township is abolished or destroyed, the township officers must go with it." The doctrine of this case is reaffirmed in *Re Wood*, 84 Kan. 645. In the case of *State v. Hamilton*, 40 Kan. 323, it was said: "There is no constitutional restriction upon the power of the legislature to abolish municipal and county organizations, and the existence of the power is not disputed and cannot be doubted." The Constitution provides for five judicial districts. It is clear that the legislature cannot reduce the number of districts below five. Section 14, above quoted, provides for an increase of the number, and the concluding sentence of the section is, "and such increase shall not vacate the office of any judge." It is argued that the word "increase" should be interpreted to include alteration or diminution, and that the real intent of the framers of the Constitution was to absolutely protect every district judge against the abolition of his office by the legislature. If so, the framers of the Constitution were singularly careless in their selection of words. This we cannot assume without most cogent reasons. If it had been intended to prohibit the vacation of the office of a judge by the abolition of his district, it would have required but very few words to say so. To vacate the office of a district judge already elected by the people and serving, by an act increasing the number of judges, would clearly be, in effect, the removal of a judge from office when his office was not destroyed. To allow the legislature, while making one new district, to legislate the judge of an old district out of office, and provide for the appointment or election of two new judges, would clearly be vicious in principle, and this is the class of legislation which falls within the constitutional inhibition. But to prohibit the legislature from abolishing a district which had been improvidently established, and thereby vacate the office of a judge, is another and altogether different thing, which the Constitution does not, in express terms, prohibit. While the independence and integrity of courts in the exercise of all the powers confided in them by the Constitution should be firmly maintained, jealousy of encroachments on judicial power must not blind us to the just power of the legislature in determining within constitutional limits the number of courts required by the public exigencies, and the kind and extent of the jurisdiction and functions to be discharged by each. We think the legislature has the power to abolish as well as to create, to diminish as well as to increase, the number

of judicial districts. We might say, in this connection, that the plaintiff in this case does not claim any vested right in an office, and that no question is presented by the record before us as to the right of the legislature to deprive a district judge of the compensation allowed him by law. In the act under consideration the legislature has seen fit to provide that the act shall not be construed to deprive any judge of his salary for the full term for which he was elected. The claim of the plaintiff in this case rests on the broad proposition that the act in its entirety is void. The conclusion we have reached is not wholly without support from authorities in other states. *Van Buren County Supers. v. Mattoz*, 30 Ark. 566; *State v. Gaines*, 2 Lea, 316; *Crozier v. Lyons*, 72 Iowa, 401.

If the contention that a judge, when once elected, is entitled not only to the emoluments of his office, but to exercise the functions of his office in the territory for which he was elected, be sound, does his right extend over the whole district, or only over a part of it, and can there be a sound distinction between the right to take away a part of his district and the right to take away the whole? It has never been contended, so far as we are aware, that the legislature is without power to change the boundaries of judicial districts by detaching counties from one and adding them to another; nor has it been doubted that the legislature might do this during the continuance in office of any judge. That this has the effect of placing the people of the county so transferred from one district to another away from the jurisdiction of a judge in whose selection they have taken part, and under the jurisdiction of another judge in whose election they have had no voice, is clear. The great fallacy, as we view the case, in the argument in favor of the plaintiff, and in the cases cited by him, is that the rights of the particular individual who chances to be elected judge are looked upon as paramount and superior to the rights of the public. The correct view is that a public officer, no matter what the department of the government in which he serves, is a public servant. A district judge is provided to aid in the administration of the laws. While it is right that the public should deal justly with him, his individual rights are by no means of primary importance. The most substantial objection that can be urged against such a transfer as is made by this act is that the people are placed in a district under a judge in whose selection they have had no voice, and who might not have been chosen if all the people in the enlarged district had been permitted to vote at the time of his election. The reasons apply against the transfer of one county with just the same force as against the transfer of all the counties included within a district. Acts of the legislature transferring a county from one district to another have very frequently been passed during the history of the state, and their validity has never been questioned. The only ground on which it can be urged that the legislature might transfer Greenwood county into the 18th district, but not Butler, is that the judge of

the 26th district resides in Butler county. This ground is purely personal to the judge. It has no weight whatever affecting the interests of the public.

We need not discuss the question, argued at some length in the brief, whether there can be a judge without a district, or without a court over which to preside, as the plaintiff in this case has no interest in that question. Nor shall we attempt to answer the list of questions asked under this head in the brief. It is sufficient for us to say that the legislature had power to transfer Greenwood and Butler counties into the 18th judicial district in the manner provided in the act under consideration.

2. It appears that on the final passage of the act two thirds of the senators voted for it; that in the House it received eighty-three votes, being one short of two thirds of the members. It is contended that the Constitution requires the concurrence of two thirds of the members of each House to increase the number of judicial districts, and that there is an implied inhibition on the reduction of the number of districts without the concurrence of an equal number. The general rule is that laws may be enacted by the vote of a majority of all the members elected to each House. The concurrence of a larger number is only required in cases mentioned in the Constitution itself. It is not apparent that the same reasons exist for a two-thirds majority in order to abolish a judicial district, or to change its boundaries, that do for creating one. One of the worst tendencies to be provided against in our system of government is that of constantly creating new offices to be filled, and increasing the salaries of old ones. Those desiring lucrative positions, or public favors of any kind, are constantly pressing their claims on the members of the law-making body, and it was thought wise to require the concurrence of two thirds of the members of each House as a safeguard against this tendency. Any one who has observed the obstacles which are invariably thrown in the way of every attempt at the abolition of an office, or reduction of a salary, or the taking away of a special privilege, must be fully aware that no necessity exists for unusual constitutional restrictions on the power to reduce the number of officers, or deprive any person of a salary or a privilege held to the detriment of the public. When the people are not vigilant, their rights are often easily lost, and regained only with utmost labor. *Facilis descensus Averno. Noctes atque dies patet atri janua Ditis; sed revocare gradum, superasque evadere ad auras, hoc opus, hic labor est.*

3. It is urged that the act is void because it violates section 16 of article 2 of the Constitution; that the title is defective because it does not clearly express the purpose of the act, does not mention the judicial districts abolished, and includes more than one subject. The first part of the title, "An Act Relating to Judicial Districts," is very broad and comprehensive. Whatever changes are made by the act are effected by so extending the boundaries of the districts named as to include within them the territory of the old

25th, 26th, and 28th districts. There is no abolition of these districts by express words, but any person reading the title of the act would be informed that changes of boundaries were made, and of course a change in the boundary of one district could not be effected without also changing the boundary of another. The contention that, because a clause is inserted in the act, making it "the duty of the trial court of the 19th judicial district in assigning the docket to so group cases arising in Arkansas City and cases controlled by Arkansas City attorneys, so they can, on motion, be tried in succession," it contains more than one subject, is not good. While this matter is perhaps a little remote from the general purpose of the act, it still is connected with judicial districts. This is not a matter of very great importance, and to hold this whole act void on this ground would seem extremely technical and hypercritical. Nor do we think that greater force should be given to the objection to the last clause of section 4, relating to summoning juries in Dickinson and Morris counties. All these matters relate to judicial districts. It is contended that the construction we have given to the act under consideration makes it amendatory legislation, and therefore void, within the rule followed in *State v. Guinney* (Kan.) 40 Pac. Rep. 928. Every act changing the law is not necessarily amendatory because previous legislation existed on the same subject. An amendment properly is a correction of one or more existing defects. It looks to particulars, without disturbing the general framework of the law. But where the legislature has under consideration not merely minor particulars, but the whole subject-matter of the law, it may wholly annul all former legislation on the subject, and pass an act covering the entire field, without specifically naming or attempting to amend particular provisions in prior statutes. The new act then becomes a substitute for all former legislation on the subject, and may repeal, either in express terms or by necessary implication, all former sections of the law inconsistent with the new enactment. Were we to hold the act under consideration amendatory of former statutes, and void because the sections amended are not contained in the new act, and apply the same rule to former statutes, it is very difficult to tell in what judicial districts the various counties named in the act would be found. By referring to chapter 147 of the Laws of 1887, by which the 26th judicial district was created, we find that it does not in terms amend any former law, nor contain even a general repealing clause. It merely creates judicial districts, and fixes the terms of court therein; the 26th district being composed of the counties of Butler and Greenwood. Prior to the passage of that act, Butler county was in the 18th district, created by chapter 102 of the Laws of 1883, and Greenwood county was in the 5th. Prior to that time, Butler county had been in the 18th district, created by chapter 112 of the Laws of 1872, and prior to that time in the 9th. Greenwood county was attached for judicial purposes to Woodson county, which was included in the 5th dis-

tract in 1861. None of the acts creating the various judicial districts in which Butler county has been included have ever complied with the constitutional requirements of an amendatory statute, and, if the act under consideration is void for that reason, the act creating the 26th judicial district is void also, and no 26th district has ever existed. It is clear that the statute is not void for this reason.

4. A final objection is that the act was not signed by the presiding officers of the respective Houses within two days after its passage, as required by section 14 of article 2 of the Constitution. If the contention of the plaintiff is sound, then a veto power rests in the presiding officers of the two Houses, which has remained undiscovered from the organiza-

tion of the state government to this time. It would undoubtedly be a very great surprise to the general public if it were to be declared by this court that the lieutenant governor and the speaker of the House, by merely delaying for more than two days to attach their signatures to it, could effectually kill a law duly passed by the Senate and House. In the case of *Leavenworth County Comrs. v. Higginbotham*, 17 Kan. 62, it was held that the failure of the presiding officer of the Senate to sign a bill did not invalidate the law, and that the act then under consideration was a law, although never authenticated as such by him.

The motion to quash the writ is sustained.
All the Justices concur.

ILLINOIS SUPREME COURT.

Fred L. VOLTZ *et al.*, Appts.,

v.

NATIONAL BANK OF ILLINOIS.

(158 Ill. 532.)

1. A bank which guaranteed the payment of the checks of another bank that was not a member of a clearing-house association, in order to clear its checks, and, after the latter bank had made an assignment for creditors and a check thereon which had been certified for the drawers had been refused at the clearing-house, paid the check in pursuance of the guaranty,—did not do this as agent of the other bank, but became an assignee of the check, with the right to recover thereon against the drawers.
2. Even if a guaranty by one bank to another for clearing-house purposes is *ultra vires* this fact will not avail the drawers of a certified check who are not parties to the guaranty, when charged with liability to the bank, which in compliance with its guaranty has paid the check and become an assignee thereof after the drawee has become insolvent.
3. A bank which pays a check in pursuance of a guaranty, even if that was *ultra vires*, is not a mere volunteer so as to be precluded from claiming the rights of the person to whom payment was made, by subrogation.

(October, 11, 1895.)

A PPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to enforce payment of a check of which defendants were drawers after it had been dishonored by the drawee and taken up by plaintiff under its guaranty. *Affirmed.*

Statement by Baker, J. :

This cause is brought to this court by ap-

peal, on a certificate of importance from the Appellate Court for the First District.

On and for some time prior to June 3, 1893, there was in the city of Chicago an association known as the "Chicago Clearing-House." The membership of that association comprised certain of the Chicago banks, and its purpose was to facilitate the daily settlement between those banks. The National Bank of Illinois, appellee, and the First National Bank of Chicago, were both members of that association. On and for some time prior to June 2, 1893, Herman Schaffner & Co. were engaged in business as private bankers in the city of Chicago. They were not in the clearing-house association, but, through an arrangement between them and appellee, checks drawn upon the former were cleared by the latter. In order to make this arrangement effective, so that checks drawn upon Herman Schaffner & Co., and certified, would be received by the clearing-house banks, it became necessary for appellee to guarantee the payment of such checks.

On June 2, 1893, the First National Bank held for collection a draft for \$581.03, drawn upon appellants, F. L. Voltz & Co., and by them accepted. On that day, appellants, who then had funds on general deposit with Herman Schaffner & Co., drew a check upon the latter for the sum of \$581.03, had it certified, and delivered it to the First National Bank in payment of the draft. That check was received by the First National Bank between eleven and twelve o'clock on June 2, and too late to be put through the clearing-house on that day. At about 8:30 A. M. of June 3, 1893, Herman Schaffner & Co. made a voluntary assignment for the benefit of their creditors. They then ceased doing business and are still insolvent. On June 8, 1893, the First National Bank presented said check, through the clearing-house, to the National Bank of Illinois. The payment of it was refused on account of the insolvency of Herman Schaffner & Co. The cashier of the First National thereupon called the attention of

NOTE.—As to clearing-house business, including agency of clearing-house members for outside banks, see *note* to *Yardley v. Philler* (C. C. App. 83 C.) 25 L. R. A. 824, also *O'Brien v. Grant* (N. Y.) 23 L. R. A. 361.

80 L. R. A.

appellee to the guaranty in evidence, and appellee issued its cashier's check for the amount, and the check in suit was indorsed "without recourse," by the First National Bank, and delivered to appellee.

The amount of the check was charged by appellee as an overdraft of Herman Schaffner & Co.'s account, and it subsequently filed a claim for the amount so paid against the estate of Herman Schaffner & Co. The following is a copy of the check as it was offered in evidence:

"No. 1076. Chicago, June 2, 1893.

"To Herman Schaffner & Co., Bankers:

"Pay to the order of First National \$581⁰⁰/₁₀₀ five hundred eighty-one and ⁰⁰/₁₀₀ dollars.

"F. L. Voltz & Co."

"Certified June 2, 1893.

"Herman Schaffner & Co.

"A Swartz, Teller."

Indorsed on back: "First National Bank.—Without recourse.—R. J. Street, Cash."

"Pay through Chicago clearing-house only."

"Paid June 3, 1893." The indorsement,

"Paid June 3, 1893," is the clearing-house stamp, put there on June 2, and dated a day ahead, by the First National Bank, in anticipation of payment through the clearing of the next day, as was the usage among the members of the clearing-house.

The following is a copy of the guaranty given by appellee to the First National Bank:

"Chicago, Feb. 3, 1886.

"L. J. Gage, Esq., Vice-president, City:

"Dear Sir:—This bank hereby holds itself accountable for payment, on presentation, in the regular course to it, of any and all checks or drafts drawn upon the banks and bankers below named, or either of them, and properly certified by them. This obligation, however, to apply only to such drafts and checks as may be received by you in the course of your business in payment of collections or discounted items. . . . Herman Schaffner & Co. Truly yours,

Wm. A. Hammond, Cashier."

The suit is assumpsit, by appellee, as assignee of the check, against appellants, as makers. The declaration also contains the common counts. The issues joined were submitted to the circuit court without a jury, and the finding and the judgment were for appellee for \$607.66 damages, and thereafter the judgment was affirmed in the appellate court.

At the trial appellants submitted certain written propositions to be held as law. The court held proposition 1, as follows:

"The court finds, as matter of law, that the relationship between Herman Schaffner & Co. and the plaintiff herein, whereby the latter represented the former in the clearing-house in the city of Chicago, was that of principal and agent."

But the court refused to hold propositions from 2 to 9 inclusive, which were as follows:

"2. The court finds, as a matter of law, that the plaintiff herein came into possession of the check sued on herein, for and as the agent of Herman Schaffner & Co., and that the payment made therefor by it to the First National Bank was, in law, a payment by

Herman Schaffner & Co., and an extinguishment of the drawer's liability.

"3. The court finds, as a matter of law, that as the National Bank of Illinois was not liable upon its guaranty to the First National Bank, the payment by it was made by it as volunteer, and it is not entitled to be subrogated, as against the defendants, to the rights of the First National Bank.

"4. The court finds, as a matter of law, that the contract executed by the National Bank of Illinois in 1886 was *ultra vires* and void, and that the First National Bank could not have maintained any recovery thereon for the check in question.

"5. The court finds, as a matter of law, that the contract of guaranty executed by the National Bank of Illinois to the First National Bank in 1886 is void, as rendering the National Bank of Illinois liable for an amount in excess of the capital stock of the company actually paid in, and that the First National Bank could not have maintained any action thereon for the recovery of the amount of the check in suit.

"6. The court finds, as a matter of law, that the contract of guaranty executed by the National Bank of Illinois to the First National Bank in 1886 is void, as being against public policy, and that the First National Bank could not have maintained any action thereon for the recovery of the amount of the check in suit.

"7. The court finds, as a matter of law, that the defendants are not liable to the plaintiff upon the check sued on herein.

"8. The court finds, as a matter of law, that the First National Bank was bound to know the *ultra vires* character of the contract of guaranty executed to it by the National Bank of Illinois in 1886, by reason of itself being a national bank.

"9. The court finds, as a matter of law, that Herman Schaffner & Co. would have no right of action upon the check in question if it had paid it, and that the National Bank of Illinois cannot, by virtue of the payments made by it in the course of its agency for Herman Schaffner & Co., acquire any greater rights, as against the defendants herein, than Herman Schaffner & Co. would have had, had such payment been made by them."

Messrs. Moses, Pam, & Kennedy for appellants.

Messrs. Moran, Kraus, & Mayer, for appellee:

The certification having been thus procured by the drawers of the check, their primary liability, the check not having been paid by Schaffner & Co., upon whom it was drawn, continued.

Metropolitan Nat. Bank v. Jones, 137 Ill. 634, 12 L. R. A. 492.

Under the circumstances there can be no difference between an uncertified and a certified check. Nonpayment of either by the bank leaves the drawer primarily liable.

Bickford v. First Nat. Bank, 42 Ill. 238, 89 Am. Dec 486.

The fact that appellee had given a guaranty to the First National Bank in no way impairs

or affects its right to have recourse against the drawers of the check. Appellee did not guarantee the payment of the check to appellants and appellants could, therefore, under no circumstances, have sued appellee upon the guaranty.

Bishop v. Rowe, 71 Me. 268; *Pacific Bank v. Mitchell*, 9 Met. 297; *McGregory v. McGregor*, 107 Mass. 548; *Pinney v. McGregor*, 102 Mass. 186; *Swope v. Leffingwell*, 72 Mo. 848.

Even if there had been no transfer of the check by indorsement from the First National Bank to appellee, the latter, by taking up this check under the guaranty in evidence, stood in the position of an indorsee thereon.

2 Dan. Neg. Inst. § 1774.

A guarantor of a note or check who, upon nonpayment of the same becomes immediately liable to an action upon that note or check, cannot be a "mere volunteer."

Bishop v. Rowe, *supra*; *Babcock v. Blanchard*, 86 Ill. 165; *Sheldon*, Subrogation, 2d ed. § 186; *Hamilton v. Johnston*, 82 Ill. 89.

There is an implied assumpsit on the part of the appellants to pay appellee the amount of the check, and the count for money paid to their use sustains the judgment below.

Brandt, Suretyship & Guaranty (1878) §§ 178, 179.

Baker, J., delivered the opinion of the court:

There was no real inconsistency in the rulings of the trial court upon the written propositions submitted to it, in holding proposition 1 and refusing to hold propositions 2, 7, and 9 as law in the decision of the case. Assuming it to be true that, while appellee represented Herman Schaffner & Co. in the clearing-house, the relation that existed between them was that of principal and agent yet that relation ceased to exist early on the morning of June 8, 1893, when Herman Schaffner & Co. made a general assignment for the benefit of their creditors and ceased doing business, and appellee refused longer to represent them in the clearing-house, and threw out and returned their clearings, amounting to \$8,976.01. The evidence is, that in the forenoon of June 8 appellee refused longer to pay checks certified by them, and that the check in question was not paid through the clearing-house. The testimony of Moll, who was assistant cashier of appellee, is explicit, that the check was paid by appellee on account of the guaranty in writing held by the First National Bank. And Street, cashier of the First National Bank, testifies in chief: "This check was shown to me by our note teller, and I remembered the fact that we had a guaranty from the National Bank of Illinois, and I held them to their guaranty, simply, and they took the check up." And he testifies on cross-examination: "When that check was not paid through the clearing-house, our bank, either on June 8 or June 5, demanded that the National Bank of Illinois should give us the face of it." And also says that he indorsed the check by way of transfer to the National Bank of Illinois, but to protect his own bank made the indorsement "without recourse."

30 L. R. A.

In holding proposition 1, the trial court did not, either in terms or by necessary implication, find, as matter of fact, that appellee, in paying the check, did so as agent of Herman Schaffner & Co., and when that proposition is read in the light of the refusal to hold propositions 2, 7, and 9 it is manifest that court must have found that appellee did not pay or come into possession of the check "for and as the agent" of Herman Schaffner & Co. Therefore the doctrine that payment by the agent of the maker of a note or drawee and acceptor of a check is a payment of the note or check, and an extinguishment of the liability of the indorser of such note or drawer of such check, has no application to the case, and the authorities cited by appellants upon this branch of the controversy,—i. e., *Mechem*, Agency, § 487; *Burton v. Slaughter*, 26 Gratt. 914, and *Johnson v. Glover*, 121 Ill. 283,—are not in point.

In our opinion, the conclusion here must be, that when appellee gave to the First National Bank its cashier's check for the face of the F. L. Voltz & Co. check, and took an assignment of the latter check, it did so, not as the agent of Herman Schaffner & Co., but as guarantor of said check; and it follows, since appellee did not pay the check as agent, that by the indorsement it took the legal title to the check, and has a legal right, as assignee, to recover the money therein specified from appellants, the drawers of the check, the said Herman Schaffner & Co. having failed and refused to make payment,—and this, wholly regardless of the considerations that may have induced it to make the payment and take the assignment. Appellants, the drawers, procured the certification of the check prior to its delivery to the payee, and they are primarily liable to such payee or its assignee. *Metropolitan Nat. Bank v. Jones*, 137 Ill. 684, 12 L. R. A. 492; *Brown v. Leckie*, 43 Ill. 497; *Bickford v. First Nat. Bank*, 42 Ill. 288, 89 Am. Dec. 436; *Rounds v. Smith*, 42 Ill. 245.

It is claimed in some of the refused propositions that were submitted to the court, and also in the argument of appellants, that the contract of guaranty given by appellee to the First National Bank was *ultra vires* and void; that it was also void as rendering appellee liable for an amount in excess of its capital stock actually paid in, and void as being against public policy; and that therefore the First National Bank could not have maintained any action thereon against appellee for the recovery of the amount of the check in suit, and consequently the payment made by appellee was made as a volunteer, and it is not entitled to be subrogated, as against appellants, to the rights of the First National Bank. Even if all these claims should be conceded, yet if we are right in the conclusions we have announced above, appellee, as assignee of the check, has a complete legal right of recovery, and it is wholly immaterial even if it has not the equitable right to be subrogated to the position of the First National Bank.

But the determination of the question whether the guaranty contract is *ultra vires* and void, or void as being otherwise contrary

to the statute under which appellee was organized, or against public policy, depends upon the interpretation that is to be placed upon the national bank act and the effect to be given its provisions. It may be that if a statute of this state was involved, then the rule that no right of action can spring out of an illegal contract (held in *Penn v. Bornman*, 102 Ill. 528, and in other cases), would apply. But in the very case just cited the paramount authority of the Supreme Court of the United States to construe all Federal statutes, including the national bank act, is fully conceded. The doctrine of the Federal courts, as applied to this case, is that, even if the guaranty which appellee gave to the First National Bank was *ultra vires*, or given in violation of the national bank act, yet appellee could not urge that defense after the First National Bank, in reliance upon that guaranty, had taken the certified check in payment of the acceptance of F. L. Voltz & Co., and that the power to redress the wrong committed by the appellee bank was in the government only, by a proceeding to forfeit the charter of the bank. *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank v. Whitney*, 108 U. S. 99, 26 L. ed. 448; *Weber v. Spokane Nat. Bank*, 64 Fed. Rep. 208.

It would seem that, under the decisions of the Federal courts, appellee could not have availed itself of the defense of *ultra vires* in an action brought on the guaranty. But even if it could have done so, it did not, but paid the check in accordance with its guaranty, and the question of the validity of such guaranty was one in which appellants had no interest, and it is a matter of indifference to them whether they pay the First National Bank or appellee, and therefore they cannot be heard to say that appellee shall not have the benefit of the doctrine of subrogation. (*Slack v. Kirk*, 87 Pa. 890, 5 Am. Rep. 438; 2 Morse, Banks & Banking, § 728). Here the guaranty was not indorsed on the check,

but was written on a separate paper, and that paper was addressed only to the First National Bank, and upon the face of the guaranty there was an express restriction that the obligation assumed should "apply only to such drafts and checks as may be received by you, in the course of your business, in payment of collections or discounted items." And the rule is that a guaranty so given and addressed to a particular person or corporation only is not negotiable, and is a mere personal contract. (2 Dan. Neg. Inst. § 1774). And it results from this rule, that appellants, the drawers of the check, are total strangers to this contract of guaranty, and it does not inure to their benefit or invest them with any right.

Appellee being legally liable, or, at the very least, under moral obligations for the payment of the certified check to the First National Bank, it cannot be said that it was a mere volunteer when it paid the money and took up the check. A person who, though not obliged to do an act, yet has an interest in doing it, is not to be regarded as necessarily and simply a volunteer. *Wright v. London & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Holmes v. North Eastern R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 128. And where one guarantees payment of a note or check, and on default of payment by the principal debtor pays the same to the holder, the law will imply a promise to repay on the part of the persons primarily liable, and the guarantor will be subrogated to the rights of the holder to whom he makes payment, and may maintain assumpsit against such persons. *Babcock v. Blanchard*, 86 Ill. 165; *Hamilton v. Johnston*, 82 Ill. 59; *Sheldon, Subrogation*, 2d ed. § 186, p. 285.

We think there was no substantial error in the rulings of the circuit court upon the written propositions that were submitted to it.

The judgment of affirmance rendered by the Appellate Court is affirmed.

GEORGIA SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,

Pf. in Err.

v.

J. S. HOWELL.

(95 Ga. 184.)

- *1. According to the principle ruled by this court in the cases of *Western U. Telegr. Co. v. James*, 90 Ga. 254, and *Western U. Telegr. Co. v. Michelson*,

Headnotes by LUMPKIN, J.

94 Ga. 426, there is nothing in that provision of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several states, prohibiting the general assembly of this state from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of Georgia, although such acts may be committed in dealing with messages which are to be transmitted to points in other states.

2. Where a message, the charges upon which were duly paid in advance, was

NOTE.—For power of state to control or impose burdens on interstate telegraph business, see *Postal Telegr. Cable Co. v. Baltimore (Md.)* 24 L. R. A. 161, and note.

For application to interstate business of state law 80 L. R. A.

as to liability for negligence, see also *Solan v. Chicago, M. & St. P. R. Co. (Iowa)* 28 L. R. A. 712, and *St. Joseph & G. I. R. Co. v. Palmer (Neb.)* 28 L. R. A. 325.

received by a telegraph company, at one of its offices in this state, for transmission to a point in another state, and was never delivered to the person to whom it was addressed, it is incumbent on the company, in order to escape liability for the statutory penalty for negligence in transmission from the Georgia office, to show that the message was in fact transmitted from that office with due diligence, and that the nondelivery to the sendee was due to some default or other cause arising beyond the limits of this state.

(December 21, 1894.)

ERROR to the Superior Court for De Kalb County to review a judgment in favor of plaintiff in an action brought to recover the statutory penalty and special damages for defendant's failure to promptly deliver a telegraph message. *Affirmed.*

Plaintiff was arrested in Georgia; he delivered a message containing this information and requesting aid, directed to his brother in Alabama, paying the charge therefor. Defendant neglected to deliver the message. Plaintiff recovered a verdict for the statutory penalty and special damages.

Messrs. Bigby, Reed & Berry and Dorsey, Brewster, & Howell for plaintiff in error.

Mr. J. S. Candler for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The facts appear in the reporter's statement.

1. The case at bar, so far as relates to the proposition announced in the first headnote, is not distinguishable in principle from those of *Western U. Teleg. Co. v. James*, 90 Ga. 254, and *Western U. Teleg. Co. v. Michelson*, 94 Ga. 436. We have therefore felt constrained to follow those cases. As no opinion was written in either of them, the writer, but for a reason which will be presently stated, would feel incumbent upon himself to endeavor to set forth with some care the views upon which these decisions rest. It is obvious that to do so would require the consumption of much time, and the expenditure of a considerable amount of labor, as the subject is one which has but lately arisen, and is not free from doubt and difficulty. Inasmuch, however, as the general assembly of this state, four days before the present case was decided by this court, repealed the act imposing penalties upon telegraph companies (Acts 1894, p. 79, repealing both the Statute of October 23, 1837, and the amendment thereto of December 20, 1892), and in consequence the question is no longer of practical importance in this state, it is not now deemed necessary to enter into an elaborate discussion of it. The time at our command can certainly be more profitably expended in preparing opinions, so far as we are able, devoted to the discussion of questions which are live issues, and are likely to arise in future litigation. We shall therefore content ourselves with citing the case of *Connell v. Western U. Teleg. Co.*, 108 Mo. 459, which supports the view entered

tained by this court, although the subject was not dealt with at any great length, nor accorded the thorough and satisfactory discussion which its importance would seem to demand. It may nevertheless be very profitably examined, for, so far as we have been able to discover, it is the only decision outside of this state which has, as yet, directly dealt with the question. Reference may also be made to the *American & English Encyclopedia of Law* (vol. 25, p. 768), where, in a note, the *Connell Case* is cited, and also to page 770 of the same volume, where, at the conclusion of note 8 (which begins on the preceding page, with the title, *Regulation of Interstate Messages*), comments and expressions in full harmony with the view of the question taken by this court will be found, together with references to cases more or less in point.

2. Counsel for the telegraph company, while not conceding its liability in any event, contended that as the plaintiff had failed to show that the omission of duty on the part of the company occurred within the limits of this state, he could not recover, even under the rulings announced in the *James* and *Michelson Cases*. We quite agree with counsel that our penalty statute could have no extraterritorial operation, but are compelled to express our dissent to the assertion that the plaintiff totally failed to make out a prima facie case of negligence on the part of the company occurring within the borders of the state. The matter simply resolves itself into a question of burden of proof, and appears to us to be free from serious difficulty. The rule as to telegraph companies seems to be the same as that applicable to railroad carriers. Proof of the delivery to a telegraph company of a message, non (or incorrect) transmission of it, and consequent damage, is all that is required to make out a prima facie case of negligence. *Thompson, Electricity*, §§ 266, 275; 25 Am. & Eng. Enc. Law, p. 881; *Whart. Neg.* § 766; 8 *Sutherland, Damages*, 2d ed. § 295, p. 2140; *Gray, Communications by Telegraph*, §§ 26, 53, 54, 77. Breach of the contract is presumed to comprehend negligence. This, as stated by *Boynton, Ch. J.*, in *Western U. Teleg. Co. v. Grisnold*, 37 Ohio St. 318, for the reason that: "If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require, in many cases, an impossibility, not infrequently enabling the company to evade a just liability. In *Turner v. Hawkeye Teleg. Co.* 41 Iowa, 458, 20 Am. Rep. 605, the court dealt with the question of presumption in a case where a message delivered by one telegraph company to another, which was sued for error in transmission, was not shown by the plaintiff to have been different from the one delivered to him. *Beck, J.*, says: "Defendant's line of telegraph did not extend to Chicago, but at Grinnell it connected with

another line reaching to that city, from which the market reports were obtained, and sent by defendant to different points on its line. It is insisted by defendant that plaintiff failed to show that a correct report was furnished, to be sent from Grinnell upon defendant's line. The evidence shows that the market reports were received at Grinnell on the day the incorrect one was delivered to plaintiff. Upon this evidence, we must presume that the reports received there, and delivered to defendant, were correct. The rules of evidence, in the absence of proof showing the report delivered to defendant at Grinnell to be either correct or incorrect, require us to presume it to have been correct. They are based upon the fact that men ordinarily, in the course of business, act correctly and speak truly. Errors and intentional misstatements are exceptions, and not the rule, in the affairs of business. Their application in this case is demanded by the fact that the evidence to establish error in the report furnished defendant was within its control and exclusive knowledge. Plaintiff was utterly unable to prove the correctness of the report furnished at Grinnell, while, if it had been incorrect, defendant could have readily established the fact." Again, in *Olympe de La Grange v. Southwestern Teleg. Co.* 25 La. Ann. 383, it was contended that the defendant was not the first carrier or contractor, and that it was not proved that the error in the transmission occurred on defendant's line, on whose printed blank there was an express provision for nonliability for the default of other companies. But it was held "that, whether first carrier or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary." Surely, the two cases last cited go further than is requisite to support our ruling in the present case; for, where a third party is also concerned, the further question is presented whether it was not in the power of the plaintiff to show that such third party, in dealing with the message, was free from negligence. In the case at bar the plaintiff showed a breach of contract,—and prima facie negligence,—which must have occurred on the defendant's line, either in this state or in Alabama. Undoubtedly, it was in the exclusive power of the telegraph company to show the exact point where the failure of diligence occurred, and through the negligence of what particular servant it was occasioned. It will not do to say that the servants of the company are equally at the disposal of the plaintiff to prove the facts connected with the transaction. The truth of this assertion may be demonstrated by the peculiar facts here presented. The plaintiff, it is true, did know the company's agent at Lithonia, and perhaps could have secured him as a witness at the trial. But suppose this had been done,

30 L. R. A.

and he had testified that he had promptly forwarded the message to the relay office at Atlanta, but had no further knowledge as to the transaction. How could the plaintiff pursue his investigation and proof? Would he have to sue out interrogatories,—for he could not compel personal presence in another county,—directed to each and every one of the numerous employees of the company stationed in the Atlanta office? Certainly, the company could not reasonably be expected to aid him by furnishing a list of all its servants, nor to keep him posted when any of them resigned, or were transferred elsewhere. It might be, and doubtless is, often convenient to the company to change the location of its employees, and it could do so in the utmost good faith; but, whatever the motive, the inconvenience to the plaintiff in reaching them as witnesses would be the same. Again, it cannot be known that the telegraph company keeps such records in writing of its business as would enable the plaintiff to show the required facts by compelling the defendant to produce its records in court. Besides, how would it be known that such records, if kept at all, were correct? If the company itself did not see to it that evidence of negligence was not recorded against it, would it not be a temptation to its employees to omit making any record of their own shortcomings which might result in their discharge? And, at last, this would merely be a different way of compelling the company to supply evidence entirely within its own keeping. It follows from the foregoing, that the default should be treated as having occurred in Georgia, the burden being on the defendant to show the contrary, and it having failed to do so. Finally, the plaintiff showed more than a mere failure to deliver. His brother, the addressee, who lived in Montgomery, testified: "I went directly to the telegraph office, as soon as I received my brother's letter, and there had been no message for me at all. The telegram was sent on Thursday. I received my brother's letter on Sunday morning, at 9:30." Therefore, it was shown, that three days after the message was handed to the agent at Lithonia, the office in Montgomery had still failed to receive it over the wire from Atlanta. This being so, it makes no difference whether the message was afterwards sent, or not. Three days' delay in Georgia, unexplained, would render the company liable to the penalty, for this would be undoubtedly, and *per se*, an unreasonable and inexcusable delay; and even if the office in Montgomery had afterwards received the message, and had made no attempt to deliver it to the addressee, these facts would be of no consequence whatever, with reference to the question of the company's liability for the penalty.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, *Plf. in Err.*

v.

Benjamin F. WALLACE.

(86 Fed. Rep. 503.)

1. A railroad company is not a common or public carrier in respect to a special train of cars loaded with wild animals and other property as well as persons belonging to or connected with a circus, which is loaded and unloaded by the proprietor of the circus, and is run on special time to suit his convenience, under a special contract that he shall assume all the risk of accidents, the only duty of the railroad being to haul the cars.
2. A railroad company hauling a special train of cars as a private carrier may lawfully contract for entire exemption from the risk of accidents.

(February 22, 1894.)

ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of plaintiff in an action brought to recover the value of certain property destroyed while it was being transported over defendant's road. *Reversed.*

NOTE.—*Railroad companies as private carriers in drawing special trains or special cars.*

Very few cases can be found on the subject of a railroad company's liability in transporting special trains or special cars. This note does not include the liability of a connecting carrier in hauling cars of another company during through transportation, nor the question of liability for goods transported for a shipper who hires the use of a whole car for the trip. Nor is the subject of the carriage of livestock included.

As to the liability of a railroad company for injury to postal clerks in mail cars, see *note* to Cleveland, C. C. & St. L. R. Co. v. Ketchum (Ind.) 19 L. R. A. 289. The liability as to passengers on sleeping cars is also considered in a *note* to Mann-Boudoir Car Co. v. Dupre (C. C. App. 5th C.) 21 L. R. A. 289.

Like the principal case, there have been several other cases of accidents to circus trains. In the case of Robertson v. Old Colony R. Co. 156 Mass. 825, an employee connected with a circus was injured by the derailment of a car, on account of a defect in its trucks in the circus train which was hauled by the railroad company under a special contract giving the carrier no control over the condition of the cars or imposing any duty to inspect them. The contract bound the railroad company to haul the cars belonging to the circus proprietors according to a schedule of time fixed by the agreement by which the work was to be done at eighteen different times and nearly all of it at night. The price to be paid was a gross sum less than the regular rates for such service, while the proprietors agreed to load and unload the cars at their own expense and under their own supervision, and to assume all risk of accident from any cause, and to exonerate and save the railroad company harmless from any and all claims for damages to person and property during the transportation. The court held that this contract was one which the railroad had the right to make, as it was under no obligation to draw the cars as a common carrier, citing the Coup Case, *infra*. It was 30 L. R. A.

Before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

Statement by Bunn, District Judge:

The facts in this case are fully and properly stated in the brief of counsel for plaintiff in error, as follows: "This is a writ of error prosecuted by the Chicago, Milwaukee, & St. Paul Railway Company, defendant below, to reverse a judgment of \$8,000 recovered against it in the lower court by Benjamin F. Wallace, the plaintiff below, for loss and injury to certain property comprising part of the belongings and equipment of a circus owned by Wallace, and for the loss of performances of the circus caused by two separate accidents happening upon the railroad company's road while it was transporting the circus in a special train composed of cars belonging to Wallace. Plaintiff's declaration is in trespass on the case for negligent violation by defendant of its duty as a common carrier. It contains two counts: The first count avers that on the 7th day of July, 1893, the defendant was possessed of and operating a certain railroad and railroad tracks in the states of Wisconsin and Iowa, and was operating and controlling certain locomotive power and engines upon and along

therefore held that the railroad company was not liable for the injury to the circus employee.

In Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 56 Am. Rep. 374, the action was brought by a circus proprietor for injuries to cars and equipments and to persons and animals caused by a collision of two trains made up of his circus cars. The railroad company furnished men and motive power to transport the circus in the special cars which were owned by the proprietor of the circus, consisting of twelve flat, six stock, one elephant, one baggage, and three passenger coaches. The contract provided that the railroad company should not be responsible for damage by want of care in the running of the cars or otherwise. The price was only 10 per cent of the rates charged for carriage. The trains were to be run chiefly at night to accommodate exhibitions, and the running times were fixed with reference to these exhibitions. The railroad employees were to attend to the moving of the train but had nothing to do with the loading and unloading of cars and no right of access or regulation in the cars themselves. The court says: "It is a misnomer to speak of such an arrangement as an agreement for carriage at all," and held that "it was in no sense a common carrier's contract." It was therefore held perfectly legal and proper in such a contract to stipulate for exemption from responsibility for consequences which might follow from carelessness of servants in such special employment.

Another accident to circus cars drawn under a special contract stipulating against any liability of the railroad company for injury to any of the animals or property transported, even if caused by negligence of the railroad company's employees, was involved in the case of Forepaugh v. Delaware, L. & W. R. Co. 128 Pa. 217, 5 L. R. A. 503, but the court, without discussing the question whether the transportation was that of a common carrier or not, held that the exemption from liability must be upheld as the contract of carriage was made in the state of New York where the alleged

its said railroad and tracks; that the plaintiff was the owner of a certain circus known and described as the 'Cook & Whitby Circus,' consisting, besides employees, of a large number of horses, wagons, tents, harnesses, and a large quantity of other property, effects, and paraphernalia, and was also the owner of twenty-four cars; that on the said 7th day of July, 1892, at the city of Prairie du Chien, in Wisconsin, the defendant then and there received as common carrier the aforesaid twenty-four cars of the plaintiff, containing the aforesaid property and effects of the plaintiff, constituting said Cook & Whitby's Circus, and the people connected therewith, to be safely transported to the town of Maquoketa, state of Iowa, and to be safely delivered there to the plaintiff on the 8th day of July, before 9 o'clock of the forenoon of that day. The plaintiff avers that it was the duty of the defendant to provide safe, strong, and efficient locomotive power for the transportation of said cars, with the property and effects of the Cook & Whitby Circus, and it was also the duty of the defendant to construct and maintain its tracks and roadbed, at and near the station known as 'Sny Magill,' in the state of Iowa, in a safe and suitable condition; that the defendant negligently failed to provide strong and efficient locomotive power, and negligently failed to construct and maintain its tracks and roadbed in a safe and suitable condition at said point near Sny Magill, and that in consequence four of said cars were damaged, twenty-four horses were killed, other horses

injured, and a large amount of harness was damaged; also that by reason of the accident plaintiff was prevented from giving performances of the circus, which he had advertised, in the vicinity of the town of Maquoketa and the city of Davenport, in the state of Iowa, and thereby lost the profits he would have made had he been able to give said performances. The second count of the declaration avers that on the 6th day of July, 1892, the defendant was possessed of and operating and controlling a certain railroad and railroad tracks in the state of Wisconsin, and operating and controlling certain steam locomotive power and engines upon and along the said railroad and railroad tracks; that upon said day the defendant, at the city of Richland Center, in the state of Wisconsin, received as a common carrier the aforesaid twenty-four cars of the plaintiff, containing all the aforesaid property and effects of plaintiff, constituting said Cook & Whitby's Circus, to be transported, by means of fit and adequate locomotive engine power to be furnished by the defendant, over the railroad and tracks aforesaid, from said city of Richland Center, in the state of Wisconsin, to the said city of Prairie du Chien, in the state of Wisconsin, and to deliver the same at Prairie du Chien on the 7th day of July, 1892, at or before the hour of 9 o'clock in the forenoon of that day; that it was the duty of the defendant to have provided safe and proper appliances at a certain switch located at and near a point south of said Richland Center, and to keep proper and sufficient lights and

breach of it occurred, and in which such stipulations by common carriers were held valid.

In hauling coal cars belonging to the owner of the coal, a railroad company was held to be a common carrier in *Mallory v. Tioga R. Co.* 39 Barb. 488, where the transportation was under a contract by which the owner of the cars loaded and unloaded them and furnished brakemen whose service was subject to the railroad company's conductor. For the derailment of such cars the railroad company was held liable. The ground of the decision seems to be that the transportation of cars in this manner was in the line of the general business of the railroad company which by its charter was authorized to charge tolls, among other things, for "empty cars" while the charter directed that no person should place any car on the road without a permit or license from the company. The court also laid stress on the fact that the entire train was controlled and managed by the railroad employees, and that the brakemen furnished by the owner of the cars were in all respects under the control of the conductor. It further appeared that the owner of the coal had large quantities carried over the road, some of it in the railroad company's cars. It seems that the cars owned by him were made a part of the railroad company's train in the same way as if the coal had been in the railroad company's own cars. As showing the real effect of the decision, the court also said: "Yet if, as is claimed by them, they simply entered into a special engagement outside of their general business to provide the plaintiff with sufficient motive power to draw his cars over their road, under the care and control of his servants, they did not thereby assume the obligation of carriers. But the case proved to be, in my judgment, materially different from the one thus hypothetically stated."

Reasonable care and diligence are held to be the measure of liability of a railroad company in hauling

ing upon its line wagons belonging to private traders, as in the case of *Watson v. North British R. Co.* 8 Scotch Seas. Cas. (4th Series) 637, 8 Ry. & C. T. Cas. XVII. (So stated in *Rapalje & Mack's Digest of Railway Law*, vol. 2, p. 25.)

In transporting over a railroad an engine belonging to another company, the owner of the road was held liable for a collision of the engine with a passenger train where the engine was in charge of a conductor employed by the owner of the road, although an engine driver and fireman on the engine were furnished by its owner. *Terre Haute & L. R. Co. v. Chicago, P. & St. L. R. Co.* 150 Ill. 502.

Where a railroad company transports a car over its road upon its own trucks it is held to be a common carrier. *New Jersey R. & Transp. Co. v. Pennsylvania R. Co.* 27 N. J. L. 100.

The distinction between transportation which a railroad company makes as common carrier and that which it makes as a private carrier has been much discussed in other cases which do not specifically touch the question here considered in respect to special trains and special cars. It was much discussed in the earlier cases respecting contracts to limit liability, but mere modifications of the extent of the carrier's liability have long been considered insufficient to destroy the nature of the service as that of a common carrier.

It would seem to be reasonable to hold that in performing a service which it was under no obligation to perform as a common carrier if requested to do so, a railroad company might well contract as a private carrier, and to hold that it could not in this way change the character of its service to that of a private carrier when performing services which the law required it to perform whether it wished to do so or not. If that is to be adopted as the line of distinction, then it would seem that the hauling of special cars or special trains might be done in the capacity of a private carrier. *B. A. R.*

signals placed at and near said switch to indicate whether said switch was open or closed; that the defendant negligently failed and omitted to perform its duty in this regard, and that by reason thereof the locomotive hauling plaintiff's cars was derailed; that the defendant failed to proceed with due and proper diligence to get its locomotive engine back onto the main track, and that in consequence plaintiff's cars were delayed so long that they did not reach the city of Prairie du Chien in time to give performances, which had been advertised there. The defendant pleaded the general issue to the entire declaration, and afterwards a special plea to the jurisdiction of the court, which was subsequently stricken from the files by order of the court.

"On the trial it appeared that the plaintiff's cars and property were hauled by the defendant under a special contract made and executed June 1, 1892, by the railroad company and by the plaintiff, Wallace, through their duly authorized agents. This special contract reads as follows:

"This agreement, made and entered into this 1st day of June, A. D. 1892, by and between the Chicago, Milwaukee, & St. Paul Railway Company, party of the first part, and Cook & Whitby Circus, party of the second part, witnesseth: The party of the first part agrees to run a special train, consisting of ten flat cars, six stock cars, six passenger cars, two advertising cars, in all twenty-four cars, to be furnished by the party of the second part, to run between as below, and as below:

"Leaving:	
Shakopee to Hastings, June 20th.....	\$180
Hastings to Redwing, June 30th.....	180
Redwing to Faribault, Jul. 1st.....	180
Faribault to Decorah, Jul. 2d.....	225
Decorah to Roscoe, Jul. 4th.....	200
Roscoe to Richland Center, Jul. 5th.....	180
Richland Center to Prairie du Chien, Jul. 6th.....	200
Prairie du Chien to Maquoketa, Jul. 7th.....	200
Maquoketa to Davenport, Jul. 8th.....	180

"Deliver to Chicago, Rock Island, & Pacific Railway at Davenport, where they leave our line, and carry on said special train, as before described, the circus property of said party of the second part, together with the people properly connected therewith, so far as the same shall be loaded on said train. The said train to be run so as to arrive at its several destinations at or about 6 o'clock in the morning, provided the same shall be loaded and ready to start in time to reach its several destinations at said hour. In consideration thereof the said party of the second part hereby agrees to pay to the said party of the first part the sums as specified above per day in advance (which said sum is a reduction from the usual and regular rates charged by said party of the first part for transportation services of the kind and nature above specified), the sum to be paid to the agent of the said party of the first part at the station from which the next succeeding run is to be made, it being mutually understood that no charge will be made for the use of train or trainmen on Mondays, when the runs for those days are made on the Sunday immediately preceding; and said party of the

second part also agrees to load and unload said cars. In consideration of the agreement of said party of the first part to run said special train as above specified, and at and for the reduced rates above named, and also in consideration that, by the running of said special train as above specified, the said party of the first part increases the risks and dangers of operating its railway, and subjects its own property to a greater liability of being damaged, and in further consideration of the premises, said party of the second part does hereby covenant and agree to release and discharge said party of the first part of and from any and all liabilities for claims and damages of every name and nature, by reason or on account of any accident or injury, from whatever cause, that may occur to, or may be suffered or sustained by, any one, or all, of the persons composing or attached to said circus company, or to the cars or other property of said party of the second part, while in or on said train or upon any of the premises belonging to or used by said party of the first part, or by reason or on account of any delays that may occur in the running of said special train, or by failure to reach the several points of destination at the specified time. And, in and for the consideration last above mentioned, said party of the second part does hereby further covenant and agree that he will protect, and forever hold free and harmless, the said party of the first part, from any and all damages or claims for damages that he or they may sustain or incur by reason of any accident or injury that may happen to or be received by any one or more of the several persons composing or attached to said circus company, or permitted by said party of the second part to ride upon said train, or upon any of the premises belonging to or used by said party of the first part. J. H. Hiland, for the Chicago, Milwaukee, & St. Paul Ry. Co. J. M. Hamilton, for Cook & Whitby."

"The plaintiff offered evidence tending to show that at a point near Sny Magill, on the defendant's road, and while plaintiff's special train was being transported from Prairie du Chien towards Maquoketa, certain of plaintiff's cars were derailed and thrown down an embankment; that as a result twenty-four horses belonging to plaintiff were killed outright, and four others died afterwards from injuries received, and about forty other horses were permanently injured; also that serious injury was done to a large number of sets of harnesses belonging to the plaintiff, as well as to the cars derailed, and that the plaintiff was prevented from giving, and lost probable profits of, performances of his circus at Maquoketa and Davenport, which he had advertised at considerable expense. Plaintiff's evidence tended to show that the derailment was caused by defective roadbed at the point of accident, and by reason of the fact that the locomotive used to haul plaintiff's train of cars was light and of insufficient power. Plaintiff's evidence also showed that, on the evening of the 7th of July, plaintiff's special train, after starting from Richland Center towards Prairie du Chien, was stopped by reason of the engine

running off the track at a misplaced switch a short distance out of Richland Center; that this accident caused a delay of several hours, and thereby prevented the plaintiff from giving, and lost probable profits of, performances at Prairie du Chien, which he had advertised at considerable expense. His evidence tended to show that the accident was caused by negligence of the defendant, and that the delay was greatly aggravated by the failure of the defendant to take proper steps for replacing the locomotive upon the track. At the close of the plaintiff's case defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled by the court, and an exception to the ruling duly taken.

"The testimony of the defendant tended to show that the accident at Sny Magill was not caused by the defective condition of the roadbed, or by reason of insufficient power in the locomotive used in the hauling of plaintiff's cars, but was caused by the breaking of an axle under one of plaintiff's cars; and that the accident to the switch at Richland Center, and the delay there, were not caused by any neglect or misconduct of the defendant or its servants. At the close of the evidence, the defendant requested the court to give certain written charges to the jury, instructing them that the defendant was not a common carrier, or subject to the liabilities of a common carrier, in accepting and transporting plaintiff's train of cars, and the property therein contained; that the defendant was therefore not restrained or controlled by rules applicable to contracts made by common carriers in the transaction of their ordinary business; and that the agreement releasing and discharging the defendant from any and all liability for claims and damages, of whatsoever nature, must control the rights of the parties, and should be enforced in favor of the defendant. The court refused all these requests, to which rulings exceptions were duly taken. The court, in substance, instructed the jury that the clause of the special contract exonerating defendant from all responsibility for loss or damage to plaintiff's property from any cause whatever was contrary to public policy, and void, in so far as it covered loss or damage occasioned by the gross negligence of the defendant or its servants, but was valid in all other respects; that if the jury found from the evidence that the defendant was guilty of gross negligence in not furnishing sufficient motive power and in not keeping its roadbed in proper condition, and that the damage to plaintiff was caused thereby, they should find for the plaintiff, notwithstanding the clause in the special contract exonerating defendant from liability. The jury thereupon brought in a general verdict for the plaintiff for \$8,000, and the court, after overruling defendant's motion for a new trial, entered judgment on the verdict, and from that judgment the plaintiff in error, the defendant below, prosecutes this writ of error."

Messrs. Edwin Walker and J. Ralph Dickinson, for plaintiff in error:

As to services so extraordinary and peculiar
30 L. R. A.

in their character, and so wholly and entirely without the scope of the business of a railroad common carrier, the railroad company cannot be deemed to have occupied the relation of a common carrier, but on the contrary it stood in the attitude of a private carrier or special bailee for hire, with reference to the cars and other property to be transported.

Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 58 Am. Rep. 374; *Robertson v. Old Colony R. Co.* 156 Mass. 525; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508.

The fact that the defendant railroad company was a common carrier by no means shows that the defendant was a common carrier with reference to transportation service of the kind to be rendered the plaintiff under the special contract.

Hutchinson, Carr. 2d ed. § 44; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.* 129 U. S. 397, 33 L. ed. 738; *Honeyman v. Oregon & C. R. Co.* 18 Or. 352, 37 Am. Rep. 20; *Powell v. Mills*, 30 Miss. 231, 64 Am. Dec. 158; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 328, 13 Am. Rep. 275; *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

Tow-boats or vessels engaged in towing other vessels are not engaged in the business of common carriers.

The "Margaret", 94 U. S. 494, 24 L. ed. 146; *Hays v. Millar*, 77 Pa. 238, 8 Am. Rep. 445; *Brown v. Clegg*, 63 Pa. 51, 3 Am. Rep. 522; *Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge*, 3 Gill & J. 248; *Wells v. Steam & Nav. Co.* 2 N. Y. 204.

The owners of a canal permitting the use of their canal to canal boats for toll are not common carriers.

Exchange F. Ins. Co. v. Delaware & H. Canal Co. 10 Bosw. 180.

Turnpike companies owning turnpikes and permitting their use for a specified toll are not common carriers.

Wilson v. Suquehannah Turnp. Road, 21 Barb. 68.

A bridge company is not a common carrier. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351.

If furnishing either the motive power alone or the roadbed alone does not constitute one a common carrier, it seems difficult to see why furnishing both of them should constitute one a common carrier.

"*Express Cases*," 117 U. S. 1, 29 L. ed. 791.

The fact that the accommodation was furnished under a special contract only, shows conclusively that the company did not undertake to furnish such facilities and accommodations in its capacity as a common carrier.

Lake Shore & M. S. R. Co. v. Perkins, and *Michigan S. & N. I. R. Co. v. McDonough*, *supra*; *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 577.

One of the peculiar duties imposed by the common law upon common carriers is the duty of furnishing transportation for all goods of the kind they profess to carry, within the limits of their ability, to all persons demanding such transportation.

This furnishes the true test of the character of a party as to the fact whether he is a com-

mon carrier or not, with reference to any particular transportation.

Fish v. Chapman, 2 Ga. 352, 46 Am. Dec. 893; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 858.

A private carrier, or bailee for hire, may exempt himself from liability even for loss resulting from his own negligence or that of his servants.

Hutchinson, Carr. § 40; *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, *Coup v. Wabash, St. L. & P. R. Co.*, and *Robertson v. Old Colony R. Co. supra*.

Plaintiff declared against the defendant as a common carrier. He bases his entire case upon alleged violations of defendant's common-law duties as a common carrier.

If defendant was not in fact a common carrier, with reference to the plaintiff's goods lost and injured, and with reference to the transportation of plaintiff's cars,—it is clear that plaintiff could not recover his declaration.

Hutchinson, Carr. 2d ed. § 760; *Kimball v. Rutland & B. R. Co. supra*; *White v. Great Western R. Co.* 2 C. B. N. S. 7; *Coup v. Wabash, St. L. & P. R. Co. supra*; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457; *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 826; *Austin v. Manchester, S. & L. R. Co.* 16 Q. B. 600; *Snow v. Indiana, B. & W. R. Co.* 109 Ind. 423; *Latham v. Rutley*, 3 Barn. & C. 20; *Shaw v. York & N. M. R. Co.* 18 Q. B. 847; *York, N. & B. R. Co. v. Crisp*, 14 C. B. 527; *Camp v. Hartford & N. Y. S. B. Co.* 43 Conn. 333; *Fairchild v. Slocum*, 19 Wend. 329; *Stump v. Hutchinson*, 11 Pa. 533.

Messrs. Barnum, Humphrey, & Barnum, for defendant in error:

The action is not *ex contractu* upon any contract, express or implied, general or special. It is in tort for negligence and for gross negligence,—wretched roadbed, worthless tracks, rotten ties, undersized and inadequate locomotive. For such gross negligence the action lies, without reference to whether the contract was general or special, express or implied.

Clark v. St. Louis, K. C. & N. R. Co. 64 Mo. 447; *Shaw v. York & N. M. R. Co.* 18 Q. B. 847; *Hutchinson*, Carr. § 78, and citations.

The release clause means a release for all negligence.

McManus v. Lancashire & Y. R. Co. 4 Hurlst. & N. 327; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473; *Shaw v. York & N. M. R. Co. supra*; *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 31 L. ed. 627.

Meaning this, it is void.

Camp v. Hartford & N. Y. S. B. Co. 43 Conn. 333; *Clark v. St. Louis, K. C. & N. R. Co. supra*; *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 105, 8 L. R. A. 508; 3 Wood, Railway Law, 1816, and citations.

Plaintiff in error was a common carrier, and, notwithstanding the special contract, was subject to the liabilities of a common carrier.

Hannibal & St. J. R. Co. v. Swift, 79 U. S. 12 Wall. 262, 20 L. ed. 423; *Mallory v. Tioga R. Co.* 89 Barb. 438; *New Jersey R. & Transp. Co. v. Pennsylvania R. Co.* 27 N. J. L. 100; *Peoria & P. U. R. Co. v. Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 603; *Peoria & P. U. R. Co. v. United States Rolling Stock Co.* 135 Ill. 643; *Terre Haute & I. R. Co. v.* 30 L. R. A.

Chicago, P. & St. L. R. Co. 150 Ill. 502; *Nicoll v. East Tennessee, V. & G. R. Co.* 89 Ga. 240.

Under the English statutes the company may make special contracts with their customers, provided they are just and reasonable and signed; and, secondly, whereas, the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature may have thought fit to impose the further security that the court shall see that the condition or special contract is just and reasonable.

M'Manus v. Lancashire & Y. R. Co. 4 Hurlst. & N. 347; *Peek v. North Staffordshire R. Co.* 10 H. L. Cas. 473.

The law throughout the United States generally is substantially the same as that established by the act of 17 & 18 Victoria. The conditions must be just and reasonable, or they are void.

New York C. R. Co. v. Lockwood, 84 U. S. 17 Wall. 357, 31 L. ed. 627; *Chicago & N. W. R. Co. v. Chapman*, 133 Ill. 96, 8 L. R. A. 508; *Austin v. Manchester, S. & L. R. Co.* 16 Q. B. 600; *Shaw v. York & N. M. R. Co.* 18 Q. B. 847; *York, N. & B. R. Co. v. Crisp*, 14 C. B. 527; *Indianapolis, D. & W. R. Co. v. Forsythe*, 4 Ind. App. 826.

Bunn, District Judge, delivered the opinion of the court:

Proper assignments of error having been made by plaintiff in error, the main question in this court, as it was below, is whether the railroad company, in carrying the plaintiff's circus people, animals, and outfit, under the special contract in evidence, assumed the relation of a common carrier for hire. If it did, then the verdict must stand. If it did not, then the contract itself was a good defense to the action; and the whole case seems to depend upon this question. The court is of opinion that the railroad company had a right to make the contract with the defendant in error; that the contract was not against public policy, but was valid and binding upon the parties who made it, according to its terms and conditions. The railroad company is charged in the declaration as a common carrier of the persons and property named in the contract, but the contract itself is wholly ignored, and the declaration framed as though no contract had ever been made. If the plaintiff had the right thus to disregard the contract, and sue the railroad company as a common carrier, the recovery must stand, because in that case the company would be liable for any defect in its roadbed which common, or even extraordinary, prudence and foresight could remedy. It would also be liable for the negligence of its own employees, and for any insufficiency in the engine or engines employed to move the plaintiff's cars, which ordinary prudence and foresight may have remedied. But if the company, in carrying the plaintiff's property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties will be bound by its terms.

That the company, in carrying the goods under the contract, was a private, and not a common or public, carrier, is the conclusion which the court has reached. There was no evidence offered that the railroad company had ever carried similar goods for Wallace before in his own private cars, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so. We know from common observation that they do not hold themselves out as common carriers of wild and domestic animals to be transported in the private cars of the owners, and loaded in a manner agreeable to the owners; persons, animals, horses, and other property being carried upon the same train, which is operated at irregular times and seasons, at the convenience of the owners of such cars. They ordinarily operate their freight trains and passenger trains separately, and upon time schedules, prepared in advance by experts for the company, and with a view to reduce the danger of accident to a minimum. Here was a special contract in writing, wholly different from the ordinary bill of lading, providing for the hauling of a special train of cars, belonging wholly to the defendant in error, to be loaded as he pleased with persons, wild animals, domestic animals, and other property, and to be run on special time, the hours of departure to depend upon the time when the plaintiff should have his cars loaded and ready to start. Wallace was to be wholly responsible for the loading and the unloading as well as for the care of the property while in transit, the only duty of the railroad company being to haul the cars. Another significant provision of the contract is that the property was to be carried at greatly reduced rates, in consideration of which the plaintiff was to assume all the risk of accidents, releasing the company therefrom. If this provision of the contract, as no doubt it was, was binding upon the railroad company, why not upon the plaintiff? The obligation was mutual. Why could not the railroad company say: "You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be carried at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well. If you wish to take upon yourself all risk of damage by accident, we will accept your proposition, and carry at the rates proposed." There is nothing unlawful in this, unless we assume that the railroad company cannot carry property or persons at all, except as common carriers, which is against all rule and precedent. No common carriers undertake to carry every species of property, in respect to which they have not held them-

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selves out as common carriers. They may contract as private carriers, and in that case they may make any reasonable contract. The railroad company as a common carrier could not enter into such a contract as this, because it cannot as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier. If any authority were needed upon so plain a proposition it is not difficult to find.

In *Hutchinson on Carriers*, 2d ed. § 44, it is stated: "A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and where this is the effect of a special arrangement, the carrier is not liable as a common carrier and cannot be proceeded against as such."

Again, at section 78, it is stated: "And even as to such carriers as are *prima facie* public or common carriers, it may be shown that, in the particular instance or under the circumstances of the case, they did not undertake to transport and are not liable as common carriers."

Again, at section 56a, ¶ 3, it is stated: "In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is therefore not liable as such where, by special engagement, or as a matter of accommodation merely, he undertakes to carry a class of goods which it is not his business to carry."

Again, at section 56b, it is stated: "Common carriers of goods do not undertake to carry by any or all means, but only by those means and methods and over the route to which their business is confined. . . . And even if a carrier should, in a particular instance, undertake by a special contract to carry goods by unusual and exceptional methods or routes, his liability would be based upon his contract and not by the ordinary rules governing common carriers."

In the case of *New York O. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, at page 377, 21 L. ed. 639, the court says: "A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

There are also two recently decided cases, one before the supreme court of Michigan and the other before the supreme judicial court of Massachusetts, where a question almost identical with the one at bar was adjudged in the same way. *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111; *Robertson v. Old Colony R. Co.* 156 Mass. 525.

The declaration charges the defendant specially as a common carrier. The court held it was not a common carrier in respect to the

property which it undertook to carry under the contract, but nevertheless instructed the jury that "the contract made it the duty of the defendant to furnish reasonably safe and sufficient motive power to haul the cars of the plaintiff over the specified portion of its road, and the defendant will be liable if it failed, while attempting to perform its contract, to furnish such character of engine or motive power, and damage resulted therefrom to the plaintiff's property or business. And under such contract defendant was bound to have a reasonably safe roadbed, over which the cars and property of the plaintiff could be transported. If its roadbed was not in a reasonably safe condition, but was out of repair, so as to be unsafe and dangerous, and the defendant knew this fact, or by reasonable diligence could have known it, and the derailment of plaintiff's cars, and injury and damages to his property, were occasioned by such insufficient and insecure track and roadbed, then the defendant would be liable for such injury and damage,"—thus allowing a recovery upon a cause of action nowhere

hinted at in the plaintiff's declaration. The plaintiff, if he recover, should recover according to his declaration. *Kimball v. Rutland & B. R. Co.* 26 Vt. 247, 69 Am. Dec. 567; *White v. Great Western R. Co.* 2 C. B. N. S. 7.

But, independent of this principle, we do not think there is any middle ground upon which to rest a recovery in this case. The railroad company was either liable as a common carrier as charged in the declaration, or it was not, and, if not, then the contract it made with Wallace, by which he assumed the risk of accident, was valid and binding. By the contract the defendant in error assumed all risk from accident, and for a proper consideration released and exonerated the railroad company from all damage occasioned thereby. He has got what he bargained for, or, if not, can sue upon his contract, but he must abide by its conditions.

The judgment of the court below should be reversed, and the cause remanded, with instructions to the court below to award a new trial.

OREGON SUPREME COURT.

PORTLAND HIBERNIAN BENEVOLENT SOCIETY, *Resp't*,

Penumbra KELLY, Appt.

(.....Or.....)

1. The restriction of the benefactions of a charitable organization to its own members or their families does not take it out of the exemption from taxation of certain property of charitable institutions by Hill's Ann. Laws, § 2733.
2. An exemption from taxation of property used exclusively for charitable or benevolent purposes cannot be extended to property occupied and used for other and different purposes, although the revenue derived from its use is devoted exclusively to charitable or benevolent objects.
3. The state is not estopped from levying a tax for the reason that no attempt has been made to assess the property for many years, during which the owner has borrowed money by a mortgage on the property for the erection of a building upon it, and agreed to pay the taxes on such mortgage.
4. An injunction to restrain the collection of a tax will not be granted merely because of an inaccuracy in the name on the assessment roll of the owner of the property.

(October 21, 1895.)

APPREAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to

NOTE.—For note on effect of using property of religious or charitable institutions for revenue, see *Book Agents of M. E. Church, South, v. Hinton* (Tenn.) 19 L. R. A. 239.
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restrain defendant from enforcing the collection of taxes against plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. W. T. Hume and John H. Hall, for appellant:

Persons who own land are chargeable with knowledge that it is liable to taxation, and if they neglect to pay what they know it is their duty to pay, they cannot escape liability on the ground of some error or inaccuracy in naming the owner.

Eads v. Rutherford, 114 Ind. 273; *Noble v. Indianapolis*, 16 Ind. 506.

Plaintiff must, before it can maintain this suit, pay or offer to pay the tax that it concedes is justly due, regardless of any mere informality in the assessment.

Dundee Mortg. Trust Invest. Co. v. Parrish, 24 Fed. Rep. 197; *Welch v. Clatsop County*, 24 Or. 452; *German Nat. Bank v. Kimball*, 108 U. S. 733, 26 L. ed. 469; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91; *Huntington v. Palmer*, 7 Sawy. 855.

A charitable institution within the meaning of the law is held to mean a public charity,—one whose benefits are extended to needy persons generally without regard to their relation to the members of the society or to the fees paid.

2 Am. & Eng. Enc. Law, p. 174; *Bangor v. Rising Virtue Lodge No. 10, F. & A. M.* 73 Me. 429, 40 Am. Rep. 369; *Morning Star Lodge No. 26, I. O. O. F. v. Hayalip*, 23 Ohio St. 144; *Gorman v. Russell*, 14 Cal. 535; *Donohugh's App.* 86 Pa. 806; *Delaware County Inst. of S. v. Delaware County*, 94 Pa. 163; *State v. Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Babb v. Reed*, 5 Rawle, 153, 28 Am. Dec. 650.

Where a portion of a building is used for commercial purposes, that is rented or leased

to other parties for gain, although the entire proceeds may be used for the purposes for which the society was organized, it cannot be exempted from taxation as property devoted to a charitable use.

Methodist Epis. Church Trustees v. Ellis, 88 Ind. 8; *Orr v. Baker*, 4 Ind. 86; *American Sunday School Union v. Taylor*, 181 Pa. 807, 28 L. A. Rep. 695; *Pierce v. Cambridge*, 2 Cush. 611; *Proprietors of South Congre. Meeting-house v. Lowell*, 1 Met. 588; *Old South Soc. v. Boston*, 127 Mass. 878; *Frederick County Comrs. v. Sisters of Charity*, 48 Md. 84; *Appeal Tax Ct. v. Grand Lodge of A. F. & A. M.* 50 Md. 421; *Appeal Tax Ct. v. St. Peter's Academy*, 50 Md. 831; *Wyman v. St. Louis*, 17 Mo. 835; *Young Men's Christian Assn. v. New York*, 118 N. Y. 187; *Connecticut Spiritualist Camp-meeting Assn. v. East Lyme*, 54 Conn. 152; *Cincinnati College v. State*, 19 Ohio, 118.

In order that a charitable or religious society may be exempted from taxation in this state, it must apply to the sovereign or taxing power, *i. e.*, the legislature, and obtain the passage of a special act exempting it alone from taxation.

Cooley, Const. Lim. 4th ed. pp. 71, 72; *Distriet Twp. of Dubuque v. Dubuque*, 7 Iowa, 275.

Musra, Gearin, Silvestone, Murphy, & Brodie, for respondent.

Bean, Ch. J., delivered the opinion of the court:

The plaintiff, a corporation organized under the statute providing for the incorporation of churches, religious, benevolent, literary, and charitable institutions, brought this suit to restrain the sheriff of Multnomah county from enforcing the collection of taxes levied upon its property for state and county purposes for the year 1892, claiming that such property is exempt from taxation under the Constitution and laws of the state. From the agreed statement of facts it appears that plaintiff was incorporated in 1878. Its Constitution declares that "the objects of this society shall be charity and benevolence, for the purpose of contributing a weekly allowance for sickness, and the means of defraying the expenses consequent upon the death of a member, and to contribute for the above-named purposes such sums as a majority of the members may be pleased to contribute." It is further provided by its Constitution and by-laws that "every Irishman, or the son of an Irishman, or a son of a member of the society," between the ages of eighteen and forty-five years, "of good moral character, possessed of reputable means of support, and free from all infirmities that might render him burdensome to the society," and a resident of the city of Portland for sixty days preceding his application, may, upon first being duly elected, "become a member thereof by signing the Constitution and paying an initiation fee of \$5." Every person who has been a member of the society for six months, and whose name is on the "list of active members," is entitled, in case of sickness, "to receive such sum as the society may direct, not to exceed \$7 per week, for three months in succession," provided he furnishes a doctor's certificate that through sickness he

is confined to his bed, and that he has not been instrumental in causing his sickness. In addition to this allowance, the society may extend benevolence to sick members as it may deem necessary, to be decided by a two-thirds vote of the members present at any regular meeting. On the death of a member in good standing, a sum of money not less than \$25, nor more than \$75, is to be paid for funeral expenses; and his widow or orphans are entitled to receive \$25, and, if need be, in three months thereafter, a like sum. Upon the death of his wife, a member is entitled to receive the sum of \$40 for funeral expenses. If there is no money in the treasury for sick or funeral expenses, when required, the board of directors is authorized to levy a special tax on the members for that purpose, and no other. It is provided that no money shall be drawn from the treasury for any but benevolent purposes, and none of the income or revenue of the society is to be used for any purpose other than as set out in the Constitution, except for the payment of principal and interest on its indebtedness, and the purchase and improvement of real estate. Provision is also made for the appointment of a committee of three members, whose duty it shall be, when notified of the illness of a member, to visit him as often as convenient, and report from time to time to the board of managers the condition of the member, lest sick dues might be drawn from the treasury contrary to the Constitution. The property assessed consists of lot 1, block 177, in the city of Portland, upon which is erected a three-story brick building, the lower story of which is rented for stores, the second story for offices (except one room, which is occupied by the plaintiff), and the third story for a public hall; the revenue derived from such rental being exclusively devoted to the objects and purposes of the society. Upon these facts the court below found that plaintiff was a charitable institution, within the meaning of the exemption law, and that the property in question was actually occupied by the plaintiff for the purposes for which it was incorporated, although the greater part of the building was leased to sundry persons, to be used for purposes wholly unconnected with the society, and entered a decree enjoining the collection of the tax. From this decree the defendant appeals.

Section 1, article 9, of the Constitution directs that "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Under this provision no property can be relieved from taxation except such as may be in use for some of the purposes enumerated therein, and then only to the extent specially permitted by legislative enactment. The Constitution itself does not exempt any property from taxation, and it authorizes the legislature to do so only for municipal, educational, literary, scientific, religious, or charitable pur

poses. It follows, then, that, before property can be exempted from taxation, it must not only be used for some of the purposes specified in the Constitution, but must be specially authorized by law. Now, the statute which undertakes to exempt property from taxation, and by which the questions presented in this case must be solved, was passed by the territorial legislature in 1854, and, so far as not inconsistent with the Constitution, continued in force by section 7 of article 18 of that instrument, and is now section 2732 of Hill's Annotated Laws. By subdivision 3 of this section, it is provided that "the personal property of all literary, benevolent, charitable, and scientific institutions, incorporated within this state, and such real estate belonging to such institutions as shall be actually occupied for the purposes for which they were incorporated," shall be exempt from taxation. Under these constitutional and statutory provisions, it is manifest that real property, to be exempt from taxation, must belong to some incorporated literary, benevolent, charitable, or scientific institution, and must be actually occupied for literary, benevolent, charitable, or scientific purposes.

The contention for the defendant is that the real property upon which the tax in question was laid is not exempt from taxation, for the reasons (1) that plaintiff is not a charitable institution, within the meaning of the law, because its benefits are confined to its own members and their families; and (2) that the property assessed is not actually occupied for the purpose for which it was incorporated.

Upon the first point the argument of his counsel is that a charitable institution, within the meaning of the exemption law, is one whose benefits are extended to the public generally, or some indefinite portion thereof, without regard to the relation the recipient may bear to the members of the particular organization or society, or to the fees or dues paid. But the principal authorities relied upon by him in support of this position were determinations of controversies arising under constitutional or legislative enactments exempting from taxation property belonging to institutions devoted to "purely public charity," which it is held does not include charitable institutions whose benevolence is confined to their own members, or persons having some particular relationship to such members. *Philadelphia v. Masonic Home*, 160 Pa. 572, 23 L. R. A. 545; *Swift v. Beneficial Soc.* 73 Pa. 262; *Delaware County Inst. of S. v. Delaware County*, 94 Pa. 168; *Donohugh's App.* 86 Pa. 306; *Mitchell v. Franklin County Treasurer*, 25 Ohio St. 144; *Babb v. Reed*, 5 Rawle, 151, 28 Am. Dec. 650; *Burd Orphan Asylum v. Upper Darby School Dist.* 90 Pa. 31; *Hennepin County v. Brotherhood of O. of G.* 27 Minn. 460, 38 Am. Rep. 298. But under constitutional or legislative provisions which, like ours, provide for the exemption of certain property belonging to "charitable institutions," and used for charitable purposes, it is believed that such an institution is entitled to the benefit of the exemption, although its benefactions are confined to its own members or their families. Thus, in 30 L. R. A.

Indianapolis v. Grand Lodge of Indiana, 25 Ind. 518, it is held that an institution which extends charity to its own members only is a charitable institution, within the meaning of the law exempting such institutions from taxation, the court saying: "The third paragraph of the answer presents the question whether that is a charitable institution, in the sense of the statute, which confines its benefactions to those who have become members of the Masonic order, having paid the fees commonly required for that purpose. We think that this question must be answered in the affirmative. It is not essential to charity that it shall be universal. That an institution limits the dispensation of its blessings to one sex, or to the inhabitants of a particular city or district, or to the membership of a particular religious or secular organization, does not, we think, deprive it either in legal or popular apprehension of the character of a charitable institution. If that only be charity which relieves human want, without discriminating amongst those who need relief, then indeed it is a rarer virtue than has been supposed. And if one organization may confine itself to a sex, or church, or city, why not to a given fraternity? So narrow a definition of charity as the third paragraph presupposes is not, that we are aware of, ever attached to it, and we are not at liberty to circumscribe the effect of the statute, and defeat its intention, by affixing to its terms an unusually limited meaning." So also, in *Petersburg v. Petersburg Benev. Mechanics' Assn.* 78 Va. 481, it was held that an association which applies its revenues to the payment of current expenses, and to the relief of its indigent members and the families of such as have died in need, was a charitable institution. "These are charitable purposes," says the court, "and the relief afforded is none the less charity because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal." And, again, in *Book Agents of M. E. Church, South, v. Hinton*, 92 Tenn. 188, 19 L. R. A. 289, it was held that a corporation created as an arm or agency of the Methodist Church, and charged with the duty of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of the church, and thereby raising a fund with which to support its worn-out preachers and their families, is a religious and charitable institution, within the meaning of the provision of the Constitution exempting such institutions from taxation. From an examination of this question and all the authorities within our reach bearing upon it, we take the result to be that an institution organized for benevolent and charitable purposes, free from any element of private or corporate gain, and which devotes its entire revenue to the payment of current expenses and the relief of the poor and needy, is a charitable institution, within the meaning of the law, although it may confine its benefits primarily to its own members and their families.

But, whether the plaintiff is such an institution or not, we are clear the property in

question is not exempt from taxation, because it is not actually occupied for charitable purposes. Subdivision 3 of section 2732, *supra*, under which the exemption is claimed, exempts only such real property belonging to incorporated literary, benevolent, charitable, or scientific institutions as shall be actually occupied for the purposes for which they were incorporated. It does not exempt from taxation the enumerated institutions as such, or real estate simply because it belongs to such institutions, or even because it is used for literary, scientific, charitable, or benevolent purposes, but it expressly confines the right of exemption to such real estate only belonging to them as shall be actually occupied in a particular manner and for a specified purpose; and this right, therefore, clearly cannot be extended to property occupied and used for other and different purposes, although the revenue derived from its use is devoted exclusively to the objects for which the institution was established. It is the actual occupancy of the property which determines its right to exemption, and not the use made of its proceeds. The plain and obvious meaning of the statute is that only the real estate actually occupied and in use by these different institutions for the purposes for which they were organized shall be exempt from taxation. While so occupied and used, it does not come in competition with the property of other owners; and the purpose for which it is used was supposed by the legislature to be a sufficient benefit to the public to justify its exemption from the burdens of taxation imposed upon other property. But, when such property is used for the purpose of accumulating money, the law imposes upon it the same burden of taxation as it imposes upon other property similarly situated. The statute does not undertake to discriminate between the uses which different societies or individuals will make of the proceeds of their business, and determine, for that reason, that one shall be taxed, and the other not. It deals with the property as it finds it, and not with what may be done with its proceeds in the future. Upon this question the authorities are practically unanimous, under similar statutory provisions. *Indianapolis v. Grand Master of G. L.* 25 Ind. 518; *Presbyterian Theological Seminary of N. W. v. People*, 101 Ill. 578; *Washburn College v. Shawnee County Comrs.* 8 Kan. 344; *Detroit Young Men's Soc. v. Detroit*, 8 Mich. 173; *Cincinnati College v. State*, 19 Ohio, 110; *Cleveland Library Assn. v. Pelton*, 36 Ohio St. 253; *First M. E. Church of Chicago v. Chicago*, 26 Ill. 432; *New Orleans v. St. Patrick's Hall Assn.* 28 La. Ann. 512; *New Orleans v. St. Anna's Asylum*, 31 La. Ann. 298; *Baltimore v. Grand Lodge of A. F. & A. M.* 60 Md. 280; *Frederick County Comrs. v. Sisters of Charity*, 48 Md. 34; *Appeal Taa Ch. v. Grand Lodge of A. F. & A. M.* 50 Md. 429; *Redemptorists v. Howard County Comrs.* Id. 449; *Salem Lyceum v. Salem*, 154 Mass. 15; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Mulroy v. Churchman*, 52 Iowa, 238; *Orr v. Baker*, 4 Ind. 86; *Phillips Exeter Academy Trustees v. Exeter*, 58 N. H. 306, 43 Am. Rep. 589; *Morris v.* 30 L. R. A.

Lone Star Chapter No. 6 R. A. M. 68 Tex. 698; *Proprietors of South Congra. Meeting-house v. Lowell*, 1 Met. 538; *Wyman v. St. Louis*, 17 Mo. 336; *State v. Ross*, 24 N. J. L. 496; *Massenburg v. Grand Lodge P. & A. M.* 81 Ga. 212; *Pt. Des Moines Lodge No. 25 I. O. O. F. v. Polk County*, 56 Iowa, 34. See also notes to *Petersburg v. Petersburg Benev. Mechanics' Assn.* 8 Am. & Eng. Corp. Cas. 488; and *Book Agents of M. E. Church, South, v. Hinton* (Tenn.) 19 L. R. A. 289.

It is so manifestly just that all property shall bear its due proportion of the expenses of government that laws granting exemption from taxation are always strictly construed, and, before such exemption can be admitted, the intent of the legislature to confer it must be clear beyond a reasonable doubt. Thus, it is held that laws exempting from taxation "houses of religious worship," or "buildings erected and used for religious worship," or "property used for religious purposes," etc., do not exempt a parsonage erected by a religious society for the use of its minister, although occupied by him free of rent and built on grounds which would otherwise be exempt. *State v. Astell*, 41 N. J. L. 117; *Hennepin County v. Grace*, 27 Minn. 503; *Ramsey County v. Church of Good Shepherd*, 45 Minn. 229, 11 L. R. A. 175; *Third Congregational Soc. v. Springfield*, 147 Mass. 396; *St. Mark's Church Wardens v. Brunswick*, 78 Ga. 541; *Gerke v. Purcell*, 25 Ohio St. 229; *Methodist Epis. Church Trustees v. Ellis*, 88 Ind. 8; *Vail v. Beach*, 10 Kan. 214. And a building belonging to the Young Men's Christian Association, which contains above the basement, in which are the gymnasium, bowling alley, and bath room, twenty-two rooms, only one of which is devoted to public worship, was held not exempt, under a law exempting "every building used exclusively for public worship." *Young Men's Christian Assn. v. New York*, 118 N. Y. 187. The Constitution of this state requires an equal and uniform rate of assessment and taxation of all property, excepting "such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Taxation is therefore the rule; exemption, the exception; and nothing can be held to be exempt by implication. It is only such property used for the purposes specified in the Constitution, as the legislature may specially exempt, which can escape taxation. Exemption is not a matter of right, but a pure matter of grace; and every person or corporation claiming that his or its property, or any part thereof, is exempt, must be able to show some clear constitutional or legislative provision to that effect. The legislature, in its wisdom, has provided that, of the real property belonging to literary, benevolent, charitable, or scientific institutions incorporated within this state, such only shall be exempt from taxation as shall be actually occupied for the purposes for which they were incorporated; and, under all the rules for the construction of exemption laws, this cannot be held to include real property which is occupied for other purposes, although the revenues received therefrom may be used for the pur-

nesses of the corporation. Some of the authorities cited go to the extent of holding that when a portion only of a building belonging to such an institution is occupied for the purposes for which it was incorporated, and the remainder is occupied by tenants paying rent, the entire building is liable to taxation; but the general tenor of the authorities, and no doubt the better rule, is that in such case the assessor, in estimating the value of the property, should make a proper allowance for the portion of the building occupied by the society, so that the tax levied will be laid only upon the value of that which is not exempt, though the property may be assessed as a whole.

It is insisted by the plaintiff that the state is estopped from levying the tax in question for the reason that, while it has owned the property assessed since 1877, no attempt was made to assess it until the year 1890, and that, relying upon that fact, it borrowed in that year \$53,000 on a mortgage, to enable it to erect the building now on the premises, and stipulated and agreed to pay the taxes on such mortgage. But the neglect or omission of the proper officers to assess the property cannot control the duty imposed by law upon their successors, or affect the legal construction of the statute under which its exemption from taxation is claimed. *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 685, 29 L. ed. 770.

The case of *State v. Addison*, 3 S. C. N. S. 490, relied upon by plaintiff, is not in point. That was a proceeding to enforce a municipal tax. The city had by ordinance, in 1798, exempted all and every religious and charitable society from the payment of any city tax, and the city council for more than three quarters of a century had included the relators as among the societies thus exempted; and the court held that the action of the city council for so long a time would be received as the proper interpretation of their own enactment so long as it remained in force.

Again, it is claimed that, because the name appearing on the assessment roll as the owner of the property is "Hibernian Benevolent Society," and not the "Portland Hibernian Benevolent Society,"—the real owner,—the assessment is void, and should be enjoined. But we understand the rule to be that a court of equity will not interfere by injunction to restrain the collection of a tax merely because of alleged illegality or irregularity appearing upon the face of the assessment, but will leave the party to his remedy at law. 1 High, Inj. § 491; *Odin v. Woodruff* (Fla.) 23 L. R. A. 699, and *note*. "In view of the authorities," says Lord, Ch. J., "the considerations which influenced a court of equity to restrain the collection of a tax are confined to cases where the tax itself is not authorized, or, if it is, that such tax is assessed upon property not subject to taxation, or that the persons imposing it were without authority in the premises, or that they have proceeded fraudulently." *Welch v. Clatsop County*, 24 Or. 487.

It follows that the decrees of the court below must be reversed, and the complaint dismissed. 30 L. R. A.

Joseph SIMON, *Appt.*,

v.

H. H. NORTHUP *et al.*, County Court of Multnomah County, *Respia.*

John R. HANSON, *Appt.*,

v.

Sol. HIRSH *et al.*, Bridge Committee, *Respia.*

(-----Or.-----)

1. The legislature has power to require a city to incur a debt without its consent for the acquisition of public bridges and ferries, as is done by act 1895 relating to the city of Portland, in the absence of any constitutional prohibition.
2. A statute providing for the acquisition of bridges and ferries by a city, the issuance of bonds in payment therefor, the transfer of the property to the county, and the collection of taxes by the county to pay the bonds, does not embrace more than one subject, in violation of Const. art. 4, § 20.
3. The acquisition by a city of certain bridges and ferries which were already public highways, provided for by act 1895, is not included in the laying out, opening, and working of highways, for which special or local laws are forbidden by Const. art. 4, § 23, subd. 7.
4. A statute requiring a county tax to be levied and collected like other taxes, for the purpose of maintaining bridges and ferries, being in effect a requirement only that the sums required shall be included in the estimate for county purposes, does not violate Const. art. 4, § 23, subd. 10, prohibiting local or special laws for assessment and collection of taxes.
5. The transfer of the management and control of public bridges and ferries may be made by the legislature to any governmental agency, such as a county court, although the bridges and ferries belong to a city.
6. The requirement that a county shall pay the debt of a city within it, made by act 1895 providing for a county tax to pay the interest and principal on the bridge bonds of the city of Portland, is unconstitutional.
7. The maintenance of a ferry by the county of Multnomah at Sellwood is not within the subject of act 1895 providing for the acquisition of specified bridges and ferries by the city of Portland.

(June 3, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County, Department 2, denying a writ of mandamus to compel defendants to take charge of certain bridges in accordance with the provisions of an act of the legislature. *Reversed.*

NOTE.—In connection with the very elaborate presentation in the above case of the subject of legislative power to direct expenditure of municipal or county funds, see also *Johnson v. San Diego* (Cal.) post. 178; *Davock v. Moore* (Mich.) 28 L. R. A. 783; *Duval County Comrs. v. Jacksonville* (Fla.) 29 L. R. A. 414.

APPPEAL by plaintiff from a decree of the Circuit Court for Multnomah County, Department 3, refusing to enjoin defendants as Bridge Committee from carrying out the provisions of an act of the legislature passed for the purpose of regulating the control of certain bridges and ferries of the city of Portland. *Affirmed.*

The facts are stated in the opinion.

Messrs. O. F. Paxton and Joseph Simon, for appellant, Simon:

The subjects of the act are sufficiently expressed in the title to make the law valid under the Constitution.

Simpson v. Bailey, 8 Or. 515; *State v. Shaw*, 22 Or. 287; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Banks*, 87 N. Y. 568; *David v. Portland Water Committee*, 14 Or. 98; *McWhirter v. Brainard*, 5 Or. 429; *Singer Mfg. Co. v. Graham*, 8 Or. 21, 34 Am. Rep. 572; *O'Keefe v. Weber*, 14 Or. 57; *State v. Koshland*, 25 Or. 180; *State v. Linn County*, 25 Or. 508; *Cooley*, Const. Lim. pp. 192 et seq.

The power to control bridges and ferries over navigable streams is vested with the state or such subordinate agency of the state as its legislature may select for the purpose, and, until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary.

Gilman v. Philadelphia, 70 U. S. 8 Wall. 718, 18 L. ed. 96; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442; *Curdwell v. American River Bridge Co.* 118 U. S. 205, 28 L. ed. 959; *Scheurer v. Columbia Street Bridge Co.* 27 Fed. Rep. 172.

Public highways and bridges are matters of general or state, rather than of municipal, concern, and are under the paramount and primary control of the legislature.

Cooley, Taxn. pp. 180, 682; *Dill. Mun. Corp.* §§ 74, 680, note; *Elliott, Roads & Streets*, p. 23; *Maxwell v. Tillamook County*, 20 Or. 495; *Allen v. Hirsch*, 8 Or. 412.

The legislature has not undertaken to relieve the city of Portland from the payment of the bonds issued on account of the bridges and ferries, or cast the same upon the county.

If it had done so, and had required the county of Multnomah to assume such indebtedness, it would clearly be within the constitutional power of the legislature so to do.

Lane County v. Oregon, 74 U. S. 7 Wall. 71, 19 L. ed. 101; *Meriwether v. Garrett*, 102 U. S. 518, 26 L. ed. 204; *Augusta v. North*, 57 Me. 894, 2 Am. Rep. 55; *Cooley*, Taxn. pp. 15, 17.

The court will take judicial knowledge that the consolidated city of Portland is practically the county of Multnomah, and that more than three fourths of the people of that county reside within the city of Portland, and that more than three fourths of the taxable property of the county is situate within said city.

If the legislature should see fit to extend the boundaries of such quasi municipal corporation by including additional territory or even the remainder of the county, thereby determining the limits of the taxing district, it has done only that which is within the undoubted power of the legislature to do, and is in no wise different from the division of cities or counties or the consolidation thereof, the right of the 30 L. R. A.

legislature to do which has never been questioned.

Cooley, Taxn. p. 149; *Cooley*, Const. Lim. p. 291.

Money raised by taxation is not the private property of the county, and an act of the legislature diverting a portion of the moneys so raised to other purposes is not an application of property to private uses nor the taking of private property for public uses without compensation.

State v. St. Louis County Ct. 34 Mo. 546; *Loos v. Schenck*, 12 Ired. L. 804; *Mobile County v. Kimball*, 102 U. S. 702, 26 L. ed. 241; *Tippecanoe County Comrs. v. Lucas*, 98 U. S. 108, 23 L. ed. 822; *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552.

The legislature may, unless restrained by the Constitution or some of the fundamental maxims of right and justice, exercise control over the county agencies and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization.

Dill. Mun. Corp. § 23; *State v. McFadden*, 23 Minn. 40; *People v. Alameda County*, 26 Cal. 642; *Napa Valley R. Co. v. Napa County*, 80 Cal. 435; *Waterville v. Kennebec County Comrs.* 59 Me. 80; *Brewis v. Duluth*, 18 Fed. Rep. 334; 4 Am. & Eng. Enc. Law, p. 850; *Grant County v. Lake County*, 17 Or. 453; *State v. St. Louis County Ct.* 34 Mo. 552; *Pattison v. Yuba County Supers.* 18 Cal. 184.

The charters of municipal corporations may be altered or repealed at pleasure.

Pom. Const. L. § 587; *Foot & Everett, Incorporated Companies*, 147-149; *Dill. Mun. Corp.* 74, 74a; *Newton v. Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710; *Laramie County Comrs. v. Albany County Comrs. supra.*

The legislature has undoubted authority to apportion a public burden among all the taxpayers of the state or among those of a particular section if in its judgment those of a single section may reap the principal benefit from the proposed expenditure.

Cook v. Port of Portland, 20 Or. 580, 18 L. R. A. 533; *Mobile County v. Kimball*, *supra*; *Gordon v. Corne*, 47 N. Y. 608.

The legislature may require a county to join with a municipality in the cost of the construction of a bridge.

Cooley, Taxn. pp. 180, 682; *Beach*, Pub. Corp. § 1472.

It is within the province of the legislature to require the county court to take possession of, maintain, and operate the bridges and ferries, and to provide the means therefor, and to create the sinking fund wherewith to retire the bonds as in the act provided for.

Philadelphia v. Field, 58 Pa. 320; *Talbot County Comrs. v. Queen Anne County Comrs.* 50 Md. 245; *Will County Supers. v. People*, 110 Ill. 511; *Carter v. Cambridge & B. Bridge Proprs.* 104 Mass. 236; *Thomas v. Leland*, 24 Wend. 65; *Seituate v. Weymouth*, 108 Mass. 128; *Agawam v. Hampden County*, 130 Mass. 528; *Linn County Comrs. v. Snyder*, 45 Kan. 636; *State v. Field*, 119 Mo. 598; *Cooley*, Taxn. p. 128.

The legislature may require a county to incur debts and obligations for a bridge within

the limits of another county when the purpose of the taxation is public and of special interest to the people sought to be taxed.

Talbot County Comrs. v. Queen Anne County Comrs. 50 Md. 259; *Skinner v. Henderson*, 26 Fla. 121, 8 L. R. A. 55; *Washer v. Bullitt County*, 110 U. S. 558, 28 L. ed. 249.

The property of a municipal corporation is held subject to the discretion of the lawmaking power of the state.

Darlington v. New York, 81 N. Y. 164, 88 Am. Dec. 248; *Richland County v. Lawrence County*, 19 Ill. 1; *Dennis v. Maynard*, 15 Ill. 477.

Messrs. Bronaugh, McArthur, Fenton, & Bronaugh and Watson, Beekman, & Watson, for respondents Northup *et al.*:

The bridge act of 1895, in so far as it relates to or pretends to create any obligation upon Multnomah county, is a local special law, and as such in violation of subdivisions 7 and 10, section 28, article 4, of the state Constitution.

Sutherland, Stat. Constr. § 127; *Maxwell v. Tillamook County*, 20 Or. 495; *Healey v. Dudley*, 5 Lans. 115; *People v. Newburgh & S. Pl. Road Co.* 86 N. Y. 7; *Frye v. Partridge*, 83 Ill. 278.

The legislative assembly cannot, by a mere legislative act, retroactive in its character, take an indebtedness of \$750,000, or any other sum, resting upon one municipality, and transfer it to and make it an obligation upon another municipality without any opportunity to consent to either the amount or the obligation.

4 Am. & Eng. Enc. Law, p. 351; *Hampshire County v. Franklin County*, 16 Mass. 83; *People v. Hurlbut*, 24 Mich. 108, 9 Am. Rep. 108; *Hasbrouck v. Milwaukee*, 13 Wis. 55, 80 Am. Dec. 718; *Jackson County Supers. v. La Crosse County Supers.* 13 Wis. 490; *Mills v. Charleton*, 29 Wis. 413, 9 Am. Rep. 578; *Grogan v. San Francisco*, 18 Cal. 618; *Brunswick v. Litchfield*, 2 Me. 32; *Boudoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197; *Atkins v. Randolph*, 31 Vt. 235; *Cooley, Const. Lim.* 688, 690; *People v. Lynch*, 51 Cal. 84, 21 Am. Rep. 677; *People v. Chicago*, 51 Ill. 31, 2 Am. Rep. 278; *People v. Batchelor*, 53 N. Y. 189, 13 Am. Rep. 490.

This act creates a debt against the county, or rather obligates the county for the entire bonded debt and interest, and requires the current expenses of operation, repairs, and renewals of these bridges and ferries to be borne by the county, without its consent. Aside from the statute being local and special, it is clearly violative of Const. art. 2, § 10.

People v. May, 9 Colo. 404; *Hockaday v. Board of County Comrs.* 1 Colo. App. 362; *Law v. People*, 87 Ill. 885; 15 Am. & Eng. Enc. Law, p. 1125; *Fuller v. Chicago*, 89 Ill. 282; *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 188.

This act in so far as it relates to the Sellwood ferry, and in so far as it relates to the provisions of the act to require the county court to levy and collect a tax to pay the interest on these bonds, or to levy and collect a tax to pay operating expenses, or to levy and collect a tax to create a sinking fund to discharge the debt at maturity, is violative of Const. art. 4, § 20.

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Messrs. Cox, Cotton, Teal, & Minor, with *Messrs. W. W. Thayer and Newton McCoy*, for appellant Hanson:

If the act is manifestly obnoxious to the whole theory of our government, it should temper the construction to be placed upon special provisions of the organic law. What is this theory? The greatest latitude in local government consistent with the public good.

Dill. Mun. Corp. § 9; *People v. Albertson*, 55 N. Y. 50; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People v. Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

A corporation is properly investing the people of the place with the local government thereof.

Cuddon v. Eastwick, 1 Balk. 143; *People v. Albertson*, *People v. Hurlbut*, and *People v. Lynch*, *supra*.

The legislative assembly has no power in municipal matters to encroach upon their established forms and rights of government.

Cooley, Const. Lim. p. 280z, note 1.

If the object sought is local, while the legislature may empower, it cannot coerce, the city to accomplish it.

Cooley, Const. Lim. 281z; *Taylor v. Palmer*, 81 Cal. 240; *People v. Lynch*, *supra*; *Schumacker v. Toberman*, 58 Cal. 508; *Hasbrouck v. Milwaukee*, 13 Wis. 88, 80 Am. Dec. 718; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278.

The bridges already purchased, at least, are property rights of which the city cannot be divested without its consent, inasmuch as they were bought by the city and paid for with its money.

The city is not a mere custodian of the bridges, but has a beneficial property interest in them, in that it is allowed to charge tolls to railways and street railways, while they are free to other vehicles and pedestrians. This is a source of revenue, and the act of the legislative assembly authorizing the acquisition of the bridges coupled with this privilege, gave the city an interest in them which cannot be divested or impaired without its consent, except by due process of law and upon just compensation paid.

Sedgw. Stat. & Const. L. 129; *Benson v. New York*, 10 Barb. 223; *People v. New York*, 32 Barb. 102; *Grogan v. San Francisco*, 18 Cal. 590.

A special law within the meaning of section 28 of article 4 of the Constitution is a private act.

Allen v. Hirsch, 8 Or. 412; *Crawford v. Linn County*, 11 Or. 498.

The act in question is a public law.

Endlich, Interpretation of Statutes, § 502; *Unity v. Furrage*, 103 U. S. 454, 26 L. ed. 407.

Subdivisions 7 and 10 of section 28 of article 4 of the Constitution apply only to roads and highways traversing the rural districts.

East Portland v. Multnomah County, 6 Or. 65.

Therefore, if the bridges and ferry mentioned in the act are considered as highways they are not within the constitutional inhibition because they are wholly within the limits of the city of Portland.

Elliott, Roads & Streets, p. 23.

The legislature has undoubted authority to apportion a public burden among all the taxpayers of the state or among those of a particular section, if in its judgment those of the single section reap the most benefit from its expenditure.

Cook v. Port of Portland, 20 Or. 580, 18 L. R. A. 533.

The legislature has undoubted power to require a municipal corporation as a governmental agency to establish and pay for necessary public improvements.

David v. Portland Water Committee, 14 Or. 98; *Winters v. George*, 21 Or. 251; *State v. George*, 22 Or. 142, 16 L. R. A. 787; *Cook v. Port of Portland*, *supra*.

The act in question is valid for it must be construed as a supplement to or amendment of the charter.

Warren v. Crosby, 24 Or. 558; *Hoffman v. Branch*, *Id.* 588.

The result of the county's inability to take the bridges and ferry from the "committee" will be that the whole act as to them must fall for such reason alone.

Sutherland, Stat. Constr. § 176; *Warren v. Charlestown*, 2 Gray, 84; *State v. Sinks*, 42 Ohio St. 345; *Shawnee County Comrs. v. State*, 49 Kan. 492.

This act is void for being in conflict with article 4, section 23, subdivisions 7 and 10, of the Constitution. This inhibits special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors."

Maxwell v. Tillamook County, 20 Or. 495; *Sutherland*, Stat. Constr. § 129; *Hammer v. State*, 44 N. J. L. 667; *Hudson County Freeholders v. Buck*, 49 N. J. L. 228; *Frye v. Partridge*, 82 Ill. 267; *State v. Mitchell*, 31 Ohio St. 592.

Messrs. Joseph Simon and O. F. Paxton for respondents, *Hirsch et al.*:

The bridge act is valid and the committee has to issue and sell bonds of the city and acquire and operate bridges.

Winters v. George, 21 Or. 251; *State v. George*, 22 Or. 142, 16 L. R. A. 787.

The act embraces but one subject and matters properly connected therewith, and the title of the act sufficiently expresses its purpose.

Simpson v. Bailey, 3 Or. 515; *McWhirter v. Brinard*, 5 Or. 429; *Singer Mfg. Co. v. Graham*, 8 Or. 21, 34 Am. Rep. 572; *O'Keefe v. Weber*, 14 Or. 57; *David v. Portland Water Committee*, *Id.* 98; *State v. Shaw*, 22 Or. 287; *State v. Koshland*, 25 Or. 180; *State v. Linn County*, *Id.* 508; *Brewster v. Syracuse*, 19 N. Y. 116; *People v. Banks*, 67 N. Y. 568; *Cooley*, Const. Lim. 4th ed. pp. 192 *et seq.*

Bean, Ch. J., delivered the opinion of the court:

These two cases, which for convenience were heard together in this court, involve the constitutionality of an act of the legislature of 1895 providing for the acquisition by the city of Portland of the Morrison street bridge, Stark street ferry, and the upper deck of the steel bridge, and requiring the supervision, 30 L. R. A.

management, and control of said bridges and ferry, when so acquired, and of all the free bridges and ferries of the city acquired under the acts of 1891 and 1893, to be turned over to the Multnomah county court, to be thereafter supervised, managed, and controlled by said court. The provisions of the act, in brief, are: That a committee, designated as a bridge committee, is thereby appointed, and charged with the duty of acquiring in the name and on behalf of the city of Portland, by purchase or condemnation, the Morrison street bridge and Stark street ferry, and of leasing the upper deck of the steel bridge, and for that purpose it is authorized to issue and dispose of the bonds of the city, not to exceed in amount the sum of \$200,000. After the two bridges specified and the ferry are thus acquired and are ready for use, the bridge committee is required to turn them over to the county court of Multnomah county. The act further provides that the bridge committee appointed under the act of 1891, and which now has control of the Madison and Burnside street bridges and Albina ferry, shall immediately turn over and deliver to said court all the bridges and ferries and property connected therewith in its possession and under its control, and the county court is required to take charge of, maintain, and operate the same, as well as the bridges and ferry to be acquired under this act, as free bridges and ferries, and to that end is given power and authority to employ all such agents or servants as it may deem necessary, and to make all needful rules and regulations for the conduct, management, and use of such bridges and ferries by the city, its inhabitants, and the public in general. The county court is required to levy and collect, in the manner and form as other taxes are levied and collected, a tax each year upon all the taxable property within the county sufficient, with such revenues as may be received from said bridges and ferries, to maintain and keep them in good condition and repair during the ensuing year, and to pay the annual rental for the upper deck of the steel bridge; and it is also required to levy and collect a tax sufficient to pay the interest to accrue upon the bonds authorized by this act to be issued, and also upon the bridge bonds already outstanding against the city, amounting to \$550,000; and, at the expiration of ten years from the passage of the act, the county court is required to levy and collect an additional tax, sufficient to raise a sum of money annually equal in amount to one twentieth part of the bonds then outstanding, to be used as a sinking fund, for the purpose of paying off and retiring such bonds. It is declared by the act, however, that the bonds already issued, and those to be issued, in accordance with its provisions, are to remain as existing, valid, and binding obligations of the city of Portland, and the city is directed and required to pay, as the same matures, the interest on the bonds, and the principal thereof when due, in the event that the county court of Multnomah county fails or neglects to do so. It is further provided that the county court shall establish and maintain a free ferry across the river at Sellwood at a

cost not to exceed \$3,400 per annum, and for that purpose it shall cause to be used such of the ferry boats as may be acquired by it under this act. The bridge act of 1891 and the amendment thereto of 1893 are repealed. It is stoutly contended that the act in question is unconstitutional for the several reasons hereinafter noticed, and, while we are satisfied that the contention is well founded in some respects, and are conscious that in others the validity of the act is not free from doubt, yet we cannot declare it wholly void because some of its provisions are so and others are involved in doubt. The courts will never exercise the extraordinary power of declaring an act of the legislature unconstitutional unless there is a plain, palpable, and clear conflict between the statute and the Constitution, which, in our opinion, does not exist in this case. *King v. Portland*, 2 Or. 152; *Cook v. Port of Portland*, 30 Or. 580, 18 L. R. A. 538.

In the first place, the entire act is challenged upon the ground that it is incompetent for the legislature to compel the city of Portland to incur a debt for the construction of public bridges within its boundaries, and much was said at the argument about the inexpediency and injustice of such legislation, and the effect previous legislation of this character has already had upon the financial affairs of the city. But the question is one of power alone, and, however unjust, inexpedient, or even oppressive such legislation may be, the courts are powerless to declare it invalid if it is within the legitimate exercise of legislative powers. A municipal corporation is but the creature of the legislature, and in its governmental or public capacity is one of the instruments or agents of the state for governmental purposes, possessing certain prescribed political and municipal powers, to be exercised by it on behalf of the general public rather than for itself; and over it, as such agent, the authority of the legislature is supreme, and without limitation or restriction other than such as may be found in the Constitution. There is a line of authorities which hold, and perhaps properly, that a municipal corporation cannot be burdened with a debt without its consent for a matter of local, as distinguished from state, purposes. *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 378; *People v. Batchellor*, 53 N. Y. 128, 18 Am. Rep. 480. But it seems to be substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to compel it to perform such duty and incur a debt therefor. That the making and establishment of public highways and bridges, and the assessment and collection of taxes, are within the legitimate legislative powers, and are among the ordinary subjects of legislation, cannot be questioned. Nor do we think it can be successfully denied that the bridges and ferries referred to in the act under consideration will, when acquired,

belong to the city of Portland in its public or governmental capacity, and that in the acquisition of them it is but discharging a public or state duty which it is entirely proper for the legislature to impose upon it; and therefore, if there is no limitation in the Constitution, it is no objection to the validity of an act for that purpose that a debt or liability against the corporation is to be created without its consent. *Cooley*, Taxn. 682; *Dill. Mun. Corp.* § 74; *Winters v. George*, 21 Or. 251; *State v. George*, 22 Or. 142, 16 L. R. A. 787; *Philadelphia v. Field*, 58 Pa. 320; *Baltimore United German Bank v. Katz*, 57 Md. 145; *Davis v. New York C. & H. R. R. Co.* 47 N. Y. 400. That the construction of bridges and highways in a city, and the incurring of a debt therefor, should ordinarily be left to the judgment and discretion of the proper municipal authorities is manifestly just and in harmony with the right of local self-government and the theory of our political institutions, but the policy of such legislation is not for the courts. When the power is conceded, the courts cannot inquire into the expediency or manner of its exercise, or the motives or reasons prompting the particular act. We conclude, therefore, that the act in question is not invalid because it compels the city of Portland to incur a debt, without its consent, for the acquisition of public bridges and ferries.

It is next contended that the act embraces more than one subject, and therefore is in violation of section 20, article 4, of the Constitution, which declares that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The design of this provision of the Constitution was to prevent matters wholly foreign, and having no relation to each other, from being embraced in one bill, and "this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title." *People v. Mahaney*, 18 Mich. 495. The subject or general object of the law in question, as expressed in its title, is the acquisition, control, and management of certain specified bridges and ferries across the Willamette river at Portland, and the details by which it is to be accomplished are matters properly connected therewith, and do not constitute more than one subject within the meaning of the Constitution. Whether the body of the act contained any provisions which are void because not properly within the subject expressed in the title will be considered later.

It is also contended that the act is in conflict with subdivision 7, section 23, article 4, of the Constitution, which forbids the passage by the legislature of special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors." It may be conceded that the act in question is special and local, but still we do not think it comes within the provision of the Constitution referred to. This provision was probably designed to require the legislature to provide by general law for the laying, opening, and working of the ordinary highways and public roads of the state, and to prevent any interference

with the general highway system by special or local acts. But if it is applicable to public highways within a municipal corporation, the act under review clearly does not come within its provisions. It does not in any sense provide for the laying or opening of a highway. The bridges and ferries referred to therein were, at the time of the passage of the act, and for a long time before had been, open and in use by the public as highways. Their character as such was already established. The bridges and ferries purchased, acquired, and constructed by the commission appointed under the act of 1891 were then free and open highways, and, while it is true that the public easement was subject to the payment of tolls for passage over the bridges and ferry to be acquired under its provisions, they were nevertheless public highways, and the rights of the owners were to be extinguished before their supervision and control were to be transferred to the county court. By the transfer to the county contemplated by this act, these bridges and ferries were to continue as public highways, but their character as such is in no way derived from the act itself, and therefore it does not provide for the laying or opening of a highway and the case of *Mazwell v. Tillamook County*, 20 Or. 495, which declares an act which did so provide invalid, is not in point. The effect of the act of 1895 is simply to transfer the management, control, and maintenance of certain existing public highways from one governmental agency, constituted and appointed by the legislature, to another, designated by the same authority, but it does not undertake to lay out or open or provide for the laying or opening of such highways. Nor do we think the act in question is for the working of highways within the meaning of the provision of the Constitution under consideration. This provision, so far as the working of highways is concerned, was intended to apply to such roads and highways as are a part of the general highway system of the state, and can be maintained and kept in repair under a general law, and not to the public bridges and ferries of a city, which are exempt from the operation of such laws, and which, in the nature of things, cannot be so kept up and maintained. *Elliott, Roads & Streets*, 329. Indeed, it was said by Judge McArthur in *East Portland v. Multnomah County*, 6 Or. 65, that this provision of the Constitution only applies and is limited to the roads and highways traversing the rural districts, and not to the streets and alleys of a city; and in *Lafayette v. Jenners*, 10 Ind. 79, it is said by way of argument that a street is not a highway in any sense within the meaning of a constitutional provision like ours, and it is not apparent that this construction would fail to accomplish the purposes intended by the framers of the Constitution. But whether this is so in the matter of opening and laying of highways it is unnecessary to consider at this time, for no such question is presented by this record. But it does not seem to us that the legislature is inhibited by this provision of the Constitution from transferring, by special or local law, the

supervision and control of an existing public bridge or ferry constructed by and within the boundaries of a municipal corporation from such corporation to a county, and requiring the latter to maintain and keep it in repair. The Constitution of 1874 of the state of New York contains a provision forbidding the passage by the legislature of any private or local bill "laying out, opening, altering, working, or discontinuing roads, highways, or alleys," and this provision was invoked to defeat a private and local act of the legislature of that state which authorized the conveyance by a certain turnpike company of a portion of its road to park commissioners, and which made provision for the improvement and ornamentation of the road authorized to be conveyed, and for the payment of the costs of such improvement, and for the keeping of the same in repair; but the court of appeals held that the constitutional provision was only designed to prevent any interference with the general highway system of the state, or with keeping the ordinary highways and public roads in repair under that system, and the supervision of the officers designated, and in the use of the means and the labor provided by law, and that the act in question did not in any of its provisions provide for the opening or working of a highway in the sense in which that term is used in the Constitution, although the road referred to belonged at the time to a private corporation, which was charging and collecting tolls thereon. *People v. Banks*, 87 N. Y. 568. This case, in many of its features, is similar in principle to the case at bar, and it seems to us the doctrine announced there is controlling here.

It is next objected that the act is violative of subdivision 10, section 28, article 4 of the Constitution, which prohibits the passage by the legislature of special or local laws "for the assessment and collection of taxes for state, county, township, or road purposes." The evident purpose of this provision was to prohibit the legislature from passing a special or local law providing a mode or manner for the assessment and collection of taxes in the enumerated cases which would interfere with or contravene the method of assessing and collecting taxes as provided by the general law, but not, in our opinion, to inhibit the legislature from authorizing or requiring a county to levy and collect a tax at the same time and in the same manner as other taxes are levied and collected for specified public purposes, and that is all the law in question required. It does not purport to provide a special manner for the assessment and collection of taxes, but only requires the county of Multnomah to include in its estimate for county purposes a sum sufficient to meet certain expenses which, by the act in question, the county is required to pay, and a tax sufficient to meet these expenses is to be assessed and collected as other taxes are assessed and collected; and hence we do not think it is a special and local law for the assessment and collection of taxes within the meaning of the Constitution.

It is also contended that the legislature cannot take from the city of Portland the

supervision, management, and control of the public bridges and ferries belonging to it, and transfer them to the county of Multnomah. In the first place, these bridges and ferries are not now, and never have been, under the supervision of the city of Portland, but are managed and controlled by a committee or commission appointed for that purpose by the legislature, and this act only purports to transfer their management and control from such committee to another state or governmental agent. But, if it were otherwise, the law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended. 3 Dill. Mun. Corp. 656, and authorities there cited; Coolley, Const. Lim. 5th ed. 885, and note. In accordance with this principle, it was held, in *Portland & W. V. R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299, that an act of the legislature granting the use of the public levee of the city of Portland to a railway company for railway purposes was a valid exercise of legislative powers. So also it was held in *People v. Walsh*, 96 Ill. 232, 36 Am. Rep. 185, that it was competent for the legislature to transfer the control of the streets of a city to park commissioners, to be by them controlled for boulevard and driveway purposes. A city occupies, as it were, a dual relation to the state,—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the legislature, except as restricted by the Constitution, and such property and easements as it may have in public streets and ways are held by it in such capacity, and at the will of the legislature. But, on the other hand, such property as it may hold or acquire in its proprietary or private capacity is as much protected by the Constitution as the property of the private citizen, and of which it cannot be deprived except for public purposes, and only then upon just compensation. To the latter effect are the authorities cited and relied upon by the defendant, and they are therefore not in point in this discussion.

It is next contended that it is not within the power of the legislature to compel the property of Multnomah county to be taxed for the payment of a debt of the city of Portland, incurred in the purchase and construction of the Madison and Burnside street bridges and Albina ferry, and to be incurred under the act in question before the county is required to receive or accept the Morrison street bridge, Stark street ferry, or the upper deck of the steel bridge. On this question there seems to be but little authority, but we think it clear upon principle that such leg-

islation cannot be sustained. As Parker, Ch. J., says: "It certainly must be admitted that, by the principles of every free government, and of our Constitution in particular, it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged." *Hampshire County v. Franklin County*, 16 Mass. 88. A question involving the authority of the legislature to compel a town to be taxed for the payment of debts previously contracted for the purpose of acquiring title to and constructing a public park partly within the boundaries of the town sought to be charged, was before the court of appeals of New York (*Re Assessment of Lands*, 60 N. Y. 898), and in holding such legislation invalid the court, speaking through Mr. Justice Miller, said: "Had the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted, and to contribute money which is to be paid into a sinking fund, and to be appropriated for the payment of bonds, already issued, for the location and improvement of the park. There is no principle, that I am aware of, which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city, or locality to contribute to the payment of the debts of another. The government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities, or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous, and oppressive, and cannot be tolerated." It is competent for the legislature, in the exercise of its plenary powers over public highways of the city of Portland, to transfer the management and control of the bridges and ferries in question from the commission appointed by it to the county, and to determine and provide the mode in which the burden of maintaining and keeping them in repair shall be borne in the future (*Scituate v. Weymouth*, 106 Mass. 128), but it is not within its power to summarily declare that a debt of the city of Portland shall be paid by the county although in fact incurred for the construction of such bridges and ferries. Nor do we think the fact that the city of Portland is within the county of Multnomah, and perhaps contains a large proportion of the inhabitants and taxable property of the county, in any way affects the question. The two corporations are separate and distinct entities, and, so far as we can see, it is no more competent for the legislature to compel the county to pay the debts of the city than the city to pay those of the county. It would indeed be, as Miller, J., says, "without a precedent," to compel every property owner in the county outside of the city to suffer a lien upon his property for the next

thirty years for its proportionate share of the interest and principal due and to become due on a debt of the city already contracted and outstanding. If such legislation can be sustained, there is nothing to prevent the legislature from compelling property in the county to be taxed for any or all debts of the city incurred for public or governmental purposes, and it would hardly be contended that legislation so manifestly unjust and mischievous could be sustained. The legislature may perhaps compel a municipal corporation to recognize and pay a debt, although not binding on it in a strict legal sense, when there is an equitable or moral obligation on the corporation to pay it. Dill, Mun. Corp. § 75. But no such authority exists when there is neither a legal, moral, nor equitable obligation resting on the corporation sought to be charged, as in this case, where it is proposed to summarily transfer the debt from one corporation to another.

And, finally, it is claimed that so much of the act of 1895 as requires the county to levy a tax for the maintenance and repair of the specified bridges and ferries, and to maintain a ferry at Sellwood, is invalid because not within the subject as expressed in the title of the act. The title of the act by its terms

is limited to the acquisition and control of certain specified bridges and a particular ferry to be acquired under its provisions, and to the bridges and ferries in the possession and under the control of the present bridge commission, and we do not think the provision requiring the county to maintain a ferry at Sellwood can be said to be within the subject of the act as so limited, or properly connected therewith, and hence such provision must be declared invalid. But it is clearly stated in the title that one of the purposes of the act is to require the county of Multnomah county "to assume the management, control, and supervision of such bridges and ferries," and this is certainly broad enough to sustain a provision requiring the county to provide the funds with which to pay the expenses of such management, control, and supervision, and such provision is germane to and properly connected with the subject expressed in the title, and valid.

Having examined all the objections urged, we conclude that the act under consideration is constitutional and valid except in so far as it requires the county of Multnomah to levy a tax and pay the interest and principal on the bridge bonds of the city of Portland, and to maintain a ferry at Sellwood.

CALIFORNIA SUPREME COURT.

P. L. JOHNSON *et al.*, *Recpts.*,
v.
City of SAN DIEGO, *Appl.*

(.....Cal.....)

1. Liability for a pro rata share of the debts of the city continued on the territory excluded from San Diego, under Stat. 1889, p. 856, providing that it shall not "relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion."

2. The power of the legislature to change and readjust the burden of municipal indebtedness after the division of a city, and after having declared in the act of separation in what manner it should be borne by the divisions, still remains; and such future adjustments may be made as the equities may suggest.

(October 9, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for San Diego County in favor of plaintiffs, and from an order denying a motion for a new trial in an action brought to determine the amount of the bonded indebtedness of the defendant city, which was chargeable upon complainant's property which had been segregated from such city. *Affirmed.*

The facts are stated in the opinion.

NOTE.—See also *Simon v. Northup* (Or.) *ante*, 171, and footnote therewith.

30 L. R. A.

Messrs. William H. Fuller and Clarence L. Barber for appellants.

Messrs. S. M. Shortridge and Gibson & Titus for respondents.

Henshaw, J., delivered the opinion of the court:

Appeals from the judgment and from the order denying a new trial. Under an act of the legislature approved March 19, 1889 (Stat. 1889, p. 856), a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The act referred to was in its nature permissive. It provided for the calling of an election upon petition, at which election the qualified electors within the territory proposed to be segregated should vote separately from the other voters of the municipal corporation, and the votes cast in such territory should be canvassed separately from the votes cast by the other electors of the municipality. If a majority of the votes cast in the territory proposed to be excluded and a majority of the votes cast in the municipality proper should both be for the segregation, then, after certain formalities had been complied with, the territory should cease to be a part of the municipal corporation, "provided [so runs the law] that nothing contained in this act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion: and provided further that such municipal corporation is hereby author-

ized to levy and collect from any territory so excluded from time to time, such sums of money as shall be found due from it on account of its just proportion of liability for any payment on the principal or interest of such debts; such assessment and collection shall be made in the same manner and at the same time that such assessment and collection are levied and made upon the property of such municipal corporation for any payment on account of such debts: and provided further that any such territory so excluded from any municipal corporation may at any time tender to the legislative body of such municipal corporation the amount for which such territory is liable on account of such debts, and after such tender is made such authority as is herein given municipal corporations to levy and assess taxes on such excluded territory shall cease." Under this law, the territory known as the "Coronado Beach," which contains the land of these plaintiffs, was excluded from the corporate control of the city of San Diego. At the time of this exclusion, the city of San Diego had a bonded indebtedness of \$484,000; and, after this exclusion, the city continued to assess and levy taxes upon the detached territory to meet the requirements of this bonded indebtedness, which taxes these plaintiffs duly paid. In 1893 the legislature passed an act entitled "An Act Providing for the Adjustment, Settlement, and Payment of Any Indebtedness Existing against Any City or Municipal Corporation at the Time of Exclusion of Territory therefrom and the Division of Property thereof" (Stat. 1893, p. 536). Plaintiffs availed themselves of the provision of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable against the excluded territory. The demurrer of the defendant city to their petition was overruled; and the court, after hearing evidence, found the existence of the bonded indebtedness; that all of the moneys received by the city and evidenced by this indebtedness had been expended for a sewer system, for the purchase of school sites and the erection of schoolhouses, for refunding a pre-existing debt of the city, and for clearing its titles to certain real estate, and for buying certain rights of way; and that no portion of the money had been expended upon or within the excluded territory. The value of the property belonging to the city at the time of the segregation was found to be \$600,000, all of which remained within its boundaries and under its control after the segregation. It was further found that the city of San Diego had never made any improvements in the excluded territory, and had never owned any property in it. The ratio of the value of the excluded territory to that of the city immediately preceding the exclusion was as 1 to 14. Under these findings, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit, and urged against the judg-

ment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when, in accordance with the permissive act of the legislature (Stat. 1889, p. 356), they elected to segregate Coronado Beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city, with the understanding that they should continue to pay their *pro rata* share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this contract cannot be destroyed or impaired by subsequent legislation; and that, therefore, to the parties to this controversy the statute of 1893 has no applicability.

This contention is first met by the respondents with the declaration that the act of 1889 did not impose or mean to impose a *pro rata* liability upon the excluded territory, but only a liability for a just proportion of the debt, which proportion was a subject of future ascertainment or determination; and much nice argument is advanced in its support. But the language of the proviso, that "nothing contained in the act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion," would seem to be a comprehensive pronouncement that the segregated territory should, after exclusion, be held by the same liabilities as bound it before; and, as before its exclusion it was liable for its *pro rata* share of these debts, it must be that after exclusion it remained subject to the same liabilities. We think, therefore, that, by the only just and reasonable interpretation of which the act in question is susceptible, the legislature, in permitting the division, exercised its undoubted power to adjust the burden of the existing corporate debt, and decreed that the excluded territory should continue to bear its former proportion of that burden.

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness after having, in the act of separation, declared in what manner it should be borne. Municipal corporations, in their public and political aspect, are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the Constitution, the legislature may increase or diminish the powers of such a corporation,—may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be found in the Constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right, through the ballot box, all these wrongs." Cooley, Const. Lim. 6th ed. p. 229. "A city," says Mr. Justice

Field, in *Jefferson City Gaslight Co. v. Clark*, 95 U. S. 644, 24 L. ed. 521, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature." This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes; or, as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." Dill. Mun. Corp. 4th ed. § 53.

The act of the legislature in relieving Coronado Beach from the corporate control of San Diego, and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature, by the terms of the act segregating the territory, had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and indisputable. It is equally well-settled law that, when the act of segregation is silent as to the common property, and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. *People v. Alameda County*, 26 Cal. 641; *Hughes v. Ewing*, 98 Cal. 414; *Los Angeles County v. Orange County*, 97 Cal. 329; *Dopers v. Bellevue*, 81 Wis. 120, 11 Am. Rep. 602; *Laramie County Comrs. v. Albany County Comrs.* 93 U. S. 807, 23 L. ed. 552; *Lycoming County v. Union County*, 15 Pa. 166, 53 Am. Dec. 575; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Layton v. New Orleans*, 19 La. Ann. 515; *Beloit v. Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 205. There is authority, however, holding that, when the legislature has spoken in the original act, rights vest under it which may not be impaired; and it is upon these cases that appellants rely. Thus, in *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197, the supreme court of Maine decided in 1839 that as the act of the legislature dividing the town of Bowdoinham, and incorporating a part of it into a new town, by the name of Richmond, enacted that the latter should be held to pay its proportion towards the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act, in destroying this right, impaired the obligation of the contract on the part of Richmond created by 30 L. R. A.

the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation. The opinion, however, looks for authority to the case of *Hampshire County v. Franklin County* (decided in 1819), 16 Mass. 75. In that case the legislature had created the county of Franklin out of territory formerly a part of the county of Hampshire. The act was silent as to the disposition of the public property and the public debt. By an act passed two years later, the legislature provided in effect that if, at the time of the segregation, there were funds belonging to the county of Hampshire in excess of its debts, the new county should be entitled to such proportion of those funds as the assessed value of the property of the new county bore to the assessed value of the property of the old. The supreme court decided, in accordance with the undoubted rule, that as the first act was silent upon the subject, all of the common property within its limits belonged to the old county, which was likewise charged with all existing debts. It further held that rights vested under this act, and that the later act providing for an apportionment, violated these rights in attempting to give the property of Hampshire to Franklin county; in other words, that the later act created a debt from Hampshire to Franklin county which before had not existed. It is to be noticed that in this case the original act was silent as to common property and debts, but as, in such case, the law steps in and makes disposition of them, the silence was deemed equivalent to an affirmative declaration of the legislature making disposition which could not afterwards be modified.

But, distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that, where the original act does not make disposition of the common property and debts, the legislature may at any subsequent time, by later act, apportion them in such manner as seems to be just and equitable. Under the decisions adopting this rule, the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories; and while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts it cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them, and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things, and thus abandon its prerogatives, and strip

itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned: In *Richland County v. Lawrence County*, 12 Ill. 1, the facts were that the former county had been carved out of the territory of the latter by an act making no disposition of the county property. The state had given to the county of Lawrence a large sum of money, which it held at the time of segregation. By a later act the legislature declared that the new county should be entitled to receive from the old a certain proportion of this fund, which sum the old county refused to pay under the claim of vested right and ownership. The supreme court upheld the act, declaring that there was no contract between the state and the old county, which was merely the state's agent. The case of *Hampshire County v. Franklin County*, *supra*, is unfavorably reviewed. In *Ferry County v. Conway County*, 53 Ark. 480, 6 L. R. A. 665, the original act detaching territory, made no apportionment of the debt. A later act, which did so, was attacked as unconstitutional. The supreme court there said: "The earlier doctrine (still followed by some courts) was that the act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county." *Hampshire County v. Franklin County*, 16 Mass. 75; *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Rep. 197. The better doctrine is, that the power of the legislature to impose the debt of the one county upon another, depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral obligation to exist." In *Dunmore's App.* 53 Pa. 374, four boroughs were erected in a township which was heavily in debt. By act afterwards passed, the burden of the debt was to be apportioned by commissioner between the boroughs and the township. The supreme court of Pennsylvania upheld the act. In *Layton v. New Orleans*, 13 La. Ann. 515, the act of the legislature consolidating several municipalities into one government, known as the "City of New Orleans," provided that the debts of each should be liquidated by taxation upon its own inhabitants. Afterwards, by another act, it was provided that the debts should be paid by taxation uniformly upon all the property of the new city. The court held that the earlier act was not a contract, and no rights vested under it; and that, as in these matters the legislature is supreme, it could change its policy and readjust these debts. In *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 573, the court says: "The doctrine that there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact that rises above and restrains the power of legislation, cannot be applied to the legislature when exercising its sovereignty over public charters granted for the purpose of government." Says Dill. Mun. Corp. 4th ed. § 189: "But upon the division of the

old corporation, and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, the legislature may provide for an equitable apportionment or division of the property, and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts, and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division, and, incidental to this, to apportion their property, and to direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division of, or change in, the corporation, since, otherwise, the old corporation becomes, under the rule just before stated, the sole owner of the property, and hence cannot be deprived of it by a subsequent act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporated bodies, divisions, and parts, and with several well-considered adjudications." To the same general effect are the cases of *Laramie County Comrs. v. Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Seituate v. Weymouth*, 108 Mass. 128; *Williamantic School Soc. v. First School Soc.* 14 Conn. 457; *Guilford v. Chenango County Supers.* 18 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in *People v. Alameda County*, 26 Cal. 641. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation, Contra Costa county owed for a bridge which had been constructed upon the territory set apart for Alameda county. The original act made no provision for the payment of this indebtedness, which thus remained a charge against the old county. By two separate later acts, the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power. And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter, since, in the first apportionment, the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest. Nor, in the operation of the act in question upon the city of San Diego, can we

perceive any hardship. It had at the time of the segregation \$600,000, acquired while Coronado Beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado Beach was also benefited by these expenditures. In the same sense, San Mateo county is benefited by the public improvements of the city and county of San Francisco; but it has never been asserted that for such benefits a sister county should be called upon to pay.

The judgment and order appealed from are affirmed.

We concur: **Beatty, Ch. J. ; Harrison, J. ; Temple, J. ; Van Fleet, J. ; Garoutte, J.**

WEINSTOCK, LUBIN, & COMPANY,
Repts.,

H. MARKS, Appt.

(.....Cal.....)

1. The words "mechanics' store" may be made a tradename, and the user thereof entitled to protection from the use of such words by a competitor in business for the purpose of deceiving the public, and especially the customers of the former.
2. A mandatory injunction to compel a person to distinguish his place of business in some mode or form that shall be a sufficient indication that it is a different place of business from that of a competitor should be granted, where he has imitated the building of another dealer in the same business so closely as to deceive customers and with intent to deceive them, and has omitted the use of any name or sign which could designate the true proprietorship of the store; but it would be too strict a rule to compel him to show the proprietorship of his store.

(October 12, 1896.)

A PPEAL by defendant from a judgment of the Superior Court for Sacramento City in favor of plaintiff in an action brought to compel defendant to cease interfering with plaintiff's business and tradename. *Reversed in part.*

The facts are stated in the opinion.

NOTE.—This is believed to be the first case in which a court has compelled a defendant for the purpose of distinguishing his business from that of a rival to perform acts of a positive kind as distinguished from the prohibition of acts causing infringement.

As to the power of equity to grant mandatory injunctions, see *Moundsville v. Ohio River R. Co.* (W. Va.) 20 L. R. A. 161.
30 L. R. A.

Messrs. Holl & Dunn for appellant.

Messrs. Johnson, Johnson, & Johnson for respondent.

Garoutte, J., delivered the opinion of the court:

Plaintiff is a corporation carrying on a large clothing and dry-goods business in the city of Sacramento. Defendant is also a dealer in clothing of the same general character, and is carrying on business in a building adjoining plaintiff's place of business. The present action is one of injunction, and by its decree, among other things, the court ordered defendant to refrain from further use of the name "Mechanical Store" as the designation of his place of business, and further decreed that defendant maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of his said store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein. Defendant appeals from the foregoing portions of the judgment.

The judgment is based upon certain findings of fact made by the trial court upon the evidence offered at the trial, and no complaint is now heard that this evidence does not fully support these findings. It therefore follows that the merit of this appeal presents itself upon a consideration of those findings and the decree based thereon. These findings of fact are full and in detail, and, for present purposes, we deem it sufficient to state the general tenor and effect of some of them. (1) The court finds that on or about the 8th day of October, 1874, H. Weinstock and D. Lubin entered into a copartnership under the firm name and style of Weinstock & Lubin, of the city of Sacramento, and, as such partners, engaged in the business of dealing in wearing apparel for men, women, and children, and that said Weinstock & Lubin selected as the name of their place of business "Mechanics' Store," and designated the same by that appellation, by which name their said store thenceforth was continually known; that, in the management and conduct of their business, they fixed a price upon each and every article carried by them in the stock of said store, and marked the said prices in figures upon each article, and sold such articles at the prices so marked, and never deviated therefrom; and they advertised the said method of doing business extensively throughout the entire Pacific coast by means of newspapers, etc., by means whereof their said method of doing business became widely known to the trade and public throughout the entire Pacific coast, and by reason whereof it became and was well known to the trade and public in California and the other states and territories of the Pacific coast that at the store of said Weinstock & Lubin only one price was charged for goods sold therein, and that no deviation from said price was permitted. (2) That, by care, attention, skill, and strict adherence to business and the rules as aforesaid, this plaintiff has materially increased the volume and importance and value of said business, and enhanced

the good will thereof, and the said plaintiff has established for the said store and business throughout the said states and territories a wide and honorable reputation, and thereby said business has become extensive and valuable and profitable, and the public have become accustomed to plaintiff's said method of doing business, and have been induced to rely, and do rely, upon the good faith of the plaintiff in managing and conducting its business in the manner aforesaid, and by reason thereof have been induced to bestow and do bestow upon the plaintiff their custom, trade, patronage, and business. (3) That on or about 1886 the defendant, who had previously been engaged in business elsewhere, and was without any established reputation of his own, and whose business was unknown to the trade and general public, removed his business from the place he then occupied to the premises on the east of and near the premises of this plaintiff; and the defendant then and there engaged in a similar line of trade as this plaintiff, and ever since then he has maintained and conducted, and still maintains and conducts, the said store at said place, and carries on the said business therein; and he named his store in the year 1887 or thereabouts the "Mechanical Store." (4) That the defendant, well knowing the foregoing facts, and contriving, intending, and designing fraudulently to injure this plaintiff, and to obtain undue advantage of plaintiff, and to deprive the plaintiff of its business, and fraudulently and unlawfully to increase his own business, and to pirate and make use of and appropriate to himself the good will of the plaintiff's business, and the said reputation and honorable esteem and confidence that the plaintiff enjoyed in the minds of the people of the Pacific coast, and in order to create confusion in the public mind, and to take advantage of the standing that the plaintiff by its aforesaid acts had acquired in said territory, and fraudulently designing to deceive the public and people intending to trade with the plaintiff, and to divert the custom of the plaintiff to himself, and to deprive the plaintiff of its customers and of the trade, and to induce the people to trade with the defendant under the belief that they were trading with the plaintiff, and for the purpose of deceiving plaintiff's customers and persons intending to trade with plaintiff into believing that the defendant's store was that of the plaintiff, and thereby inducing them to enter said store of defendant to trade with said defendant, to his profit, and in order to carry out his fraudulent and corrupt designs as aforesaid,—the defendant has persistently carried out a system of deceit and misrepresentations concerning his store and its ownership, in connection with plaintiff's store and business, as follows: That in 1891 plaintiff, at its place of business, erected a store, the front of which is of peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento; that afterwards the defendant, at his said place of business, and adjoining plaintiff's store, erected a building which, so far as the first or lower story is concerned, was and is similar in architec-

ture in every respect to the store of plaintiff, so much so that passers-by were liable to go into the store of defendant thinking that they were entering the store of plaintiff, and that customers of plaintiff in many instances did so enter the store of defendant thinking they were in the store of plaintiff; that defendant had no sign inside of his store or on the outside of his store by which customers could for themselves ascertain the true proprietorship thereof; that the erection of the defendant's building exactly the same as plaintiff's building in every particular, and the adoption of the use of the words "Mechanical Store," and the absence of any name or sign upon or in defendant's store designating the true proprietorship of defendant's store, were all done by the defendant for the purpose of deceiving the public, and more especially plaintiff's customers, and enticing and pirating and securing the patronage of said customers from plaintiff to defendant. (5) That, by the aforesaid means the defendant has diverted from the plaintiff a large part of plaintiff's trade and custom; has induced many persons to trade with the defendant who otherwise would have traded with the plaintiff; has sold large quantities of goods in his said store to persons who, but for said acts of defendant, would have purchased said goods of the plaintiff; has deprived the plaintiff of a large share of its legitimate profits; has injured the business and reputation of the plaintiff; has impaired the confidence of the public in the plaintiff and its method of doing business; and has deprived the plaintiff of a large number of its customers and patrons.

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store" as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trademark, and that therefore plaintiff can have no exclusive right to them. As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trademark is not the problem to be solved. That these words are of a kind that may be used as a tradename we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not become technical or specific trademarks may become the names of articles or of places of business, and thereby the use thereof receive the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in *Lee v. Haley*, L. R. 5 Ch. 156: "I quite agree that they [the plaintiffs] have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name

with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." A similar doctrine is declared in *Glen & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 19 Am. Rep. 278, and also in the late case of *Coats v. Merrick Thread Co.* 149 U. S. 562, 87 L. ed. 847. This court said in *Pierce v. Guittard*, 68 Cal. 71, 58 Am. Rep. 1: "We are of opinion that it is not necessary to decide whether the plaintiff's label with the accompanying words and devices constituted a trademark, and as such the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name or mark." The same general principle is also recognized and approved in *Schmidt v. Brigg*, 100 Cal. 672, 23 L. R. A. 790. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle; and in cases without number, restraining defendants from trespassing upon the good will of plaintiff's business, such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition. In *Levy v. Walker*, Cox, Man. Trade-mark Cas. No. 689, the learned judge declared: "The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trademarks, and provide for the filing thereof with the secretary of state, with accompanying affidavits, etc., yet tradenames are equally protected upon analogous principles of law. And that the words "Mechanics' Store" may be made a tradename, and the user thereof become entitled under the law to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The court has declared the fact to be, and it is not challenged by defendant that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the good will of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms. In *Celluloid Mfg. Co. v. Celluloid Mfg. Co.* 83 Fed. Rep. 97, Justice Bradley, of the Supreme Court of the United States, in speaking to the ques-

tion of similarity in name, said: "It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law." In this case the trial court determined that there was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business; and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passers-by, indicating his proprietorship; and, while the power of the court to issue mandatory injunctions in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where courts have ordered the subject-matter of the litigation to be placed in its original condition; as, for instance, the removing of obstructions to ancient lights. But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanics' Store." By various kinds of advertising, and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its good will, and throughout the Pacific coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento; and defendant thereupon erected a store building, immediately adjoining that of plaintiff, in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its good will. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of un-

lawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there is no relief. This cannot be so, for the whole law of trademarks, tradenames, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device, defendant is defrauding plaintiff of his business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trademarks, declares the wrong to be, "not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude; the wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry,—an injustice that is in direct transgression of the decalogue, 'Thou shalt not covet . . . anything that is thy neighbor's.' The most detestable kind of fraud underlies the filching of another's good name, in connection with trafficking." We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive. In *Howard v. Henriquez*, 8 Sandf. 725, the court, in speaking of the competitor in business, said: "He must not by any deceitful or other practice, impose upon the public, and he must not by dressing himself in another man's garments, and by assuming another man's name endeavor to deprive that man of his own individuality and thus despoil him of the gains to which by his industry and skill he is fairly entitled." It may well be said that the defendant by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in

plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way. In the leading case of *Lee v. Haley*, *supra*, the whole question is condensed by the final conclusion of the court into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, "If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?" Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trademarks and tradenames. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent. In *Glenny v. Smith*, 11 Jur. N. S. 965, the court held: "Where a tradesman, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been), the court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm 'Thresher & Glenny.'" In *Knott v. Morgan*, 2 Keen, 218, the "London Conveyance Company" had its omnibuses painted green, and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the court issued its injunction, declaring that plaintiff had "a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of, the plaintiffs." The author, by a note, approves the doctrine here declared, saying: "There was an obvious attempt to trade upon the plaintiff's reputation,—a constructive fraud,—coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction." The same principle is reiterated by the same learned judge in *Croft v. Day*, 7 Beav. 84, in the

following words: "It has been very correctly said: that the principle in these cases is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud." In the very recent case of *Coats v. Merrick Thread Co.* 149 U. S. 586, 37 L. ed. 850, the court said: "There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trademark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs."

They have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals." To the same point, see *Dr. Jaeger's Sanitary Woolen System Co. v. Le Boutillier*, 5 Misc. 78; *Apollinaris Co. v. Scherer*, 27 Fed. Rep. 18; *Burgess v. Burgess*, 8 De G. M. & G. 896; *Von Mumm v. Frash*, 56 Fed. Rep. 830.

Having decided that defendant's acts constitute a fraud upon plaintiff, and that a court of equity will administer relief, the question then presents itself, What shall be the form of the decree? How may the court

reach the wrong? The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had a right to do all these things, for, of themselves, they did not offend against equity, but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practiced, and equity will do what it can to right the wrong. The decision of the trial court in effect ordered defendant to place signs both inside and outside his building, showing to the world the proprietorship thereof. We think this decree holds defendant to a rule too strict, in that it requires the proprietorship of the store to be shown. In this particular we think the decree should be modified so as to require that the defendant, in the conduct of this business, shall distinguish his place of business from that in which the plaintiff is carrying on its business, in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff. For the foregoing reason, the judgment in this respect only is reversed, and the cause remanded, with directions to the trial court to modify the same, as heretofore suggested; and thereupon it is ordered that said judgment stand affirmed. Appellant is to pay the costs of this appeal.

We concur: **Harrison, J. ; Van Fleet, J.**

UTAH SUPREME COURT.

**M. C. SULLIVAN et al., Appts.,
v.
NORTHERN SPY MINING COMPANY,
Resp.**

(.....Utah.....)

The discoverer of a flow of percolating waters on the public lands may, by dig-

ging wells and improving them and constantly using the water for a beneficial purpose, acquire a right to take water from such wells as against one who by subsequent location acquires title to the land.

(June 17, 1905.)

APPPEAL by plaintiff's from a judgment of the District Court for Juab County in favor

NOTE.—Appropriation of percolating waters on public lands.

SULLIVAN v. NORTHERN SPY MINING COMPANY seems to be the first case in which the question of the right to appropriate, by means of wells, percolating waters found in public lands as against the subsequent patentee, has been considered. There are a few cases which have discussed questions analogous to the subject, which may throw some light on it.

The right to such appropriation is not an extension or application of a common-law right. *Booth v. Driscoll*, 20 Conn. 541.

For in *Ballard v. Tomlinson*, L. R. 24 Ch. Div. 121, 24 Am. L. Reg. (N. S.) 636, 54 L. J. Ch. 454, 53 L. T. N. S. 942, 38 Week. Rep. 593, 49 J. P. 603, it is said that every one has unlimited right to appropriate per-

colating water while it is under his own land, and may take it all so as to prevent it going onto the land of others.

The common-law rights in percolating water generally will be found stated in a note to *Southern P. R. Co. v. Dufour* (Cal.) 19 L. R. A. 92.

If the water has risen to the surface, so as to form a stream, of course it may be appropriated in states recognizing the doctrine of prior appropriation, so that it cannot be interfered with on the surface. *DeNeocoea v. Curtis*, 80 Cal. 397.

As to what states recognize the doctrine of prior appropriation, see note to *Isaacs v. Barbour* (Wash.) post. —

The water flowing from springs may be appropriated by the construction of ditches up to the mouth of the springs. *Ely v. Ferguson*, 31 Cal. 198.

of defendant in an action brought to recover damages for alleged interference by defendant with water rights belonging to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. O. W. Powers and D. N. Straup, for appellants:

Barney only had a license to use the water in consideration of his making some repairs on the well. A licensee has the right to do any act which is necessary to the full enjoyment of the license, but the terms of the license must be strictly followed and cannot be extended or varied.

Laford v. Putnam, 85 N. H. 568; *Dempsey v. Kipp*, 62 Barb. 811.

The license or privilege to use the water was given to Mr. Barney personally, and it has been repeatedly held that a license is strictly confined to the original parties.

Jackson, Hull, v. Babcock, 4 Johns. 418; *DeHaro v. United States*, 72 U. S. 5 Wall. 599, 18 L. ed. 681; *Paine v. Northern P. R. Co.* 14 Fed. Rep. 407; 18 Am. & Eng. Enc. Law, p. 545.

A well is not "a natural source of supply" within the meaning of the law of February 20, 1880 (2 Utah Comp. Laws 1888, p. 184), pertaining to primary water rights.

2 Bouvier, Law Dict. p. 808; Anderson, Law Dict. p. 1111; *Johnson v. Rayner*, 6 Gray, 110; *Mizer v. Reed*, 25 Vt. 257.

Unless the territorial statute, by the use of the words "or other natural source of supply," intended to and actually did apply to wells, the common law in regard to the use of water from wells is still in force in this territory, and the water from wells on private property is not subject to appropriation like the water from "natural streams, watercourses, lakes, or springs."

Acton v. Blundell, 12 Mees. & W. 850; *Roath v. Driscoll*, 20 Conn. 541, 53 Am. Dec. 852; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. 518, 84 Am. Dec. 511; Rights in Subterranean Waters, 2 Am. L. Reg. N. S. 65; *Bassett v. Salisbury Mfg. Co.* 28 N. H. 488, 8 Am. L. Reg. 289.

Water filtering or percolating in the soil belongs to the owner of the freehold, like the

rocks and minerals found there. It exists there free from the usufructuary rights of others.

Hanson v. McOue, 42 Cal. 808, 10 Am. Rep. 299; *Harwood v. Benton*, 82 Vt. 787; *Cross v. Kitts*, 69 Cal. 232, 58 Am. Rep. 558.

Where there is nothing to show that the waters of a spring or well are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil. Percolating waters, and those whose sources are unknown, belong to the realty in which they are found.

Kinney, Irrigation, § 49; *Wheatley v. Baugh*, 64 Am. Dec. 727, note; *Nosier v. Caldwell*, 7 Nev. 368; *Delhi v. Youmans*, 50 Barb. 816, 45 N. Y. 863, 6 Am. Rep. 100; *Taylor v. Welch*, 6 Or. 199.

Where a spring is fed solely by percolating waters which seep into it from swamp or wet land surrounding the same, and not by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user.

Kinney, Irrigation, § 298; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92.

No notice of intention to appropriate the water of the well in question was ever given. In order to appropriate the water there must be an actual bona fide intention to apply the same to some beneficial use or purpose, and one of the first steps necessary for the appropriator to take is to give notice of that intent.

Osgood v. Eldorado Water & Deep Gravel Min. Co. 56 Cal. 571; *Kimball v. Gearhart*, 13 Cal. 27; *Kinney, Irrigation*, § 187.

Messrs. Marshall & Royle for respondent.

Smith, J., delivered the opinion of the court:

The main question in this case, and the only one, in fact, which we deem it necessary to consider, is, Can the discoverer of a flow of percolating waters on the public lands, by digging wells and improving the same and constantly using the water for a beneficial purpose, acquire a right to take water from such

And in *Cross v. Kitts*, 69 Cal. 217, 58 Am. Rep. 558, the right to acquire title to percolating waters by appropriation is recognized, —so far, at least, as to entitle a grantee of the water right to hold the same against a subsequent grantee of the mining claim on which the water was brought to the surface.

So, the water of a spring which goes to feed a creek, although part of the way by underground or unknown channels, cannot be diverted to the injury of a prior appropriator of the water of the creek. *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497.

But it was subsequently held that no right can be acquired by appropriation in a spring on state land which is formed by percolating water, so that a subsequent owner of the land could cut off the supply by excavating on his own land. *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92.

And also, in a Nevada case, it was held that the mere fact that water from a spring has been appropriated by the one in possession of the land will not prevent the digging of a well on adjoining land, 20 L. R. A.

although the effect is to cut off the water from the spring so that it ceases to flow. *Mosier v. Caldwell*, 7 Nev. 368.

In one Colorado case it was said that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean stream or an obvious surface channel. If by any of these natural methods it reaches the point and is there appropriated in accordance with law, the appropriator has a property in it which cannot be devested by a wrongful diversion by another, nor can there be any substantial diminution. *McClellan v. Hurdle*, 3 Colo. App. 430. But in that case the water was part of the sunken stream, and was not merely percolating water or that of a spring proper.

If water flows underground in a well-defined and constant stream, an appropriation of it at the point where it rises to the surface will give a right of it which will be protected against subsequent appropriators. *Kenney v. Carillo*, 2 N. M. 480.

H. P. F.

wells as against an owner of the land on which the well is located, where the owner of the land acquired title by a location made subsequent to the digging of the wells? Many other questions are raised on this appeal, but their materiality all depends on the answer to the question just stated. If this question is answered in the affirmative, the judgment must be affirmed; if answered in the negative, it must be reversed; so we do not deem it necessary to examine the other questions presented.

We are not aware of any case having been decided in these arid regions, in which this precise question has been passed upon. The doctrine may be said to be settled that the owner of lands has a right to dig thereon, and to appropriate and use percolating waters therein, although by so doing he may dry up the wells or spring of an adjacent proprietor. See *Hanson v. McOus*, 42 Cal. 808, 10 Am. Rep. 299; *Kinney, Irrigation*, §§ 49, 398; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92. But this rule does not determine the case at bar. The facts here, so far as necessary to be stated, are: The plaintiffs are the owners of a mining claim in Tintic mining district, located in 1889. When this claim was located there was a well dug in the ground, and one Barney had a house at or near this well, and was engaged in hauling water from the well to the defendant. The defendant continued to procure water from the well, and plaintiffs bring this suit to recover damages, alleging trespass. The undisputed facts are that the predecessors in interest of Barney and the defendant, in about 1870, discovered evidences of percolating waters at the point where the well was dug, and by digging a hole about 8 feet deep procured a supply of water. These discoverers were miners, and were working a mine, part of which, at least, the defendant now owns. It seems that this hole or well, if it may be called such, was so shallow that cattle and horses on the range came to it and trod down its banks, so that the discoverers arranged with one Barney that if he would repair the well, wall it up, and protect it, he might use water therefrom. Barney did this, and put in a pump. For about twenty years it remained in this condition. The well, being in the midst of a desert, was used as a source of water supply for several mines in the neighborhood, and was all the time on public lands of the United States. In 1889 the plaintiffs located the ground, including the well and Barney's house, as a mining claim. In 1890 Barney conveyed whatever right he had in the premises to the defendant, and it continued to procure water from the well. The well is shown to be from 10 to 15 feet deep, and to furnish a very abundant supply of water. The question is, Has the defendant an easement in plaintiff's land to continue to take water from the well constructed by its predecessors? The Federal government, as proprietor of the public lands, early recognized the necessity of permitting persons in this arid region to acquire an interest in water sources on the public lands distinct from the lands themselves. It had always been the settled law that the owner of land was likewise the

owner of all waters situate thereon or percolating therein. This may be said to have been the universal rule in the United States, prior to the settlement of California. Local decisions, arising from the necessities of the people, soon altered it there, and in 1866 Congress passed an act (14 Stat. at L. 253; Rev. Stat. § 2339), which provided, among other things, as follows: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." By the act of July 9, 1870 (16 Stat. at L. 218; Rev. Stat. § 2340), it was further provided: "All patents granted, or pre-emption, or homesteads allowed, shall be subject to any vested and accrued water right, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." The question is, then, Is the right of defendant to use water, under the facts stated, one that is recognized by the local customs and laws? Section 2780, Utah Comp. Laws, provides: "A right to the use of water for any useful purpose, such as domestic purposes, irrigating lands, propelling machinery, washing or sluicing ores and other like purposes, is hereby recognized and acknowledged to have vested and accrued as a primary right to the extent of and reasonable necessity for such use thereof under any of the following circumstances: First, whenever any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, water-course, lake, or spring, or other natural source of supply." We think it would be a very strained construction to hold that a hole dug 8 feet deep, into which the waters naturally gathered, was not a natural source of supply, while it is conceded if the water come to the surface and flowed along a few feet, and was then collected in a like hole, it would be a natural source of supply. We are inclined to give these statutes a much broader construction. In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment. This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises, although he should thereby dry up that of the first appropriator.

The determination of this question disposes of the whole case, and it is therefore ordered that the judgment be, and it is, affirmed.

Merritt, Ch. J., and King, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Elizabeth G. DE HASS, *Pff. in Err.*,
v.

Kate R. DIBERT, Admrx., etc., of John H.
Dibert, Deceased.

SAME, *Pff. in Err.*,
v.

Martha DIBERT, Admrx., etc., of John
Dibert, Deceased.

SAME, *Pff. in Err.*,
v.

John D. ROBERTS, Survivor, etc., of John
Dibert & Company.

(70 Fed. Rep. 287.)

1. The negotiability of a note with accompanying interest coupons is not destroyed by clauses declaring that the contract shall be construed by the laws of the state in which it is executed, that it shall draw a specified higher rate of interest after maturity, and that, if any coupon is not paid when due, the whole debt shall mature at that time without demand, and the first unpaid coupon shall become a part of the principal and bear interest at the higher rate specified.
2. An assignment without recourse by the payee of a negotiable note payable to order will not prevent an indorsement by the assignee from making him liable as indorser of negotiable commercial paper.
3. An agreement to pay interest at 12 per cent after maturity, in a note made in Kansas expressly made subject to the laws of that state, is not usurious.

(October 24, 1885.)

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review judgments in favor of defendants in actions brought to enforce the alleged liability of indorsers upon certain promissory notes. *Reversed.*

Before Dallas, Circuit Judge, and Butler and Wales, District Judges.

The facts are stated in the opinion.

Messrs. T. W. Shreve and Shiras & Dicksey, for plaintiff in error:

All notes which are non-negotiable in form merely, and not in substance, may be so indorsed by a party thereto as to bind him as a commercial indorser to his immediate indorsee, and if he use fit words in his indorsement, to the holder, each new indorsement of an instrument upon which an indorser may be bound as a commercial indorser is a new contract in the nature of a bill of exchange. But for an indorsement to have that effect the instrument

upon which the indorsement is placed is such in terms and substance that the bill of exchange thereby created will have all the requisites of a negotiable instrument.

Patterson v. Poindexter, 6 Watts & S. 224, 40 Am. Dec. 554.

The cases bearing apparently against the claim that the defendant is bound on the said indorsement are cases in which the instrument indorsed was non-negotiable in substance, lacked some essential element of negotiability besides the mere formal words of negotiability.

Gray v. Donahoe, 4 Watts, 400; *Wright v. Hart*, 44 Pa. 454; *Ottisens' Nat Bank v. Piolet*, 126 Pa. 194, 4 L. R. A. 190; *First Nat. Bank v. Gay*, 71 Mo. 627; *Kline v. Keiser*, 87 Pa. 485.

An indorsement of a non-negotiable instrument by the payee will not render it negotiable, nor give the indorsee an action against prior parties; although it will render such indorser liable to his indorsee, and will, if he use fit words in the indorsement, render him liable to all subsequent indorsees.

Randolph, Com. Paper, § 177; *Story*, Prom. Notes, § 128; *Carruth v. Walker*, 8 Wis. 252, 76 Am. Dec. 235; *Brenser v. Wightman*, 7 Watts & S. 224; *Patterson v. Poindexter*, 6 Watts & S. 227, 40 Am. Dec. 554; *Ledy v. Tammany*, 9 Watts, 258; *Seymour v. Van Slyck*, 8 Wend. 404; *Dean v. Hall*, 17 Wend. 214; *Aldis v. Johnson*, 1 Vt. 136; *Chitty*, Bills, § 19; *First Nat. Bank v. Falkenhan*, 94 Cal. 144; *Helfer v. Alden*, 3 Minn. 832.

The indorser of a note not negotiable is liable to his indorsee in the same manner as in case of a negotiable note.

Minot's Mass. Digest, citing *Jones v. Fales*, 4 Mass. 245; *Sanger v. Stimpson*, 8 Mass. 260; *Seymour v. Van Slyck*, *supra*; *McMullen v. Rafferty*, 89 N. Y. 456; *Dean v. Hall*, and *Aldis v. Johnson*, *supra*.

Each indorsement is a new and substantive contract.

Slacum v. Pomery, 10 U. S. 6 Cranch, 224, 3 L. ed. 206.

The effect of the transfer by John D. Knox & Co. was not to destroy utterly the original negotiability of the said note, and the effect of the indorsement of John Dibert & Co., to the order of F. S. DeHass, was to make them liable as indorsers to the holder.

Dan. Neg. Inst. § 696d; *Holmes v. Hooper*, 1 Bay, 160.

Where there is an express stipulation that a certain rate shall run after maturity, interest at that rate is recoverable.

17 Am. & Eng. Enc. Law, p. 416, and note.

A note otherwise negotiable is not rendered non-negotiable by reason of the provision: "If this note is not paid at maturity the same shall bear 12 per cent interest from date."

Parker v. Pymell, 28 Kan. 403.

The negotiability of a note is not destroyed by a clause therein stating that it was accompanied by a collateral security, and how the latter might be sold by the holder of the note if not paid at maturity.

Valley Nat. Bank v. Crenell, 148 Pa. 284.

Under the general mercantile law the nego-

NOTE—The present case, reversing the decision of the circuit court, decides what is believed to be an entirely new question in the law of negotiable paper, in respect to the effect of an indorsement by one to whom the paper has been transferred by mere assignment without recourse.

As to effect of transfer without recourse, see also *Maine Trust Bkg. Co. v. Butler* (Maine) 12 L. R. A. 370, and note.
90 L. R. A.

tiability of a promissory note is not affected by provisions therein that the title to the personal property for which it was given should remain, as security, in the vendor, the payee of the note, until all notes of a series to which it belonged were paid, and that the note should become due and payable to the holder on the failure of the maker to pay the principal or interest of any of the notes of the series.

Chicago R. Equip. Co. v. Merchants' Nat. Bank, 136 U. S. 268, 34 L. ed. 849; *Ernst v. Steckman*, 74 Pa. 18, 15 Am. Rep. 542.

Making a note payable on or before a certain fixed future date will not make the time of payment so uncertain as to destroy the negotiability of the note.

First Nat. Bank v. Skeen, 101 Mo. 683, 11 L. R. A. 748, and notes.

Mr. Robert S. Fraser, for defendant in error:

The original note for \$3,000 is not a negotiable instrument.

Woods v. North, 84 Pa. 407, 24 Am. Rep. 201; *Killam v. Schoepe*, 26 Kan. 318, 40 Am. Rep. 318; *First Nat. Bank v. Gay*, 71 Mo. 627; *Overton v. Tyler*, 3 Pa. 387, 45 Am. Dec. 645.

An inflexible rule of the common law requires that a promissory note payable to the order of any person to be negotiated so as to carry to the holder the right of a bona fide holder of a negotiable promissory note should be first indorsed by the person to whose order it is made payable.

Briggs v. Latham, 36 Kan. 205; *Calvin v. Sterritt*, 41 Kan. 216; *Hatch v. Barrett*, 34 Kan. 228; *McCrum v. Corby*, 11 Kan. 464; *South Bend Iron Works v. Paddock*, 87 Kan. 510; *Fear v. Dunlap*, 1 G. Greene, 384; *Graham v. Wilson*, 6 Kan. 490; *Story v. Lamb*, 52 Mich. 525; *First Nat. Bank v. Gay*, *supra*; *Osgood v. Artt*, 17 Fed. Rep. 575.

A bill or note payable to the order of the payee may be assigned without indorsement, but if thus assigned instead of being transferred by a proper indorsement, the assignee will take the paper subject to all equities in the same manner as though the instrument were not negotiable, or as though it were overdue. The holder of a note not indorsed is a mere assignee, and his rights are to be settled by the same rules that govern the case of an assignee of any other chose in action.

White v. Brown, 14 How. Pr. 232; *Hedges v. Sealy*, 9 Barb. 214; *Haskell v. Mitchell*, 58 Me. 468, 89 Am. Dec. 711.

If the \$3,000 note is a negotiable instrument, and if the interest coupons shall not be paid when due, the whole of the principal matures and becomes due at that time without demand, and the principal debt and unpaid coupons represent and stand for the amount due. In that case the \$3,000 note becomes a note for \$3,150 and we would be charged with interest on interest, which the courts have universally held is not allowable, either as an incident or as compensation for the detention of the money.

Stokely v. Thompson, 84 Pa. 210.

Under the provisions of the note when default was made in the payment of an installment of interest the whole of the principal matured, and the contract then ceased. In such cases the legal rate of interest only should be allowed thereafter as damages.

30 L. R. A.

Holden v. Freedman's Sav. & T. Co. 100 U. S. 72, 25 L. ed. 567; *Ennell v. Daggs*, 108 U. S. 143, 27 L. ed. 682.

The note and mortgage, having been made at the same time and in relation to the same subject, are part of one transaction. They constitute one transaction and one contract, and must be construed together as if they were parts of one instrument.

Meyer v. Graber, 19 Kan. 166; *Muzzy v. Knight*, 8 Kan. 456.

Uncertain stipulations such as are contained in the mortgage ought to have no place in negotiable paper.

Johnston v. Speer, 92 Pa. 229, 37 Am. Rep. 675; *Woods v. North*, 84 Pa. 407, 24 Am. Rep. 201.

Butler, District Judge, delivered the opinion of the court:

The suits were brought on indorsements of a promissory note and its accompanying interest coupons, and by agreement of parties were tried together. After a jury had been sworn, a paper was filed consenting to a verdict for the plaintiff in \$3,887.60, subject to the opinion of the court on the following questions reserved:

"1. Whether under the evidence, to wit, the writing sued on, and the attached guaranty and the mortgage securing said obligation, and the writing sued on, dated the 15th day of June, 1887, for \$3,000, payable to the order of John D. Knox & Co., is a negotiable commercial instrument.

"2. Whether the indorsement of John Dibert & Company after the assignment, without recourse made by John D. Knox & Company, the payees, upon the writings sued *pro ut*, same in evidence, made the said John Dibert & Company liable as indorsers of negotiable commercial paper, the transfer from John D. Knox & Co. to John Dibert & Co., and the transfer of John Dibert & Co. to F. S. De Haas, having been made in the state of Kansas.

"3. Whether the plaintiff is entitled to recover interest at the rate of 12 per cent per annum from the date of protest of the writings sued on to the date of verdict, the law of Kansas authorizing the making of contracts bearing such rate of interest."

The court filed an opinion in the plaintiff's favor as respects the first question, in the defendant's favor as respects the second, and entered judgment for the latter.

The promissory note sued on and accompanying interest coupons, with the indorsements thereon, are as follows:

"Know all men by these presents: For value received we promise to pay John D. Knox & Co., or order, \$3,000 lawful money of the United States, five years after date hereof, with interest thereon at the rate of 8 per cent per annum, payable semiannually on the 15th day of December and June in each year, according to the tenor of ten interest coupons for \$120 each, hereto annexed and bearing even date therewith.

"Said principal and interest being payable at the banking house of John D. Knox & Co., Topeka, Kan. It is expressly declared and agreed that this note and coupons hereto at-

tached are made and executed under, and are to be construed by, the laws of the state of Kansas, in every particular, and are given for an actual loan of \$3,000. This note and these coupons are to draw 12 per cent interest per annum after maturity, and are secured by a first mortgage on real estate.

"And if any of the interest coupons shall not be paid when due, the whole of the principal shall mature and be due at said time without demand, and said principal debt and said unpaid coupons shall represent and stand for the amount due, and the unpaid coupon first matured shall become a part of the principal, and the whole of said principal and the first unpaid coupon shall bear 12 per cent per annum interest thereon from the maturity of said coupon until paid.

"Topeka, Kansas, this 15th day of June, A. D. 1887.

"R. J. McFarland,
"Ida McFarland."

Indorsed: "For value received we hereby assign and transfer the within bond, together with all our interest in and rights under the same, without recourse, to John Dibert & Co.

"John D. Knox & Co.

"Pay to the order of F. S. De Hass.

"John Dibert & Co.

"E. G. De Hass,

"Executrix of F. S. De Hass."

"\$120.00. Topeka, Kansas, June 15th, 1887.

"Fifty-four months after date we promise to pay to the order of John D. Knox & Co., \$120 at the banking house of John D. Knox & Co., Topeka, Kansas, with interest after maturity at the rate of 12 per cent per annum. This coupon being for six months' interest on a principal note for \$3,000 value received.

"Due December 12, 1891.

"R. J. McFarland,
"Ida McFarland."

"Loan No. 8,151."

Indorsed: "For value received we hereby assign and transfer the within bond, together with all interest in and rights under the same, without recourse to John Dibert & Co.

"John D. Knox & Co.

"Pay to the order of F. S. De Hass.

"John Dibert & Co.

"E. G. De Hass,

"Executrix of F. S. De Hass."

"\$120.00. Topeka, Kansas, June 15th, 1887.

"Sixty months after date we promise to pay to the order of John D. Knox & Co., \$120 at the banking house of John D. Knox & Co., Topeka, Kansas, with interest after maturity at the rate of 12 per cent per annum. This coupon being for six months' interest on a principal note for \$3,000, value received.

"Due June 15th, 1892.

"R. J. McFarland,
"Ida McFarland."

"Loan No. 8,151."

Indorsed: "For value received we hereby assign and transfer the within bond, together with all our interest in and rights under the same, without recourse, to John Dibert & Co.

"John D. Knox & Co.

"Pay to the order of F. S. De Hass.

"John Dibert & Co.

"E. G. De Hass,

"Executrix of F. S. De Hass."

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The plaintiff excepted to the entry of judgment, and assigns the same as error.

Should judgment have been so entered? As respects the first question reserved, we agree with the circuit court. The note and coupons are mercantile instruments, not only according to the laws of Kansas, by which the parties bound themselves, but according to the law-merchant as well; and we deem it unnecessary to add anything to what the court has so well said on the subject.

As respects the second point raised, we cannot adopt the conclusion reached. If the payee's transfer of the paper had been by indorsement, instead of assignment, no question could have arisen. The assignment relieved the maker from the effect of his promise to pay "to order," and thus subjected the paper to defense by him in the hands of subsequent indorsees. The suit, however, is not against him, but against the indorser, John Dibert & Co.; and the question presented is therefore, What is the effect of the indorsement? It must be decided by the terms of the statute of 3 & 4 Anne, and the construction given them by the courts. Originally promissory notes were not recognized as mercantile instruments, but were treated as common choses in action; and were therefore not transferable. The statute placed them on equality with bills of exchange, provided for their transfer by indorsement, giving to such transfer the effect accorded to indorsements of bills of exchange; and thus made them mercantile instruments. Soon after the date of the statute the question arose: Is a promissory note from which the term "order," or "bearer," has been omitted, embraced by it, and therefore transferable by indorsement, with the consequences, as respects the indorser and indorsee, therein provided for? By the omission the maker reserved to himself the right to defend against payment after transfer; and it was therefore urged that the instrument is not covered by the statute, and consequently that the indorsement creates no obligation. The English courts, however, decided otherwise; holding that the instrument is within the spirit of the statute; that it is consequently transferable by indorsement; and that such transfer has the same consequences between the indorser and indorsee as it would have if the term had not been omitted; thus holding the paper to be a mercantile instrument, the indorsement of which creates a contract to pay according to its face—if the maker fails to do so. The courts said the indorsement is substantially the drawing of a new note in the terms of the old; or of an inland bill of exchange whereby the indorser orders the maker to pay the money due him to the indorsee. From the date of the earliest decision of the question (in *Hill v. Lewis*, 1 Salk. 182) to the present time there has been no variation in this respect by the English courts, though the point has been repeatedly raised; and the decision has been uniformly followed in this country. As the supreme court of Pennsylvania said in *Leidy v. Tammany*, 9 Watts, 356: "The English courts, looking upon the statute as a remedial one, entitled to a liberal construction in accordance with its spirit, extended

it to notes not made transferable by their tenor, when they are deemed mercantile instruments." This statement is fully sustained by *Hill v. Lewis*, 1 Salk. 182; *Hodges v. Steward*, Id. 125; *Smith v. Kendall*, 6 T. R. 128; *Burchell v. Slocock*, 2 Ld. Raym. 1545; *Gooshen & M. Turpin. Road v. Hurtin*, 9 Johns. 217, 6 Am. Dec. 278; *Leonard v. Mason*, 1 Wend. 532; *Codwise v. Gleason*, 8 Day, 12; *Smallwood v. Vernon*, 1 Strange, 479; *Leidy v. Tammany*, 9 Watts, 358. In the last of these cases, where the general subject is fully and ably considered, the court says, although without the word "order" or "bearer" being inserted, the payee cannot transfer the note so as to enable his transferee to maintain an action in his own name against any party to it "except the indorser, yet it is now well settled that the indorsee may maintain an action against the indorser; so that as against him the note and indorsement will have the same operation as if he had express authority to transfer." In *Hill v. Lewis*, 1 Salk. 182, it is said that an indorsement is, under the statute, equivalent to making a new bill in the terms of the one indorsed. In *Ballingalls v. Gloster*, 8 East, 483, the court says: "There is no distinguishing the case of an indorser from that of a drawer, it having long ago been decided that every indorser is in the situation of a new drawer, every indorsement a new bill, and that the indorser stands as to the indorsee, in the law merchant, the same as the drawer." This is repeated in *Smallwood v. Vernon* and others of the cases cited. In *Heylyn v. Adamson*, 2 Burr. 676, Lord Mansfield likened the indorser to the drawer of a bill of exchange, saying that while as between the maker and payee there is no such similarity the "resemblance begins with the indorsement, for that is an order on the maker by the indorser to pay the amount due him to the indorsee, and is thus within the very definition of a bill of exchange." In *Slacum v. Pomery*, 10 U. S. 6 Cranch, 222, 3 L. ed. 205, Chief Justice Marshall says: "The indorsement of a bill is understood to be, not simply a transfer of the paper, but a new substantive contract."

Later the question arose: Is the indorser of an overdue promissory note (even when drawn to order or bearer) within the statute, and responsible accordingly? It was urged that he is not, because by the delay the maker is let in to defend, as if the terms "to order" or "bearer" had been omitted. The courts of England, however, as well as of this country, following the reasoning in the former class of cases, held otherwise. *Brown v. Davies*, 3 T. R. 88; *Bank of North America v. Barriers*, 1 Yeates, 360; *Bower v. Hastings*, 36 Pa. 285; *Barnet v. Offerman*, 7 Watts, 180; *Snyder v. Riley*, 6 Pa. 165, 47 Am. Dec. 452. In *Bank of North America v. Barriers*, the court says: "Every indorsement of a bill is considered a new drawing. After the day of payment in a note has expired, the indorser cannot be looked upon otherwise than as a new drawer;" and he was consequently held responsible as such. In *Brown v. Davies*, Justice Buller said: "When a note has been indorsed after it became due, I consider it a

note newly drawn by the indorser;" and the defendant was held responsible accordingly.

About the same time a third question arose: Is the indorsement of nonmercantile paper—such as a written promise to pay money conditionally, or to pay in something else than money, etc.—within the statute, and the indorser liable as such? To this question the courts of England and of this country returned a negative answer; holding that such paper stands as it did at common law, constituting a mere chose in action, and is not therefore transferable in the sense of the law merchant. *Patterson v. Poindexter*, 6 Watts & S. 227, 40 Am. Dec. 554; *Gray v. Donahoe*, 4 Watts, 400; *Wright v. Hart*, 44 Pa. 454; *Citizens' Nat. Bank v. Piollet*, 126 Pa. 194, 4 L. R. A. 190; *South Bend Iron Works v. Paddock*, 87 Kan. 510; *Story v. Lamb*, 52 Mich. 525; *First Nat. Bank v. Gay*, 71 Mo. 637; *Fear v. Dunlap*, 1 G. Greene, 384; *Anida v. Yeomans*, 39 Mich. 171.

How, then, should the case before us be decided? It is not covered by the terms of the statute, nor are its facts embraced in either of the three classes of cases cited. It must be determined, therefore, by the light which its proper analogies shed on the subject. These analogies are, we believe, found in the first two classes of cases cited. In all material respects it closely resembles them; in principle it seems identical with them. Here the paper is, as it was there, mercantile in character, and consequently negotiable. In the law merchant this latter term signifies transferable by indorsement, with the consequence there attached to such transfers. The negotiability of paper (except as between the original parties) does not depend, as we have seen, upon the maker's authorization of a transfer, as by promising to pay to order, or bearer (as is sometimes inaccurately said), but upon the character of the paper. In the last of the three classes of cases mentioned the paper involved, contained such a promise, but as it was not mercantile in character, the indorsement had not the effect of a mercantile contract. As said by the court in *Patterson v. Poindexter*, 6 Watts & S. 224, 40 Am. Dec. 554: "The contract of indorsement is a parasite which like the chameleon takes its hue from the thing with which it is connected." On the other hand, the paper involved in the first of these classes (which did not contain such a promise) was held to be mercantile, and consequently negotiable. In our case it is true the situation of the indorsee is simply that of an equitable assignee as against the maker; but so was that of the indorsees in the first class of cases cited, and substantially so, at least, was that of the indorsees involved in the second class. Here the effect of the maker's promise to pay "to order" was lost by the payee's failure to indorse, while in the second class it was lost by his failure to indorse before the note matured. In both the promise to pay to order or bearer was thus annulled (as if erased), and the note made to read as if such promise had been omitted—rendering the instrument identical with those involved in the first class.

The circuit court likened the case to those of the third class—from which, as we believe for the reasons stated, it is plainly distinguishable. There the instruments involved were not mercantile—although drawn to “order” or “bearer.” The cases relied upon by the court all rest on this plain distinction. The indorsement there was of a mere chose in action. In *Gray v. Donahoe*, Chief Justice Lewis points out the distinction between such cases and those of the first class mentioned, very clearly. The note before him was drawn “to order,” but was payable in “current funds at Pittsburgh.” While he therefore held it to be nonmercantile and consequently non-negotiable,—saying that “nothing but money is properly the subject of a

negotiable contract,—he added: “A note not negotiable in form, as between the original parties, may be negotiable between subsequent ones;” citing *Leidy v. Tammany*.

The third question reserved, on which the circuit court did not pass, must now be disposed of. The paper is made payable in Kansas, and, as we have seen, the parties expressly submitted themselves to the laws of that state. They fixed the rate of interest at 12 per cent after default, which the laws of Kansas justify. This question must therefore receive an affirmative answer.

The judgment must be reversed, and the record remitted to the Circuit Court for further proceedings, in accordance with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

HARTFORD FIRE INSURANCE COMPANY *et al.*, *Plffs. in Err.*,

v.

CHICAGO, MILWAUKEE, & ST. PAUL RAILROAD COMPANY.

(70 Fed. Rep. 201.)

1. The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions, not by the varying opinions of laymen, lawyers, or judges, as to the demands of the interests of the public.
2. Decisions by state courts as to the validity of a contract against liability for negligence are not conclusive upon the Federal courts.
3. A stipulation against liability for negligence of a railroad company setting fire to buildings erected on its right of way under a lease may be included in the lease without violating public policy.

(October 7, 1905.)

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of plaintiff in an action brought to hold defendant liable for loss sustained by fire alleged to have been set out by its negligence. *Affirmed.*

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Statement by Sanborn, Circuit Judge:

On February 1, 1890, the Chicago, Milwaukee, & St. Paul Railway Company, the defendant in error, leased to Simpson, McIntire, & Co., a copartnership, certain portions of its depot grounds at Monticello, in the state of Iowa, “upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part

NOTE.—The question above decided has also been decided in several other recent cases. See *Griewold v. Iowa C. R. Co.* (Iowa) 24 L. R. A. 647; *Stephens v. Southern P. Co.* (Cal.) 20 L. R. A. 751; *King v. Southern P. Co.* (Cal.) Id. 755.

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[Simpson, McIntire, & Co.], for themselves, and for their heirs, executors and administrators, and assigns, do hereby expressly release them from all liability or damage by reason of any injury to or destruction of any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances, or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains, or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company.” Simpson, McIntire, & Co. had, or constructed, a cold-storage building and warehouse on the leased premises, stocked it with butter and eggs, and insured the buildings and stock with the Hartford Fire Insurance Company and seven other insurance companies, which are the plaintiffs in error, and the buildings and stock were burned. The insurance companies brought an action against the railway company in the court below, and alleged in their complaint that they had insured Simpson, McIntire, & Co. against loss by fire on their cold-storage building, warehouse, and stock; that these were destroyed by a fire caused by the negligence of the railway company on November 11, 1892; that the insurance companies had paid Simpson, McIntire, & Co. \$28,450 on account of their loss by this fire; that they were thereby subrogated to the rights of Simpson, McIntire, & Co. against the railway company, and were entitled to recover from it that amount with interest. The railway company answered this complaint, and one of the defenses it pleaded was the condition of the lease to Simpson, McIntire, & Co., by which they exempted and released the railway company from all liability for damage to their buildings and stock caused by fire set by the railway company. The plaintiffs in error demurred to this defense on the ground that this stipulation of the lease was against public policy and void. Their demurrer was overruled, and judgment was rendered against them

thereon. The writ of error in this case was sued out to reverse this judgment, and the ruling upon the demurrer is the error assigned.

Messrs. Charles A. Clark and Richard W. Barger, for plaintiffs in error:

Railway companies using, as they do, the dangerous agencies of steam and fire for the purposes of locomotion, may be required to take additional safeguards for protection of adjoining property from the danger of destruction by fire.

Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; *Lyman v. Boston & W. R. Corp.* 4 Cush. 288; *Pratt v. Atlantic & St. L. R. Co.* 43 Me. 579; *Smith v. Boston & M. Railroad*, 63 N. H. 25; *Rodemacher v. Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Union P. R. Co. v. De Busk*, 12 Colo. 294, 3 L. R. A. 850.

Statutes making railway companies absolutely liable for damages caused by fires set out by locomotives are constitutional, and are upheld and enforced by the courts.

Union P. R. Co. v. Arthur, 2 Colo. App. 159; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L. R. A. 161; *McCandless v. Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 140; *Lyman v. Boston & W. R. Corp. supra*; *Regan v. New York & N. E. R. Co.* 60 Conn. 124; *Martin v. New York & N. E. R. Co.* 62 Conn. 881; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 82 L. ed. 107; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 82 L. ed. 109.

Statutes attempting to exempt railways from liability for damages caused by fires negligently set out would be unconstitutional and void.

Cooley, Const. Lim. 8d ed. *851-854; *Thirteenth & F. Street Pass. R. Co. v. Boudrou*, 92 Pa. 481, 87 Am. Rep. 707; *Cleveland & P. R. Co. v. Rowan*, 66 Pa. 898; *Park v. Detroit Free Press Co.* 72 Mich. 566, 1 L. R. A. 599; *Hinks v. Milwaukee*, 46 Wis. 559, 32 Am. Rep. 785; *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500.

The Iowa statute does not make the railways absolutely liable for damages from fires set out, but makes the fact of the fire prima facie proof of negligence on the part of the railway, which might be rebutted by it by showing freedom from negligence.

Small v. Chicago, R. I. & P. R. Co. 50 Iowa, 388; *Slosson v. Burlington, C. R. & N. R. Co.* 51 Iowa, 295; *Libby v. Chicago, R. I. & P. R. Co.* 52 Iowa, 292; *Rose v. Chicago & N. W. R. Co.* 72 Iowa, 625.

The simple fact that a fire is set by a locomotive makes a prima facie case against the company.

Engle v. Chicago, M. & St. P. R. Co. 77 Iowa, 661; *Babcock v. Chicago & N. W. R. Co.* 62 Iowa, 598; *Senka v. Chicago, M. & St. P. R. Co.* 77 Iowa, 187.

This statute is constitutional.

Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592.

The contributory negligence of the injured party is no defense in case of fire set out by the railway company.

West v. Chicago & N. W. R. Co. 77 Iowa, 655; *Engle v. Chicago, M. & St. P. R. Co. supra*.

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Railway companies are held to a very stringent degree of liability if it is shown that fires are set out by them.

Greenfield v. Chicago & N. W. R. Co. 83 Iowa, 274; *Hamilton v. Des Moines & K. C. R. Co.* 84 Iowa, 182; *Babcock v. Chicago & N. W. R. Co.* 62 Iowa, 598, 72 Iowa, 197.

Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipment, including locomotive engines, and of operating its road without negligence.

Griswold v. Illinois C. R. Co. (Iowa) 21 Ins. L. J. 961.

Neither as a precedent nor as an authority is the decision overruling that case binding upon this court.

It is the duty of men to manage their own affairs carefully and circumspectly for the avoidance of injury to others, and a neglect of this duty, resulting in harm to any person, places them under an obligation from the law to compensate him.

Bishop, Non-Cont. L. pp. 1072, 1074.

The mere tendency of a contract to promote unlawful acts renders it quite illegal as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts.

Bishop, Cont. § 476; Bestor v. Wathen, 60 Ill. 188; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 663, 32 L. ed. 819; *Fuller v. Dame*, 18 Pick. 472; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 589; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 863; *Hamilton v. Hamilton*, 89 Ill. 351; *Thomas v. Caulkett*, 57 Mich. 894, 58 Am. Rep. 369.

Public policy should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct.

Cooley, Torts, 687; *Johnson v. Richmond & D. R. Co.* 86 Va. 975; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 61 Fed. Rep. 993, 4 Inters. Com. Rep. 578; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 657, 32 L. ed. 825; *Fuller v. Dame*, 18 Pick. 472; *Pope Mfg. Co. v. Gormully*, 144 U. S. 233, 36 L. ed. 418; *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 451, 22 L. ed. 368; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 660, 24 L. ed. 535.

A common-law carrier may by special contract limit his common-law liability, but he cannot stipulate for exemption from the consequence of his own negligence or that of his servants.

New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. 6 How. 344, 12 L. ed. 465; *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 128, 22 L. ed. 827; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 585; *Hart v. Pennsylvania R. Co.* 112 U. S. 838, 23 L. ed. 720; *Little Rock & Ft. S. R. Co. v. Cravens*, 57 Ark. 112, 18 L. R. A. 527; *State v. Missouri P. R. Co.* 29 Neb. 550; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1,

24 L. ed. 708; *Western U. Teleg. Co. v. American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781.

The duty of the carrier extends to the providing of proper and reasonable station facilities, such as platforms, warehouses, approaches, and the like.

Hutchinson, Carr. § 295d; *Mason v. Missouri P. R. Co.* 25 Mo. App. 478; *McCullough v. Wabash W. R. Co.* 34 Mo. App. 28; *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 78; *Oregon Short Line & U. N. R. Co. v. Iwaco R. & N. Co.* 51 Fed. Rep. 613; *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387.

Contracts attempting to exempt such railway company from the negligence of itself or its servants are contrary to public policy and void.

New York O. R. Co. v. Lockwood, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Hart v. Pennsylvania R. Co.* 112 U. S. 338, 28 L. ed. 720; *Bank of Kentucky v. Adams Exp. Co.* 98 U. S. 181, 28 L. ed. 875; *Liverpool & G. W. Steam Co. Limited, v. Phenix Ins. Co.* 129 U. S. 440, 32 L. ed. 792; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 267, 22 L. ed. 558; *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 8 Wall. 107, 18 L. ed. 170; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 51, 35 L. ed. 65.

As to merchandise in transit, a railway company cannot by contract exempt itself from liability if such merchandise is destroyed by fire set out by its own negligence or the negligence of its employees.

Whart. Neg. § 598; *Condict v. Grand Trunk R. Co.* 54 N. Y. 500; *Empire Transp. Co. v. Wamsutta Oil Ref. & M. Co.* 63 Pa. 14, 8 Am. Rep. 515; *New Jersey R. Co. v. Kennard*, 21 Pa. 204; *Steinweg v. Erie Railway*, 43 N. Y. 123, 3 Am. Rep. 678; *Davidson v. Graham*, 2 Ohio St. 131.

Even if the railway company did not contract as common carrier the exemption which it pleads is still contrary to public policy and void.

Hutchinson, Carr. 2d ed. § 62, by Mechem; *Kansas P. R. Co. v. Peavey*, 20 Kan. 169; *Little Rock & Ft. S. R. Co. v. Rubanks*, 48 Ark. 460; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 476; *Roesner v. Hermann*, 10 Biss. 486. And see *Thomp. Neg.* § 1025.

Every contract is declared void which contravenes any legal principle or enactment.

Aubert v. Maze, 2 Bos. & P. 374; *Cannan v. Bryce*, 3 Barn. & Ald. 188; *Greenough v. Balch*, 7 Me. 461; *White v. Buss*, 3 Cush. 448.

One cannot in advance waive his rights of action by the wholesale for injuries inflicted upon him.

Home Ins. Co. v. Morse, 87 U. S. 20 Wall. 451, 22 L. ed. 368; *Wildley v. Collier*, 7 Md. 278, 61 Am. Dec. 846; *Norman v. Cole*, 8 Esp. 253.

Whether forbidden by statute or condemned by public policy, the result is the same. No legal right can spring from such a source.

Meguire v. Corwine, 101 U. S. 111, 25 L. ed. 900; *Hall v. Coppel*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 644, 32 L. ed. 824; *Wardell v. Union P. R. Co.* 103 U. S. 658, 26 L. ed. 512; *West v. Camden*, 135 U. S. 521, 34 30 L. R. A.

L. ed. 258; *Irwin v. Williar*, 110 U. S. 499, 28 L. ed. 225; *Teal v. Walker*, 111 U. S. 252, 28 L. ed. 419.

Federal courts must decide the question of public policy for themselves, and are not bound by decisions of state courts.

Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good.

People v. Chicago Gas Trust Co. 180 Ill. 268, 8 L. R. A. 497; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, 29 Cent. L. J. 309.

Questions of public policy arise out of the common law, and are governed by common-law principles.

Gibbs v. Consolidated Gas Co. 180 U. S. 409, 32 L. ed. 984; *Fowle v. Park*, 181 U. S. 88, 33 L. ed. 67; *Oregon Steam Nav. Co. v. Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 815; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 704, 28 L. ed. 571; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922; *Larin v. Emigrant Industrial Sav. Bank*, 18 Blatchf. 18; *United States v. Muscatine*, 75 U. S. 8 Wall. 575, 19 L. ed. 490.

That law is thoroughly well settled.

Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co. 129 U. S. 443, 32 L. ed. 798; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 511, 10 L. ed. 1051; *Swift v. Tyson*, 41 U. S. 16 Pet. 18, 10 L. ed. 871; *Myrick v. Michigan C. R. Co.* 197 U. S. 109, 27 L. ed. 837; *Chicago v. Robbins*, 67 U. S. 3 Black, 418, 17 L. ed. 298; *Brooklyn City & N. R. Co. v. National Bank*, 103 U. S. 14, 31, 26 L. ed. 61, 67; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 370, 37 L. ed. 773.

Courts of the United States determine the common law for themselves.

Washington & G. R. Co. v. Gladmon, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 23 L. ed. 898; *Hough v. Texas & P. R. Co.* 100 U. S. 218, 25 L. ed. 612; *Northern P. R. Co. v. Mares*, 123 U. S. 710, 31 L. ed. 296; *Inland & S. Coast-ing Co. v. Tolson*, 139 U. S. 551, 35 L. ed. 270; *Texas & P. R. Co. v. Volk*, 151 U. S. 77, 38 L. ed. 80; *Lane v. Vick*, 46 U. S. 8 How. 464, 11 L. ed. 681; *Jefferson Branch Bank v. Shelly*, 66 U. S. 1 Black, 443, 17 L. ed. 177; *Proprietors of Bridges v. Hoboken Land & Imp. Co.* 63 U. S. 1 Wall. 145, 17 L. ed. 577; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 106, 37 L. ed. 101; *Newport News & M. V. Co. v. Howe*, 52 Fed. Rep. 362, 6 U. S. App. 173; *Western U. Teleg. Co. v. Wood*, 57 Fed. Rep. 471, 21 L. R. A. 706; *Northern P. R. Co. v. Peterson*, 51 Fed. Rep. 182, 4 U. S. App. 574; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 370, 37 L. ed. 773; *Lake Shore & M. S. R. Co. v. Spangler*, 44 Ohio St. 476; *Foxcroft v. Mallett*, 45 U. S. 4 How. 858, 11 L. ed. 1008; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 511, 10 L. ed. 1051; *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 126, 27 L. ed. 830; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 258, 27 L. ed. 926; *Gibson v. Lyon*, 115 U. S. 446, 29 L. ed. 442; *Chicago v. Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Smith v. Alabama*, 124 U. S. 478, 31 L. ed. 512; *Oates v. First Nat. Bank*, 100 U. S. 289, 25 L. ed. 580; *Pana v. Bowler*,

107 U. S. 539, 27 L. ed. 424; *Olcott v. Fond du Lac County Suprs.* 88 U. S. 16 Wall. 689, 21 L. ed. 886; *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 677, 22 L. ed. 238; *Pleasant Twp. v. Aitna L. Ins. Co.* 138 U. S. 70, 34 L. ed. 866; *Burgess v. Seligman*, 107 U. S. 30, 27 L. ed. 359; *Clark v. Bever*, 189 U. S. 116, 35 L. ed. 96; *Carroll County Suprs. v. Smith*, 111 U. S. 562, 29 L. ed. 519; *Anderson v. Santa Anna Twp.* 116 U. S. 865, 29 L. ed. 636; *Bolles v. Brimfield*, 120 U. S. 762, 30 L. ed. 788; *East Alabama R. Co. v. Doe, Vischer*, 114 U. S. 852, 29 L. ed. 140; *Bumcombe County Comrs. v. Tommey*, 115 U. S. 127, 29 L. ed. 807; *Ober v. Gallagher*, 98 U. S. 207, 23 L. ed. 833; *Johnson County Comrs. v. Thayer*, 94 U. S. 642, 24 L. ed. 185; *Mohr v. Manierre*, 101 U. S. 421, 25 L. ed. 1054; *United States v. Muscatine*, 75 U. S. 8 Wall. 582, 19 L. ed. 498; *Venice v. Murdock*, 92 U. S. 501, 23 L. ed. 585; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 623, 30 L. ed. 523.

If the contract when made was valid by the laws of the state as then expounded by all departments of the government, and administered by its courts of justice, its validity and obligation cannot be impaired by any subsequent action or legislation or decision of its courts altering the construction of the law.

Ohio L. Ins. & T. Co. v. Debolt, 57 U. S. 16 How. 432, 14 L. ed. 1008; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 206, 17 L. ed. 536; *Havemeyer v. Iowa County Suprs.* 70 U. S. 8 Wall. 298, 18 L. ed. 88; *Thompson v. Lee County*, 70 U. S. 8 Wall. 327, 18 L. ed. 177; *Lee County Suprs. v. United States*, 74 U. S. 7 Wall. 181, 19 L. ed. 168; *Douglas v. Pike County*, 101 U. S. 677, 25 L. ed. 968.

At the time the fire in this case occurred, the original decision of the supreme court of Iowa in *Griswold v. Illinois C. R. Co.* (Iowa) 21 Ina. L. J. 961, had been made, and was in full force and effect, holding the attempted exemption of the railway company from liability on account of negligence to be contrary to public policy and void.

The Federal courts are not bound by decisions of state courts on questions of public policy.

Groves v. Slaughter, 40 U. S. 15 Pet. 503, 10 L. ed. 820; *Rowan v. Runnels*, 46 U. S. 5 How. 184, 13 L. ed. 85; *Ohio L. Ins. & T. Co. v. Debolt*, 57 U. S. 16 How. 432, 14 L. ed. 1008; *Delmas v. Merchants' Mut. Ins. Co.* 81 U. S. 14 Wall. 667, 20 L. ed. 759; *Bank of West Tennessee v. Citizens' Bank*, 80 U. S. 13 Wall. 432, 20 L. ed. 514, 81 U. S. 14 Wall. 9, 20 L. ed. 514; *Bethell v. Demaret*, 77 U. S. 10 Wall. 587, 19 L. ed. 1007; *Thorington v. Smith*, 75 U. S. 8 Wall. 1, 19 L. ed. 861; *Planter's Bank v. Union Bank*, 83 U. S. 16 Wall. 433, 21 L. ed. 473; *Confederate Note Case*, 86 U. S. 19 Wall. 548, 23 L. ed. 196; *Wilmington & W. R. Co. v. King*, 91 U. S. 8, 23 L. ed. 186; *Cook v. Lillo*, 108 U. S. 792, 26 L. ed. 460; *Tarver v. Keach*, 82 U. S. 15 Wall. 67, 21 L. ed. 82; *Worthy v. Marston*, 81 U. S. 14 Wall. 10, 20 L. ed. 826; *Osborn v. Nicholson*, 80 U. S. 13 Wall. 654, 20 L. ed. 689; *White v. Hart*, 80 U. S. 13 Wall. 646, 20 L. ed. 685; *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 443, 32 L. ed. 793; *Boyce v. Tabb*, 85 U. S. 18 Wall. 548, 21 L. ed. 757; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 830, 14 L. ed. 960; *Bank of United*

States v. Owens, 27 U. S. 2 Pet. 540, 7 L. ed. 512; *Burke v. Child*, 88 U. S. 21 Wall. 449, 23 L. ed. 624; *Collins v. Blantern*, 2 Wils. 347; *Western U. Teleg. Co. v. Cook*, 61 Fed. Rep. 624; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 206, 17 L. ed. 525; *Gibson v. Lyon*, 115 U. S. 446, 29 L. ed. 448; *Smith v. Alabama*, 124 U. S. 478, 81 L. ed. 512; *Olcott v. Fond du Lac County Suprs.* 88 U. S. 16 Wall. 689, 21 L. ed. 886; *Pine Grove Twp. v. Talcott*, 86 U. S. 19 Wall. 677, 22 L. ed. 238; *Pleasant Twp. v. Aitna L. Ins. Co.* 138 U. S. 70, 34 L. ed. 866; *Burgess v. Seligman*, 107 U. S. 30, 27 L. ed. 359; *Clark v. Bever*, 189 U. S. 116, 35 L. ed. 97; *Carroll County Suprs. v. Smith*, 111 U. S. 562, 29 L. ed. 519; *Anderson v. Santa Anna Twp.* 116 U. S. 865, 29 L. ed. 636; *Bolles v. Brimfield*, 120 U. S. 762, 30 L. ed. 788; *East Alabama R. Co. v. Doe, Vischer*, 114 U. S. 852, 29 L. ed. 140.

Mr. Charles B. Keeler, for defendant in error:

The supreme court of Iowa finally held that such exemption or release was not in violation of the fire statute of Iowa, or contrary to any public policy of the state, but was lawful and would be enforced by the courts of Iowa.

Griswold v. Illinois C. R. Co. (Iowa) 24 L. R. A. 647.

The insurance companies, upon payment of their policies, were subrogated, in law, to such rights (and only such) as said lessees held against their lessor.

Phenix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 812, 29 L. ed. 878; *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728; Wood, Land. & T. p. 435; 13 Am. & Eng. Enc. Law, p. 1000.

Federal courts adopt the local law of real property, as ascertained by the decisions of state courts, whether founded on statute, or a part of the unwritten law of the state.

Jackson, St. John, v. Chew, 25 U. S. 12 Wheat. 153, 6 L. ed. 583; *Green v. Neal*, 81 U. S. 6 Pet. 291, 8 L. ed. 402; *Swift v. Tyson*, 41 U. S. 16 Pet. 18, 10 L. ed. 871; *Suydam v. Williamson*, 65 U. S. 24 How. 427, 16 L. ed. 742; *Beauregard v. New Orleans*, 59 U. S. 18 How. 497, 15 L. ed. 469; *Williams v. Kirtland*, 80 U. S. 13 Wall. 806, 20 L. ed. 683; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 57, 26 L. ed. 77; *Bondurant v. Watson*, 103 U. S. 281, 26 L. ed. 447; *Bucher v. Cheshire R. Co.* 125 U. S. 583, 31 L. ed. 799.

The decision of the supreme court of Iowa in *Griswold v. Illinois C. R. Co.* (Iowa) 21 Ina. L. J. 961, should be followed by this court, because it is based, in part at least, upon a construction of state statutes.

The public policy of a state means the local self-interest of that commonwealth. Each must determine for itself what its own policy or self-interest shall dictate.

Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148.

The policy of the state is the law of that commonwealth, whether enacted by statutes or expressed by courts.

Bank of Augusta v. Earle, 38 U. S. 18 Pet. 519, 10 L. ed. 274; *Vidal v. Philadelphia*, 48 U. S. 2 How. 127, 11 L. ed. 205; *Teal v. Walker*, 111 U. S. 242, 23 L. ed. 415; *Lancaster v. Amsterdam Imp. Co.* 140 N. Y. 578, 24 L. R. A. 322 (1894); *Green v. Van Buskirk*, 72 U. S. 5

Wall. 812, 18 L. ed. 601; *Swann v. Swann*, 21 Fed. Rep. 299; *United States v. Trans-Missouri Freight Assn.* 58 Fed. Rep. 58, 24 L. R. A. 73, 4 Intern. Com. Rep. 443; *Rogers v. Kennelbee S. B. Co.* 86 Me. 261, 25 L. R. A. 491; *Buscher v. Cheakire R. Co.* 125 U. S. 555, 31 L. ed. 795; *Detroit v. Osborn*, 185 U. S. 493, 34 L. ed. 260; *Rhderidge v. Sperry*, 189 U. S. 266, 35 L. ed. 171; *Brown v. Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 23 L. R. A. 817; *Union Nat. Bank v. Bank of Kansas City*, 186 U. S. 235, 34 L. ed. 846; *Printing & N. Registering Co. v. Sampson*, L. R. 19 Eq. 465; *Griswold v. Illinois C. R. Co.* (Iowa) 24 L. R. A. 647; *Richmond v. Dubuque & S. C. R. Co.* 26 Iowa, 202; *Kellogg v. Larkin*, 3 Pinney, 128, 56 Am. Dec. 164.

The lessees being where they were either as trespassers or as mere licensees, no active duty of care towards them or their property was imposed upon the railway, in the operation of engines and trains, but only the negative duty of not wilfully or wantonly destroying it by fire.

Cleveland, O. C. & St. L. R. Co. v. Tarrt, 64 Fed. Rep. 827; *Orans Elevator Co. v. Lippert*, 68 Fed. Rep. 945; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 214; *Wright v. Boston & G. R. Co.* 142 Mass. 300; *Bartow v. Old Colony R. Co.* 143 Mass. 556; *Illinois C. R. Co. v. Godfrey*, 71 Ill. 506, 29 Am. Rep. 112; *Illinois C. R. Co. v. Hatherington*, 83 Ill. 516; *Blanchard v. Lake Shore & M. R. Co.* 126 Ill. 428; *McClaren v. Indianapolis & V. R. Co.* 88 Ind. 819; *Spittorf v. State*, 106 N. Y. 214; *Richards v. Chicago, St. P. & K. O. R. Co.* 81 Iowa, 480; *Chicago, M. & St. P. R. Co. v. Wallace*, 66 Fed. Rep. 506; *Coup v. Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Robertson v. Old Colony R. Co.* 156 Mass. 525; *Forepaugh v. Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508; *Piedmont Mfg. Co. v. Columbia & G. R. Co.* 19 S. C. 353; *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 377, 31 L. ed. 639; *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 440, 33 L. ed. 792; *Hutchinson, Carr.* 2d ed. §§ 44, 78; *Hoamer v. Old Colony R. Co.* 156 Mass. 506; *Bates v. Old Colony R. Co.* 147 Mass. 264; *Hart v. Pennsylvania R. Co.* 112 U. S. 831, 28 L. ed. 717; *Phenix Ins. Co. v. Eris & W. Transp. Co.* 117 U. S. 821, 29 L. ed. 879.

The state court in the *Griswold Case* upheld instead of impaired the obligation of such leases, consequently no question was raised, under the 25th section of the judiciary act, which United States courts were authorized to consider or review.

Bethell v. Demaret, 77 U. S. 10 Wall. 540, 19 L. ed. 1008; *Bank of West Tennessee v. Citizens' Bank*, 81 U. S. 14 Wall. 10, 20 L. ed. 515; *Delmas v. Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 666, 20 L. ed. 759; *Worth v. Marston*, 81 U. S. 14 Wall. 12, 20 L. ed. 826; *Balkam v. Woodstock Iron Co.* 154 U. S. 187, 38 L. ed. 956; *Anderson v. Santa Anna Twp.* 116 U. S. 856, 29 L. ed. 633; *Clark v. Beeer*, 189 U. S. 98, 35 L. ed. 88; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359.

Sanborn, Circuit Judge, delivered the opinion of the court:

Is a condition, in a lease by a railway com-

pany of a portion of its right of way, that it shall not be liable to the lessee for any damage to any buildings or personal property thereon, caused by fire set by its locomotives, or by the negligence of its officers or servants, in violation of public policy, and therefore void? This is the question in this case. The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 197, 11 L. ed. 205, 233; *United States v. Trans-Missouri Freight Assn.* 7 C. C. A. 15, 78, 58 Fed. Rep. 58, 24 L. R. A. 978, 4 Intern. Com. Rep. 443; *Swann v. Swann*, 21 Fed. Rep. 299. If this was a question of local law, or of the public policy of the state of Iowa alone, it would require little consideration by this court. There are many provisions of the statutes of the state of Iowa relating to the duties of individuals and corporations to use care to prevent damage from fire. The two which bear most directly upon the question under consideration in this case are sections 1289 and 1306 of the Code of that state, which provide "that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway" (McClain's Anno. Code (Iowa) 1888, § 1972); and "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into" (Id. § 2007). In *Griswold v. Illinois C. R. Co.* (Iowa) 24 L. R. A. 647, the supreme court of Iowa considered these statutes and the public policy of that state, and, after repeated argument and the most careful deliberation, held that a provision in a lease by a railway company of a portion of its right of way, on which the lessee had placed an elevator and warehouse and personal property, which exempted the railroad company from liability for damages by fire negligently communicated by its servants to these buildings and their contents, violated no law of that state, was not injurious to the public interests, and was not against public policy. This was the decision of the highest judicial tribunal of that state. It constitutes an authoritative construction of the statutes of the state (*Dempey v. Onego Twp.* 4 U. S. App. 416, 435, 2 C. C. A. 110, 51 Fed. Rep. 97; *Rugan v. Sabin*, 10 U. S. App. 519, 8 C. C. A. 578, 58 Fed. Rep. 415; *Travelers' Ins. Co. v. Onego Twp.* 7 C. C. A. 669, 674, 59 Fed. Rep. 58; *Madden v. Lancaster County*, 12 C. C. A. 566, 570, 65 Fed. Rep. 188), and a very persuasive authority that the contract here in question is not contrary to public policy.

Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law, and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent

jurisdiction with those of the state, and, while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment. *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 383, 21 L. ed. 634, 637; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Carpenter v. Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 511, 10 L. ed. 1044, 1051; *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 685; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365; *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 513; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 583, 31 L. ed. 795, 799; *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 397, 443, 32 L. ed. 788, 793.

We turn accordingly to the consideration of this question. Before entering upon its discussion, it is important to note the terms and effect of the lease before us, and the situation of the parties and of the property which was destroyed. Before the lease was made, the lessees had no right to enter upon, or to place any property upon, the leased premises, and the railway company owed to the lessee no duty to exercise ordinary care not to set fire to any property on those premises, because, presumptively, there was none there, and because, if any one put any there, the only duty of the company was not wilfully and wantonly to injure it, because it would be there in violation of law. If, however, the railway company should lease the right of way to Simpson, McIntire, & Co., and should permit them to put buildings and personal property thereon, it would thereby subject itself to a new burden and assume a new duty,—the duty of exercising ordinary care to prevent the burning of their property on these premises by the operation of its railroad. It was apparently willing to discharge all the duties it owed to the public, and to every individual of the public, and it did not undertake, by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right of way to these lessees, or to any one else, nor had they, or any one, any right to the use of the leased premises before this lease was made. The property that was burned was the private property of the lessees. None of it was in process of transportation by the railway company, none of it was awaiting delivery by the company to its consignees after transportation, and none of it had been received by the company for transportation. The warehouses and the property in them bore the same relation to the carrying business of the company, according to this record, that the store and contents of any merchant or commission man would bear to it. Neither the lease, nor the relation of the property to the railway company, arose out of the discharge of any duty imposed upon the corporation by its

position of a common carrier, or by its character of a quasi public corporation.

The question, then, is, Was it a violation of public policy for the lessees to agree, under these circumstances, that, if they were permitted to put their buildings and property upon the right of way of the railroad company, and to use them thereon, the duties and liabilities of the latter to them, and to the public, should remain as they were before the lease was made, and should not be increased by any additional burden? No act of Congress, no statute, no decision of any court (except a decision of the supreme court of Iowa, which was overruled by *Griswold v. Illinois C. R. Co. supra*), which prohibits such an agreement or declares it to be against public policy, has been called to our attention. Counsel for plaintiffs in error present a carefully prepared and exhaustive argument, by analogy, to show that such an agreement is detrimental to the public welfare, and against public policy, but their contention rests entirely upon that argument. If the analogy fails, the argument fails. The argument runs in this way: A contract by a railroad company with one of its employees, or with a passenger, or with a shipper, to exempt itself from liability for negligence in operating its railroad is against public policy and void. *St. Louis & S. F. R. Co. v. Payne*, 29 Kan. 169; *Little Rock & Ft. S. R. Co. v. Eubanks*, 48 Ark. 460; *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 637; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 267, 23 L. ed. 556, 558; *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174, 181, 183, 185, 23 L. ed. 872, 875-877; *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 440, 441, 32 L. ed. 791, 792. The contract to exempt the railway company from liability for damage to the property of these lessees, caused by fires resulting from the negligence of the railway company, is similar to contracts with its employees, passengers, and shippers to exempt it from liability to them for negligence in operating its railroad. Therefore, the provision for exemption in this lease is against public policy, and void. But the analogy fails in that vital part which constitutes the reason and foundation of the rule established by the authorities cited. Its fallacy is, that the law imposes upon a railroad company the absolute duty to operate its railroad, to employ suitable men to operate it, to exercise ordinary care to furnish them with a reasonably safe place in which to render their services, and with reasonably safe machinery and appliances with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interests, because it endangers the lives and limbs of citizens, which are of the highest value to the state and nation. A contract which exempts the carrier from negligence in the discharge of these duties is void, because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably

endangers the lives of employees and passengers. But the law imposes no duty upon a railroad company to lease its right of way, or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission. In the former case, public policy and the law impose upon the carrier the duty to hire employees, to operate its railroad with reasonable care, in order to protect its employees from injury, and therefore it may not contract to be relieved from the law and the duty. The carrier has no choice. It must perform these duties, or forfeit its charter. In the latter case, no duty to lease is imposed. The company has the option—the choice—to lease or to refuse to lease; and if it does lease, and does stipulate for indemnity from damages caused by its negligence in firing the property of the lessee placed upon the leased premises by its permission, that contract in no way relieves it from the discharge of any duty to the public, or to any citizen, that the law or public policy had imposed upon it.

Again, the law imposes upon a railroad company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost, and the latter with ordinary, care. The passenger is often obliged to travel, and the shipper to send his goods, by railroad. In making their contracts, they do not stand on an equal footing with it. They cannot stop to negotiate and settle the terms of a contract every time they desire to use the railroad. They would often prefer the abandonment of the contracts to such negotiations. On the other hand, the railroad company, with its trained employees, and its monopoly of the transportation facilities sought, has the ability and the power to exact the contract it desires. This inequality in the situation of the parties, which would, if permitted, enable the railroad company to obtain unfair contracts from passengers and shippers, and the fact that contracts with them, which exempt the company from liability for negligence, relieve it from an absolute duty imposed by the law, and thus violate it, and at the same time increase the danger to the lives and property of the people from the operation of a railroad, constitute the reasons for the decisions that have established and maintain the rule that such contracts are against public policy. *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 369, 378, 379, 21 L. ed. 627, 637, 639, 640; *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 8 Wall. 107, 112, 18 L. ed. 170, 171; *United States Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342, 353, 19 L. ed. 457, 460; *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 397, 440; 443, 32 L. ed. 788, 791, 792; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 267, 268, 22 L. ed. 556, 558.

But the defendant in error and Simpson, McIntire, & Co., did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute, or to refuse to execute, the lease. The condition exempting the company from liability for damages

to the property of the lessees caused by fire set by the negligence of the company relieved the company from no duty it was required by law to perform but simply provided that it should not assume an additional burden, which it had the option to take or to refuse. Thus, in the case at bar, all the reasons for the rule avoiding contracts exempting common carriers from liability for negligence failed. And it is difficult to perceive how the proposition that this rule should govern this case can be successfully maintained.

It is said that it was the duty of the railroad company to furnish suitable warehouses for the receipt of butter and eggs offered to it for transportation, and already transported, but awaiting delivery to the consignees, that it was bound to exercise ordinary care not to burn the contents placed in such warehouses by it as a carrier, and that, if it employed Simpson, McIntire, & Co. to receive and store the goods of its shippers, it was bound to exercise the same degree of care to protect the goods in their possession. *Covington Stock-Yards Co. v. Keith*, 139 U. S. 128, 133, 136, 35 L. ed. 73, 75, 76. It is a conclusive answer to this contention that there is nothing in this record to show that the railroad company ever had employed Simpson, McIntire, & Co. to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from, any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid. It goes without saying that the railroad company could have legally employed an insurance company to indemnify it against loss by fire occasioned by the negligence of its servants. If there were goods of its customers burned in the warehouse, the lessees had, in effect, insured the railroad company against damages for their loss, and the insurance companies had insured the lessees. No reason is perceived why these contracts were not valid.

It is said that a statute which should provide that a railroad company should not be liable to the owner of property for damages to it by fire, caused by the negligence of the company, would be unconstitutional and void, because it would authorize the taking of private property without due process of law, and without compensation, and that therefore the contract here in question is void. But a statute enacting that a private individual who should construct a building or store personal property upon the right of way of a railroad company should be deemed guilty of negligence, and should not be permitted to maintain any action against the company for its destruction by fire, occasioned by the negligence of the latter in the operation of its railroad, would not be obnoxious to this objection, nor detrimental to the public interest, and it is not perceived how a contract to that effect could be.

The public policy of this nation, with reference to contracts of common carriers exempting them from liability for negligence, was established and declared by the decisions of the Supreme Court in *New York*

C. R. Co. v. Lockwood, 84 U. S. 17 Wall. 357, 384, 21 L. ed. 627, 641; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 267, 268, 22 L. ed. 556, 558; and *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 397, 440, 441, 32 L. ed. 788, 791, 792. In the leading case of *New York C. R. Co. v. Lockwood*, *supra*, Mr. Justice Bradley declared the rules by which the validity of such contracts must be determined to be: "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; secondly, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter."

In *Liverpool & G. W. Steam Co., Limited, v. Phenix Ins. Co.* 129 U. S. 397, at page 441, 32 L. ed. 788, 792, Mr. Justice Gray thus states the rule in a single paragraph: "Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld—such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged,—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. *United States v. Trans-Missouri Freight Assn.* 7 C. C. A. 15, 82, 58 Fed. Rep. 58, 24 L. R. A. 78, 4 Inters. Com. Rep. 443; *Printing & N. R. Co. v. Sampson*, L. R. 19 Eq. 462; *Tallis v. Tallis*, 1 El. & Bl. 391; *Rousillon v. Rousillon*, L. R. 14 Ch. Div. 351, 365; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372, 391 (Gil. 348); *Marsh v. Russell*, 66 N. Y. 288; *Phippen v. Stickney*, 3 Met. 384, 389. In our opinion the plaintiffs in error fall far short of sustaining this burden, and our conclusions are:

The reasons why an unreasonable and unjust contract between a common carrier and another, exempting the former from liability for negligence, is against public policy and void, are, that it attempts to release the carrier from the discharge of the essential duties imposed upon it by law, that the parties to the contract are not upon an equal footing, and that it tends to endanger the lives and limbs of passengers and employees. A contract in a lease by a railroad company of a portion of its right of way, that it shall not be liable to the lessees for any damage, caused by fire set by the negligence of itself

or of its employees, to the buildings or personal property which the lessees have or place on the leased premises, does not fall within this rule, and is not void because it does not fall within its reasons. A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier or as a quasi public corporation. The contract leaves it under the same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity, and care, after a lease containing such a contract is executed, that it would have been required to exercise if no such agreement had been made. *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 267, 268, 22 L. ed. 556, 558. The only effect of the contract is to prevent the assumption by the railroad company of a new duty, which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employees or passengers of the company, and the parties to it stand upon an equal footing when the lease is made because each is free to make or refuse to make the contract.

For these reasons the judgment below must be affirmed, with costs, and it is so ordered.

Caldwell, Circuit Judge, dissenting:

I concur in the conclusion reached in this case, but dissent from this statement in the majority opinion, namely: "Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law, and not dependent solely upon any local statute or usage."

The contract referred to is a lease of real estate situated in Iowa. The lease was made and executed, and its covenants were to be performed, in that state. The supreme court of Iowa held the lease and all its conditions valid under the laws of that state. No decision of the Supreme Court of the United States has been cited, and it is believed none can be found, holding that this decision of the supreme court of Iowa is not binding on this court. But, however this may be, there is no difference of opinion between the supreme court of Iowa and this court as to the validity of the lease and all its conditions, and there is therefore no occasion for this court to express an opinion upon the question whether it would be found by the decision of the supreme court of Iowa if the two courts differed in opinion on the question of public policy. What is said on this subject is not necessary to the decision of the case, and, moreover, is not law. A "local statute," declaring such a condition in a lease to be either valid or void, would undoubtedly be obligatory on this and all other courts. There are weighty reasons why a question of this character should not be lightly considered. The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding and final. This unfortunate condition of our

jurisprudence results from our dual system of government. It has no existence in any other country, and ought to be confined within the narrowest limits possible in this. Nothing can be more repugnant to one's sense of justice, or to a uniform and harmonious administration of the law, than to require the citizen to be bound by conflicting decisions of courts of different governments. Under the operation of this unseemly rule, a suit against one in a state court may be decided one way, and a suit against the same party in the Federal court, involving the very same question, may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case. It was the hope that this court would overrule the decision of the supreme court of Iowa in a similar case that caused the removal of this case into the circuit court. The class of questions as to which different rules of decision may obtain, and the Federal courts may disregard the decision of the state courts thereon, has not been very clearly defined. What is said here has reference, of course, to nonfederal questions, such as the one raised in this case. As to Federal questions, there is but one rule of decision, and one court of last resort. The general statement has been often made that the Federal courts are not bound to follow the decisions of state courts on questions of general jurisprudence, when unaffected by state legislation; but no exact enumeration has ever been made, or ever can be made, of the questions that come within this general definition. Moreover, the decisions of the supreme court relating to the subject are not uniform or harmonious. The question as presented by this record is not free from doubt. It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case.

John R. HANNA *et al.*, *Appts.*,
v.
STATE TRUST COMPANY *et al.*

(70 Fed. Rep. 2.)

A court of chancery cannot, against the objection of the first mortgagee, authorize the receiver of a private corporation appointed at the suit of a second mortgagee to borrow money to carry on the corporate business on certificates to be made a first and paramount lien on the corporate property.

(September 28, 1895.)

APPPEAL by defendants Hanna and Clark from an order of the Circuit Court of the United States for the District of Colorado, permitting a receiver which had been appointed

NOTE.—As to the question involved in the above case, see also *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* (C. C. S. D. Ill.) 16 L. R. A. 608, and *note*.

30 L. R. A.

for the Denver Land & Water-Storage Company to issue certificates to raise money for the improvement and preservation of the property which should be a prior lien to that of the first mortgage on the property. *Reversed.*

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Statement by Caldwell, Circuit Judge:

On the 1st day of November, 1889, the Denver-Arapahoe Land Company, a Colorado corporation, executed to the appellant John R. Hanna its trust deed on 11,820 acres of land in Arapahoe and Douglas counties, Colo., to secure to the appellant Rufus Clark the payment of its promissory notes aggregating the sum of \$97,000. On the same day the same corporation executed to the Mercantile Trust company of New York, as trustee, a deed of trust on 4,480 acres of land in Arapahoe county, Colo., to secure an issue of its first-mortgage bonds amounting to \$140,000. On the 1st day of March, 1890, the Denver Water-Storage Company, a Colorado corporation, executed to the State Trust Company of New York, as trustee, a deed of trust on about 1,100 acres of land in Douglas county, Colo., together with the Castlewood dam and reservoir, irrigating canals, ditches, etc., to secure the payment of its first-mortgage bonds amounting to the sum of \$800,000. Each of these deeds of trust covers different properties, and is the first and valid lien upon the property covered by it. On or about the 1st day of May, 1891, the Denver Land & Water-Storage Company was organized, pursuant to the laws of Colorado, by the consolidation of the Denver-Arapahoe Land Company and the Denver Water-Storage Company, and by virtue of such consolidation acquired, subject to the deeds of trust above described, all of the property covered by or embraced therein. Immediately after its organization the Denver Land & Water-Storage Company executed a deed of trust upon the entire property acquired by the consolidation mentioned, subject to the several deeds of trust executed by the constituent companies, and above set forth, to the State Trust Company of New York, as trustee, to secure an issue of its general or consolidated mortgage bonds to the amount of \$800,000. On the 4th day of June, 1894, the State Trust Company of New York, as trustee in the consolidated mortgage last above mentioned, filed its bill of complaint in the circuit court of the United States for the district of Colorado against the Denver Land & Water-Storage Company, alleging that it had made default, and failed to pay the taxes on its lands or interest upon its bonds, and that it was insolvent, and prayed for the foreclosure of its mortgage and the appointment of a receiver. This bill admitted the priority of the underlying deeds of trust executed by the constituent companies, and that any relief granted in the suit, by foreclosure or otherwise, must be subject to the rights and equities existing under the prior mortgages. On the day the bill was filed the Denver Land & Water-Storage Company appeared and answered, admitting its insolvency, and confessing all the allegations

to the bill. The court thereupon appointed a receiver. On the 24th of July, 1894, the State Trust Company filed its amended and supplemental bill of complaint, to which the Mercantile Trust Company of New York, and the appellants John R. Hanna and Rufus Clark were made defendants. This amended bill prayed relief as follows: That the said Mercantile Trust Company, John R. Hanna, and Rufus Clark might be brought in as defendants in the action, and required to set up their respective rights upon the real estate covered by the deeds of trust executed by the Denver-Arapahoe Land Company; that the respective rights of the trustees under the several mortgages or deeds of trust might be judicially ascertained and determined by the court; that the properties covered by the respective deeds of trust might be marshaled, and judicially ascertained and adjusted; that the amounts due upon the notes and bonds issued under the several deeds of trust might be adjudicated and determined; that the said deeds of trust might be foreclosed; that the receiver theretofore appointed in the action might be continued as receiver of all the property covered by each and all of said deeds of trust; that the said John R. Hanna, Rufus Clark, and the Mercantile Trust Company, and the holders of any of the notes, bonds, or securities issued under said deeds of trust, might be enjoined and restrained from commencing any action or proceeding in the circuit court of the United States for Colorado, or any other court, for the foreclosure of the said deeds of trust, and from enforcing their said notes and bonds, or for the collection thereof, against the Denver Land & Water-Storage Company, or its property and effects, except in this action.

On the 16th day of August, 1894, a special master appointed in the cause made a report, from which it appears that the company was endeavoring to carry on a colonization business, and was engaged in selling small tracts of land, for fruit raising and garden purposes, to settlers, or those who proposed to become settlers, or colonists; that in many cases the company sold these tracts of land (usually ten acres), under executory contracts, for small amounts of cash down, and deferred payments extending over a period of five years, when the various purchasers were to receive the deeds. The company agreed to plant these tracts with fruit trees, and cultivate and care for them during the five years. On the 16th of August the receiver filed his petition, stating, substantially, that the property of the Denver Land & Water-Storage Company consists of 17,000 acres of land in the counties of Arapahoe and Douglas, Colo., and an extensive dam or reservoir, known as the "Castlewood Dam," and a system of canals and irrigating ditches connected therewith, and a large number of land-purchase contracts and land-purchase notes, referred to in the report of the special master; that the original plan of the Denver Land & Water-Storage Company contemplated the colonization of these lands; the amount of the land-purchase contracts and notes, as shown by the report of the special

master; the agreements made by the Denver Land & Water-Storage Company to plant and cultivate the lands, already referred to, and that in consideration thereof the various purchasers have made large payments, and have a right, in justice and equity, to demand performance of the contracts of the Denver Land & Water-Storage Company, and that otherwise the fruit trees upon the tracts sold under the planting and cultivation contracts will die, and the payments made by the purchasers will be absolutely lost; and that, moreover, it is of vital importance to the company that it should collect the balance due upon the land-sale notes and contracts mentioned, which collection is entirely dependent upon the keeping up of the tracts of land, and the performance by the company of the contracts with the purchasers aforesaid. The petition then presents a number of reasons and arguments why, in the judgment of the receiver, certificates should be issued, and calls attention to the default in taxes upon the company's lands, alleged to amount to about \$4,000. The particulars of the three underlying mortgages and the consolidated mortgage are then given, and the receiver calls the court's attention to the opportunity which presents itself for engaging in the colonization of the company's barren lands, if he is authorized to issue certificates of indebtedness to raise funds with which to properly present the merits and advantages of the Denver Land & Water-Storage Company's property. On the 15th day of September, 1894, the court made an order, upon the receiver's petition, which authorized the issue of receiver's certificates to pay taxes due upon the lands, and to redeem the same from tax sales, and making such certificates a first and paramount lien upon the property upon which the taxes were paid. The order also contained this provision: "(5) It is further ordered, adjudged, and decreed that in addition to the amounts which may be necessary to pay the taxes now in arrears upon the property set forth and described in paragraphs 2, 3, and 4 of this order, the receiver shall have, and is hereby granted, authority to borrow such additional sum of money as shall, together with said amounts for taxes, amount in the aggregate to a sum not exceeding \$10,000, and to issue therefor his certificates of indebtedness, which said certificates of indebtedness shall be first and paramount liens upon all the property, rights, and franchises now owned or controlled by the said the Denver Land & Water-Storage Company, defendant herein, wheresoever situated, and subject to the jurisdiction of this court. And said additional sums of money shall be used and applied by said receiver for the purpose of preserving the property of the Denver Land & Water-Storage Company in his possession and custody, and carrying out and maintaining the contracts of the company now in existence, under and by which the company has heretofore sold tracts of land to various parties, which said contracts are referred to in the report of said receiver, and for such other purposes as are set out in said petition, with references to the maintenance, preservation,

and protection of the property of the company, or as the court may "from time to time direct." From this order, John R. Hanna, trustee in the deed of trust dated November 1, 1889, and Rufus Clark, the beneficiary named therein, and the holder of a large amount of the bonds secured by the mortgage to the Mercantile Trust Company, appealed to this court.

Messrs. Enos Miles and John S. Macbeth, for appellants:

The power to allow receivers' certificates exists and has been only exercised in railroad cases, and then on the ground of the public character of these institutions, and the interest the general public have in the continued operation of the public highways.

Beach, Railways, § 402; Jones, Railroad Securities, §§ 559 *et seq.*

Even in railroad cases, the priority of receivers' certificates over existing mortgages in almost all instances in which the courts have authorized receivers to borrow money and make their certificates a first lien upon the property, either the suits were filed by the bondholders themselves, with an offer to postpone their liens, or the mortgagees have themselves asked for these orders, or expressly assented to them, or the state legislature has imposed upon the chancellor the obligation, when an incorporated railroad becomes insolvent, of operating the road for the use of the public.

Hoover v. Montclair & G. L. R. Co. 29 N. J. Eq. 4; Jones, Railroad Securities, § 551, and cases cited in note; Beach, Receivers, §§ 393, 394; High, Receivers, § 398c.

The attempt to invoke the exercise of the peculiar power of the chancellors in relation to receivers' certificates in other than railroad cases has failed.

Raht v. Attrill, 106 N. Y. 438, 60 Am. Rep. 456; *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603; *Laughlin v. United States Rolling-Stock Co.* 64 Fed. Rep. 25.

If such power exists or is inherent in a chancellor in the exercise of his equitable powers, there was no sufficient nor any showing in the case at bar to warrant the exercise of this exceptional and extraordinary jurisdiction against the objection of appellants.

Jones, Railroad Securities.

Courts have always held that such an order as the one complained of shall only be made under extraordinary and exceptional circumstances, and, with ample opportunity given to all parties to examine witnesses and accounts, and to produce testimony, a court should not authorize the issue of receivers' certificates without clear proof of the correctness of the facts alleged as a ground for their issuance, and of the necessity for raising the money.

Ex parte Mitchell, 12 S. C. 83; *Meyer v. Johnston*, 58 Ala. 849; High, Receivers, § 398.

Messrs. A. E. Pattison, Henry W. Hobson, and A. C. Campbell, for appellees:

It is the duty of the court of chancery to protect and preserve the property—to prevent it from being wasted, dissipated, and destroyed.

Kennedy v. St. Paul & P. R. Co. 2 Dill. 448; 30 L. R. A.

Stanton v. Alabama & C. R. Co. 2 Woods, C. C. 506; *Jarome v. McCarter*, 94 U. S. 788, 24 L. ed. 188.

The editor of the *Lawyers' Reports Annotated*, in commenting upon the case of *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 50 Fed. Rep. 481, in a note to 16 L. R. A. 603, wherein Circuit Judge Gresham made the distinction between quasi public and private corporations, says: "The distinction taken in this case between quasi public and private corporations has not always been observed in practice, although in the cases in which it has been disregarded it seems that no question has been raised as to the power of the court to permit the receivers to charge property in their possession for current expenses." See also *Neafie's App.* (Pa.) 11 Cent. Rep. 186; *Karn v. Rorer Iron Co.* 86 Va. 754; *Ellis v. Vernon Ice, L. & W. Co.* 86 Tex. 109.

As to the general power of a court of chancery to authorize a receiver to issue certificates, the same to be a prior lien.—

See *Meyer v. Johnston*, 58 Ala. 287; *Kerrison v. Stewart*, 93 U. S. 155, 23 L. ed. 843; *Wallace v. Loomis*, 97 U. S. 147, 24 L. ed. 895; *Hoover v. Montclair & G. L. R. Co.* 29 N. J. Eq. 4; *Bank of Montreal v. Chicago, C. & W. B. Co.* 48 Iowa, 519; *Shaw v. Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25 L. ed. 757; *Hale v. Nashua & L. Railroad*, 60 N. H. 338; *Dow v. Memphis & L. R. Co.* 20 Fed. Rep. 260; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 484, 29 L. ed. 963; *Kent v. Lake Superior Ship Canal, R. & I. Co.* 144 U. S. 75, 36 L. ed. 852; *Kneeland v. Lucas*, 141 U. S. 491, 35 L. ed. 830.

Caldwell, Circuit Judge, delivered the opinion of the court:

The precise question in this case is whether a court of chancery which has appointed a receiver for an insolvent private corporation in a foreclosure suit brought by a second mortgagee may, against the objection of the first mortgagee, authorize its receiver to issue receiver's certificates to raise money to carry on the business of the insolvent corporation and to improve its lands, and make such certificates a first and paramount lien upon the lands covered by the first mortgage. So far as we are advised, the power to do this has been denied in every case in which the question has arisen. One of the first cases in which the question arose was *Raht v. Attrill*, 106 N. Y. 438, 60 Am. Rep. 456. In that case a hotel company mortgaged its property to raise funds to build a hotel. Before the completion of the hotel the corporation became insolvent, and upon the application of its principal stockholder a receiver was appointed; and upon an application and showing that the wages of the men who worked on the hotel building were unpaid, and that they threatened, unless paid, to burn the building, the court made an order authorizing the receiver to issue certificates, which were declared to be a lien prior to the trust mortgage, to raise funds to pay the wages due the laborers. A referee reported that, if the money had not been raised to pay the wages due the men, the hotel and other property of the corporation "would, in all probability, have been destroyed or seriously injured." In

the progress of the case the mortgagees denied that the court had authority or power to set aside the prior lien of the mortgage and make the receiver's certificates, issued under the circumstances mentioned, a first and prior lien upon the property. The court delivered an exhaustive opinion, covering every aspect of the question. We quote some of its utterances. The court said: "The lien of the mortgage attaches not only to the land in the condition in which it was at the time of the execution of the mortgage, but as changed or improved by accretions, or by labor expended upon it while the mortgage is in existence. Creditors having debts created for money, labor, or materials used in improving the mortgaged property acquire on that account no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. . . . The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses which are called 'expenses of preservation,' may be incurred under the order of the court, on the credit of the property, and it follows, from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or, when necessary, out of the corpus of the property before distribution, or before the court passes over the property to those adjudged to be entitled. . . . It would be difficult to define, by a rule applicable in every case, what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by James, L. J., in *Re Regent's Canal Iron Works Co.* L. R. 8 Ch. Div. 411, that 'the only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.' Wherever the true limit is, we think it does not include the expenditure authorized by the order of August 17, and that such an expenditure is, and ought to be, excluded from the definition. There must be something approaching a demonstrable necessity to justify such an infringement of the rights of the mortgagees as was attempted in this case."

After referring to the cases in which the receivers of insolvent railroad corporations have been authorized to issue certificates which were declared to be a first lien on the property of the corporations, the court said: "It cannot be successfully denied that the decisions in these cases vest in the courts a very broad and comprehensive jurisdiction over insolvent railroad corporations and their property. It will be found, on examining these cases, that the jurisdiction asserted by the court therein is largely based upon the public character of railroad corporations; the public interest in their continued and successful operation; the peculiar character and terms of railroad mortgages, and upon other special grounds not applicable to ordinary private corporations. . . . These cases

furnish, we think, no authority for upholding the order of August 17, or for subverting the priority of lien which, according to the general rules of law, the bondholders acquired through the trust mortgage on the property of the company. It would be unwise, we think, to extend the power of the court in dealing with property in the hands of receivers to the practical subversion or destruction of vested interests, as would be the case in this instance if the order of August 17 should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained and that a rigid, rather than a liberal, construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted."

We concur in the doctrine expressed in this case. See, to the same effect, *Farmer's Loan & T. Co. v. Grapes Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603; *Laughlin v. United States Rolling-Stock Co.* 64 Fed. Rep. 25; *Fidelity Ins. T. & S. D. Co. v. Roanoke Iron Co.* 68 Fed. Rep. 623; *Shively v. Loomis Coal Co.* 69 Fed. Rep. 204; and *Hooper v. Central Trust Co. (Md.)* 29 L. R. A. 262.

The contention of the appellees is that the order made by the circuit court finds sanction in the cases of *Wallace v. Loomis*, 97 U. S. 146, 24 L. ed. 895; *Fordick v. Schall*, 99 U. S. 235, 25 L. ed. 839; *Barton v. Barbour*, 104 U. S. 126, 26 L. ed. 672; *Mittenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 236, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488,—and other later cases of like character, in which receivers of insolvent railroad corporations were authorized to issue receivers' certificates for various purposes, which were made a first and paramount lien on the property of the insolvent railroad company. But the doctrine of these cases has no application to this case. They rest on the peculiar character of railroad property and of a railroad corporation. The distinction between railroad corporations, which are of a quasi public character, and purely private corporations, has been often pointed out, and need not be repeated here. It is enough to say that the supreme court itself has said that the doctrine of the cases cited has only been applied in railroad cases. In *Wood v. Guarantees Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, the court said: "The doctrine of *Fordick v. Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis upon the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

The bill in this case is one to foreclose a second mortgage. To such a bill the prior mortgages are not even necessary parties. *Jerome v. McCarter*, 94 U. S. 734, 24 L. ed. 186. The validity and priority of the liens of the mortgages under which the appellants claimed is distinctly admitted in the original and amended bills. The purpose of filing

the amended bill making the prior mortgagee defendants seems to have been to enjoin them from foreclosing their mortgages, and subject the lands covered by their mortgages to a prior lien for money borrowed to carry on the business of the corporation and improve its lands. It prays that the receiver may be empowered to manage and operate the property of the insolvent corporation, which consists in irrigating, improving, and colonizing, or settling, arid lands; and, to the end that the receiver may not be interfered with in the conduct of the business, it prays that the holders of all mortgages prior to the complainants' may be enjoined from foreclosing the same. The amended bill would seem to be founded on the theory that a private corporation conducting any kind of business may, when it becomes insolvent, obtain immunity from the compulsory payment of its debts by procuring a junior mortgagee, or some other creditor, to file a bill alleging the insolvency of the corporation, and praying for the appointment of a receiver with authority to manage and conduct its business. Upon the filing of such a bill, it is supposed to be competent for the court, in addition to appointing a receiver to carry on the business of the corporation, to enjoin its creditors, including the holders of the prior liens on its property, from collecting their debts by due course of law, and to continue such injunction in force so long as the court, in its discretion, sees fit to carry on the business of the insolvent corporation. When a receiver is appointed under such a bill, he usually makes haste, as the receiver did in this case, to assure the court that, if he only had some capital to start on, he could greatly benefit the estate by carrying on the business that bankrupted the corporation. In this case, the company being insolvent, and its property mortgaged for more than it was worth, there was no way of raising money to set the receiver up in business, except by the court giving its obligations, in the form of receiver's certificates, and making them a paramount lien on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation, and the junior mortgagee united in urging the court to arm its receiver with the desired powers. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security; so that it had nothing to lose, and everything to gain, in experiments to enhance the value of the mortgaged property, so long as the cost of those experiments was made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. The representation is always made, in such cases, that the receiver can carry on the business much more successfully than was done by the insolvent corporation. This commonly proves to be an error. *Raht v. Attrill*, 106 N. Y. 430,

60 Am. Rep. 456. But, if it were true, it would afford no ground of equitable jurisdiction, for it is not a function of a court of equity to carry on the business of private corporations, whether solvent or insolvent. It is obvious that if the holders of the first mortgages and the other creditors of the insolvent corporation were allowed to proceed, in the customary and lawful mode, to collect their debts, it would put an end to the business of the receiver, and they are therefore enjoined from foreclosing their mortgages or collecting their debts. The chancery court thus assumes, in effect, all the powers and jurisdiction of a court of bankruptcy or insolvency, but without any bankrupt or insolvent law to guide or direct it in the administration of the estate. Its only guide is that varying and unknown quantity called "judicial discretion." The powers claimed for a court of equity in such cases are, indeed, much greater than a court of bankruptcy can exercise. There never was a bankrupt court, under any bankrupt act, authorized, at its discretion, to displace or nullify valid liens on the bankrupt's property, or itself to create liens paramount thereto. The rights of the citizen, lawfully acquired by contract, are under the protection of the Constitution of the United States, and, like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent on the discretion of the chancellor than they are on the discretion of the legislature. "Rights," says the Supreme Court of the United States; "under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise." *Re Parker*, 181 U. S. 221, 38 L. ed. 123. If junior lien creditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a saw-mill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court, and those courts would soon be conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporations at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value. It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person.

Without pursuing the subject further, we refer to what is said, and to the cases cited, in *Scott v. Farmers' Loan & T. Co.* 69 Fed. Rep. 17. The order appealed from is void, whether the suit in which it was made is treated as one to foreclose a second mortgage, or as a bill in equity to administer the estate of an insolvent corporation. It was open to the complainant to take and execute a decree foreclosing its second mortgage, and it is good practice in such cases to require this to be done, on pain of dismissing the bill. And if the complainant desired that money be spent, beyond the income of the property, in carrying on the business of the corporation or improving the mortgaged property, it was at liberty to furnish the means for that purpose; but it had no equity to ask that the expense and the hazards of doing so should be saddled on the first mortgagee, and the court had no jurisdiction or power to place it there.

Taxes are the first and paramount lien on all property, and must be paid. When taxes are due on property in the hands of a receiver, and he has no funds to pay them, the court will authorize him to borrow money for that purpose, and make the obligation given for the money so borrowed a prior lien on the property on which the taxes were due. This is not fixing a new or additional lien

on the property, or displacing any prior lien. It is simply changing the form of the lien from one for taxes to one for money borrowed to pay the taxes.

The order and decree of the Circuit Court appealed from, which authorizes the receiver to borrow money to "be used and applied by said receiver for the purpose of preserving the property of the Denver Land & Water-Storage Company in his possession and custody, and carrying out and maintaining the contracts of the company, now in existence, under and by which the company has heretofore sold tracts of land to various parties, which said contracts are referred to in the report of said receiver, and for such other purposes as are set out in said petition with reference to the maintenance, preservation, and protection of the property of the company," and which authorizes the receiver to issue his certificates of indebtedness for the money borrowed for these purposes, and makes such certificates of indebtedness the first and paramount lien "upon all the property, rights, and franchises now owned or controlled by the said Denver Land & Water-Storage Company," is void, in so far as it makes the certificates issued by the receiver a first and paramount lien on the lands embraced in the mortgages of the appellants, and is therefore reversed.

MISSISSIPPI SUPREME COURT.

FIDELITY & CASUALTY COMPANY,

Appt.,
v.

Georgiana JOHNSON.

((.....Miss.....))

1. An application to compel the attendance of a witness, which will delay the trial, is properly refused where the attempt would be idle because he is without the jurisdiction of the court and beyond the reach of its process.

2. Death by hanging at the hands of a mob is an accident within the meaning of a policy against injuries through "external, violent, and accidental means."

(February 25, 1895.)

A PPEAL by defendant from a judgment of the Circuit Court for Pike County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

NOTE.—What constitutes an accident within the meaning of an accident insurance policy.

I. Definitions; general rules.

II. Intentional injuries.

- a. Self-inflicted.
- b. Inflicted by others.
- c. *Proviso against liability for intentional injuries.*

III. Accident and disease.

- a. Distinguished.
- b. Accident caused by disease.
- c. Disease caused by accident.
- d. Disease aggravated by accident.

IV. Other instances.

I. Definitions; general rules.

An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 8 L. R. A. 448; *North West. Com. Travellers' Assn. v. London Guarantee & Acco. Co.* 10 Manitoba L. Rep. 587.

An accident is also defined to be "an event happening without the concurrence of the will of the" 30 L. R. A.

person by whose agency it was caused. *North West. Com. Travellers' Assn. v. London Guarantee & Acco. Co. supra.*

Any event which takes place without the foresight or expectation of the person acted upon or affected by the event is an accident, within the meaning of an insurance policy. *Ibid.* *Richards v. Travelers' Ins. Co.* 90 Cal. 170; *Ripley v. Railway Pass. Assur. Co.* 2 Big. L. & Acc. Ins. Rep. 722, affirmed on other grounds, 58 U. S. 16 Wall. 520, 21 L. ed. 469.

The term "accidental" as used in an insurance policy is to be taken in its ordinary, popular sense, as meaning, "happening by chance, unexpectedly taking place, not according to the usual course of things, or not expected." *Dosier v. Fidelity & Casualty Co.* 46 Fed. Rep. 444, 13 L. R. A. 114; *United States Mut. Acc. Assn. v. Barry.* 131 U. S. 100, 33 L. ed. 60, affirming *Barry v. United States Mut. Acc. Assn.* 23 Fed. Rep. 712.

Some violence, casualty, or *vis major* is necessarily involved in an accident. *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478, 30 L. J. Q. B. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342.

An accident, within the meaning of an insurance

The insurance was against bodily injuries sustained through external, violent, and accidental means. The premium was to be paid in four monthly instalments by giving an order on the paymaster of the Illinois Central Railroad Company, by which corporation the insured was employed. The insured was hanged by a mob, and this action was brought on the policy.

Further facts appear in the opinion.

Mr. A. C. McNair for appellant.

Messrs. W. B. Mixon and J. B. Sternberger for appellee.

Woods, J., delivered the opinion of the court:

There was no error in the court's action in overruling the appellant's application to compel the attendance of appellee's witness Barnes in open court. Section 1756, Code 1892, provides for the procuring the attendance in open court of a witness whose deposition has been taken by the opposing party. The language of the section is as follows: "Depositions taken, certified, and returned in pursuance of law shall be admissible as evidence in the cause, but when the deposition of any witness shall be taken, the party against whom the witness was examined may procure the attendance of such witness at the trial of the cause, and may put the witness on the stand in open court as the witness of the party who

procured his deposition, and may cross-examine him as the witness of such party, who shall be entitled to re-examine the witness in open court; but the party procuring such oral examination shall be liable for all the costs thereof." At the time this motion was made, and by the court overruled, Barnes was, and for a long while had been, living in New Orleans, La. He was without the jurisdiction of the court, and beyond the reach of its process. The attempt to procure his attendance then and there would have been futile and vain, and the court properly refused to delay the trial of the case, and to make this idle attempt to do a thing which was plainly impossible. The statute has no reference to such case.

It is contended that payment of dues to the paymaster of the Illinois Central Railroad was not payment to the Casualty Company, and that it was incumbent on appellee to prove payment of dues by the insured to the paymaster, and then to follow this up and prove payment by the paymaster to the Casualty Company. This is a mistaken view. The seventh condition in the indorsement on the policy of insurance is as follows: "(7) In case the assured shall fail to leave in the hands of the paymaster the instalments of premium as agreed in said order [that is, the order of the assured on the paymaster to retain the instalments out of the assured's wages], this policy shall be void." The as-

policy, is not less an accident because of the negligence of the person injured. *Champlin v. Railway Pass. Assur. Co.* 6 La. 71; *Freeman v. Travellers' Ins. Co.* 144 Mass. 573.

But injury to the arm of a passenger who inadvertently puts it out of a car window while the train is running at its usual speed was held, in *Morci v. Mississippi Valley L. Ins. Co.* 4 Bash, 585, to be due to the fault of the passenger himself, and therefore not covered by a policy of insurance against railway accidents.

There is no discussion by the opinion in this case of the doctrine of negligence of the insured as affecting insurance, and the decision is believed to be contrary to the almost unanimous decisions in insurance cases of all kinds.

While the burden of proof is upon the plaintiff in an action upon an accident policy to make out a case, it is generally held that there is a presumption that an unexplained personal injury is accidental. But the authorities on this point have not been here collected.

II. Intentional injuries.

a. Self-inflicted.

Cutting one's own throat while insane without knowing the result and not intending thereby to kill oneself constitutes "death by external, violent, and accidental means," within the meaning of a policy. *Blackstone v. Standard Life & Acc. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486.

So, the shooting by which a person takes his own life must be regarded as the result of accident, if it was done when insane, with unconsciousness that the act would take his life. *Mut. Ben. L. Ins. Co. v. Davies*, 87 Ky. 541.

Death caused by accidentally taking and drinking poison is from "external, violent, and accidental means." *Healey v. Mutual Acc. Assn.* 138 Ill. 556, 9 L. R. A. 371, reversing 35 Ill. App. 17; *Travelers' Ins. Co. v. Dunlap*, 69 Ill. App. 515; *Metropolitan Acc. Assn. v. Froidland*, Id. 522; *Mutual Acc. Assn. v. Tuggie*, 39 Ill. App. 503, reversed on another point, 30 L. R. A.

126 Ill. 423; *Hill v. Hartford Acc. Ins. Co.* 22 Hun, 187; *Ingersoll v. Knights of Golden Rule*, 47 Fed. Rep. 272.

A mistake in taking an overdose of opium causing death, when opiates had been prescribed to induce sleep, was held to be by other than "external, violent, and accidental means." That such death was accidental is not denied by the court, but it is said that violence is not an ingredient in the act. *Bayless v. Travellers' Ins. Co.* 14 Blatchf. 143.

In numerous other cases the question of liability for self-inflicted injuries has been considered under a provision excluding liability for death by "suicide," "by one's own hand," "by poison," "by self-inflicted injuries," or similar provisions. So far as such cases turn on the proviso, concerning the accidental character of the injury, they are not here considered.

b. Inflicted by others.

The doctrine of *LOVELACE v. TRAVELLERS' PROT. ASSO. OF AMERICA AND FIDELITY & C. CO. v. JOHNSON* is sustained by nearly all the decisions.

Death caused by the wrongful act of another person, although intentional, may be accidental so far as the insured is concerned, within the meaning of the policy. *Warner v. United States Mut. Acc. Assn.* 8 Utah, 431.

An injury not anticipated or expected by the insured, though intentionally inflicted by another, is an accidental injury, within the meaning of an insurance policy. *Accident Ins. Co. v. Bennett*, 90 Tenn. 256.

So, a blow intentionally struck by another person is accidental within the meaning of an insurance policy against accidents. *Richards v. Travelers' Ins. Co.* 89 Cal. 170.

So, intentional shooting in an affray is an accident, within the meaning of an insurance policy, so far as concerns the person shot. *Supreme Council O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298.

The same is decided in *Robinson v. United States Mut. Acc. Assn.* 68 Fed. Rep. 325. In this case it

assured's duty as to the payment was fully performed when he left the instalment in the hands of the paymaster.

The court refused to charge the jury for appellant as asked in its 12th instruction. This instruction reads as follows: "If the jury believes from the evidence in this case that John Johnson came to his death by the hands of a mob, his death was not the result of an accident, and this case is not within the terms and conditions of the policy sued on, and the jury will find for defendant." By the terms of the policy, indemnity against "bodily injuries sustained through external, violent, and accidental means" was secured by the insured. That Johnson came to his death by external and violent means is not denied; but death by hanging at the hands of a mob, it is said by appellant's counsel, is foreign to our preconceived ideas as to what constitutes an accident. According to lexicographers, an accident is a sudden, unforeseen, and unexpected event. It has been held by courts, adopting this or any similar definition, that, where a man was killed by robbers, this was a case of death by accident, in the sense in which that word is used in accident insurance policies. So, too, it has been held that death from a blow struck by one who has attempted to blackmail the assured was an accident covered by an accident insurance policy.

In these and all like cases in which death occurs by violent means, external to the man, and against or without intention or concurrence of will on the part of the man, death may probably be called an accident. A learned and laborious writer states the true rule for determining whether injuries are accidental. With great simplicity, clearness, and strength, Biddle says: "An injury may be said objectively to be accidental, though subjectively it is not; and, if it occurs without the agency of the insured, it may logically be termed accidental, though it was brought about designedly by another person." See Biddle on Insurance, and the numerous cases cited by him in his elaborate consideration of this subject in his chapter 10, vol. 2, beginning at page 780. See, too, 2 Bacon, Ben. Soc. chap. 15, and the many cases there cited. There is, upon authority, hardly room for controversy as to the rightfulness of the action of the court below in refusing to charge the jury that death by hanging at the hands of a mob was not an accident.

There is evidence to support the verdict, and we are not authorized to substitute another finding, more in consonance with our views of the testimony, for that of the jury, which rests upon sufficient proof. We find no reversible error, and the judgment of the trial court is affirmed.

was found that the victim was unarmed and had made no menacing gestures at the time he was shot, and the court regarded him as the victim of the nervous apprehension of the person who shot him.

That a person waylaid and killed by robbers meets death by violent and accidental means within the meaning of an insurance policy was declared by Withey, J., in the United States district court for the western district of Michigan in the case of *Ripley v. Railway Pass. Assur. Co.* 2 Rlg. L. & Acc. Ins. Rep. 738, but recovery in the case was denied as the policy covered accidents only "while traveling by public or private conveyance," and the robbery was committed while the insured was walking, after leaving a steamer, to finish his journey, of which about 8 miles remained. It was held that while thus walking he was not traveling by public or private conveyance, and the decision on this question was confirmed in 83 U. S. 16 Wall. 236, 21 L. ed. 469.

The doctrine of the above cases is also recognized, either expressly or by implication, in nearly all the cases found *infra*, II. c. *Proviso against liability for intentional injuries*.

But as an exception to these cases, it was held, on the other hand, in *American Acc. Co. v. Carson* (Ky.) 80 S. W. Rep. 879, that wounds inflicted upon an officer by a person resisting arrest were not incurred through accidental means. But a further provision in the policy against liability for intentional injuries is another ground of the decision.

e. *Proviso against liability for intentional injuries.*

While injuries intentionally inflicted by an assault constitute an accident so far as the person injured is concerned, if he did not expect or voluntarily bring on the assault, such injuries give no right of action on a policy stipulating against intentional injuries inflicted by the insured or any other person. *Phelan v. Travelers' Ins. Co.* 38 Mo. App. 640. A brief in this case cites to the same effect an unreported decision of Judge Thayer as circuit judge in St. Louis, Feb. 17, 1887, in the case of *Schreck v. Insurance Co.*

80 L. R. A.

So in *De Graw v. National Acc. Soc.* 51 Hun, 142, it was held that wounds inflicted upon a person in a felonious assault are included among the "intentional injuries inflicted by the insured or any other person" which are excluded from the indemnity of an accident policy.

A stipulation against liability for "intentional injuries inflicted by the insured or any other person" will defeat any liability for death caused by the intentional act of another person, and the intention of the insured is immaterial. *Travelers' Ins. Co. v. McCarthy*, 15 Colo. 85, 11 L. R. A. 297; *Fischer v. Travelers' Ins. Co.* 77 Cal. 248, 1 L. R. A. 572.

Such is the doctrine established by all the cases.

Thus, murder is within a proviso against liability for "intentional injuries inflicted by the insured or any other person. *Hutchcraft v. Travelers' Ins. Co.* 87 Ky. 301; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 651, 33 L. ed. 308.

The intentional killing of a deputy sheriff by a resisting prisoner will not sustain a recovery on a policy for accidental injuries which provides that it shall not cover "intentional injuries" inflicted on the insured by any other person. *American Acc. Co. v. Carson* (Ky.) 80 S. W. Rep. 879.

So, a proviso against liability for death as "the result of design either on the part of the insured or of any other person" does not apply to the shooting of a person by an officer seeking to arrest him, if he did not design to shoot him or know the identity of the man he was shooting. *Utter v. Travelers' Ins. Co.* 85 Mich. 545.

Death caused by a fight, although conceded to be accidental, is held to be excluded from a policy by a provision against liability for death caused by fighting, even if the slayer was insane, where both parties voluntarily engaged in the fight. *Gresham v. Equitable Acc. Ins. Co.* 87 Ga. 497, 13 L. R. A. 683.

To similar effect, a person who fell and caught the thumb of his hand on a chair, and thereby injured it, while engaged in a fight, although the other party was the aggressor, cannot recover under an accident policy stipulating against liability for injuries caused directly or indirectly, wholly or

MISSOURI SUPREME COURT (Division 1).

Margaret V. LOVELACE, *Resp't.*,TRAVELERS' PROTECTIVE ASSOCIATION OF AMERICA, *Appl't.*

(128 Mo. 104.)

The death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident, and not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed.

(December 22, 1894.)

APPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. Henry T. Kent for appellant.

Mr. Valle Rayburn, for respondent:

In construing the benefit certificate issued by defendant, and its constitution and by-laws applicable thereto, a liberal construction favorable to plaintiff should be adopted.

Bacon, Ben. Soc. ¶ 178; Cook, Life Ins. § 18, p. 20; Niblack, Mut. Ben. Soc. ¶¶ 172, 173a; *Henley v. Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 371; *Utter v. Travelers' Ins. Co.* 65 Mich. 548; *Paul v. Travelers' Ins. Co.* 113 N. Y. 472, 3 L. R. A. 448.

The death of Lovelace was by accident, and not from natural causes, in contemplation of law, and within the language of the membership certificate as defined by the provisions of defendant's constitution.

Cook, Life Ins. p. 78, § 49, p. 81, § 50, p. 82, § 51; *Supreme Council O. of C. F. v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256; *Richards v. Travelers' Ins. Co.* 89 Cal. 170; *Hutchcraft v. Travelers' Ins. Co.* 87 Ky. 800; *Ripley v. Railway Pass. Assur. Co.* 2 Big. L. & Acc. Ins. Rep. 739; May, Ins. 8d ed. § 530.

Barclay, J., delivered the opinion of the court:

This is an action upon a benefit certificate, in the nature of an insurance policy, issued to Charles H. Lovelace by the Travelers' Protective Association of America, the defendant, a benevolent association incorporated under

in part, by fighting. *United States Mut. Acc. Asso. v. Millard*, 48 Ill. App. 143.

III. Accident and disease.

a. Distinguished.

Death resulting from malignant pustule caused by contact with putrid animal matter containing bacteria of the kind known as "bacilli anthrax" is death from disease, and not from accidental means, within the meaning of an accident policy. *Bacon v. United States Mut. Acc. Asso.* 123 N. Y. 304, 9 L. R. A. 617, reversing 44 Hun, 569.

Sunstroke or heat-prostration causing the death of a supervising architect is a disease, and not an accident, within the meaning of an insurance policy. *Dodier v. Fidelity & Casualty Co.* 46 Fed. Rep. 446, 13 L. R. A. 114.

So, it was held in *Sinclair v. Maritime Pass. Assur. Co.* 3 Bl. & El. 473, 30 L. J. Q. B. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342, that death caused by sunstroke while a person is engaged in the performance of his regular business does not arise from accident. This was the case of the master of a vessel insured against "accident at sea," and his death occurred on the southwest coast of India. But the question was decided with respect to the character of the disease called "sunstroke," and not with any reference to the fact that it was on shipboard or while at sea.

On conflicting testimony as to whether death was caused by a hurt or by typhoid fever, it was found by the jury in *Standard L. & Acc. Ins. Co. v. Thomas*, 13 Ky. L. Rep. 593, that it was the result of accident.

See also, on this subject, the cases of *Southard v. Railway Pass. Assur. Co.*; *Clidero v. Scottish Acc. Ins. Co.*; *Cobb v. Preferred Mut. Acc. Asso.*; and *McCarthy v. Travelers' Ins. Co.*, in IV. *infra*.

b. Accident caused by disease.

Drowning in a brook while in an epileptic fit is within a policy covering death by "accidental, external, and visible means," although it excludes death "from natural disease or weakness or exhaustion consequent upon disease." *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 43, 50 L. J. Q. B. 232, 43 L. T. N. S. 459, 29 Week. Rep. 116, 45 J. P. 110, 30 L. R. A.

But death by drowning, which ensues upon a fall into the water which is caused by disease, although it is an accidental death, will not sustain a cause of action on a policy which stipulates against liability for death caused, either directly or indirectly, by disease. *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 58 Fed. Rep. 945, 22 L. R. A. 620.

A person who fell without apparent external cause, and struck his forehead violently upon the floor, while his heart and brain are shown to have been much diseased is held to be within the exception of a policy against liability for death or disability caused wholly or in part by bodily infirmities or disease. *Sharpe v. Commercial Travelers' Mut. Acc. Asso.* 129 Ind. 92.

So, death by falling in a fit in front of a moving train is caused by accident, and covered by an accident policy which insures against accidental injuries, and it is not a case within an exception in the policy against liability for death "arising from fits . . . whether consequent upon such accidental injury or not," whether such death results "directly or jointly with such accidental injury." *Lawrence v. Accidental Ins. Co.* L. R. 7 Q. B. Div. 216, 50 L. J. Q. B. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 731.

That an injury from a fall due to a temporary and unexpected disorder is caused by violent, external, and accidental means within the meaning of a policy of insurance confining liability to injuries so caused, is also declared in the late case of *Meyer v. Fidelity & Casualty Co. (Iowa)* 65 N. W. Rep. 323.

c. Disease caused by accident.

Death from apoplexy resulting from an effusion of blood caused by a concussion or contusion of the brain produced by a fall is within an accident policy. *Hall v. American Masonic Acc. Asso.* 86 Wis. 518; *National Ben. Asso. v. Grauman*, 107 Ind. 283.

Death from blood poisoning as a result of the inoculation of some substance into a wound at the time of an accident causing the wound is the result of such accident, within the meaning of an insurance policy. *Martin v. Equitable Acc. Asso.* 61 Hun. 467.

Death caused by embolism or thrombus, which

the laws of Missouri. The pleadings need not be recited. No point is raised touching the formal presentation of the case. Counsel for both parties, with commendable frankness and brevity, have put the material facts into compact form to facilitate the solution of the controversy. It was submitted to the trial judge, without a jury, upon an agreed statement and depositions. The only question now urged is a question of law. Mr. Lovelace was a member in good standing in the defendant association when he met with his death, August 8, 1892. The plaintiff is his mother, the beneficiary in his membership certificate. The contract of insurance is contained in the certificate, and in parts of the constitution of the association, which, counsel mutually agree, control the issue of the litigation. In the statement introducing the report of the case, copies of these documents are given. No point is raised touching proofs of loss, notice, or any formal matter. The defendant meets the case broadly on its merits. The decisive question before us is, Was the death of the assured an "accident," within the true meaning of the contract of insurance? The question was presented by an instruction that, under the evidence, plaintiff was not entitled to recover, which the trial court refused to give. On the contrary, the court found for the plaintiff, and gave judgment accordingly for \$4,119.30 (which included some interest). Defendant then appealed, after the usual preliminaries.

The following facts show the circumstances of the death of Mr. Lovelace: He was a commercial traveler. On the 5th day of August, 1892, he came as a guest to the hotel in Hazel-

hurst, Miss. He was a friend of the proprietor, and spoke to some member of the latter's family on the porch of the hotel before entering the office. Another man named Graves was in the office of the hotel, making more or less noise, and cursing at times, when Lovelace arrived, about half past 11 o'clock at night. The only witness besides Graves who saw the killing was one Scott. From his testimony it seems that that night the proprietor, Mr. Brown, was sick, and there was no one in charge of the office. Scott was putting in the chairs from the porch, when Lovelace walked in and said, "Who has got charge of the office to-night?" Scott answered, "No one," and that he was going to bed. Lovelace then said, "It looks like somebody ought to be about it," and Lovelace then turned to Graves, and said, "Look here, young man, you have got to get out of here, drinking and cursing that way," and Graves replied, "What have you got to do with it?" Lovelace answered, "I am a guest at the hotel, and I think a heap of the family; and I think in the absence of Mr. Brown, it is sorter my duty to see after things." Graves said, "You had better put me out." Lovelace replied, "I will do it in a pair of minutes," and Graves said, with an oath, he would like to see him (Lovelace) put him out. Lovelace said, "I will do that — quick." Scott then walked between them, and separated them; Lovelace started up stairs, but it seems that he turned again, and went back to the register. Lovelace then said with an oath, "Don't you shake your hand in my face." (Graves had made a gesture which Lovelace interpreted as he stated.) They were then a few feet apart.

was the direct result of the breaking of an arm by accident, is a death caused by accidental means. *Peck v. Equitable Acc. Asso.* 52 Hun, 255.

Where an angular draw-bar of several hundred pounds' weight fell upon a sensitive and delicate portion of one's person, bearing him down to the earth and hurting him, although he did not leave work until night, but became seriously ill during the night, it was held, in *Owens v. Travelers' Ins. Co.* (Marion Co. Super. Ct. Ind.) 12 Ins. L. J. 75, that the accident was the cause of the illness and resulting death.

Death from erysipelas resulting from an accidental injury is within an accident policy covering death of which an accident was the proximate and sole cause, and is not within an exception of death "directly or indirectly in consequence of disease, nor . . . wholly or in part by bodily infirmities or disease." *Accident Ins. Co. v. Young*, 20 Can. S. C. 280, 12 Can. L. T. 217, affirming on this point. *Young v. Accident Ins. Co.* Mont. L. Rep. 6 Super. Ct. 3.

But an accident policy does not cover death from erysipelas caused by a wound, where the policy contains a clause excluding liability for death from "rheumatism, gout, hernia, erysipelas, or any other disease of secondary cause arising within the system of the insured before or at the time or following such accidental injury, whether causing such death directly or jointly with such accidental injury." *Smith v. Accident Ins. Co.* L. R. 5 Exch. 802, 39 L. J. Exch. 211, 23 L. T. N. S. 861, 18 Week. Rep. 1107.

Death from hernia caused by a violent accident in striking against the knob of a door while running is within an accident policy, and not within an exception of death "wholly or partially, directly or indirectly, from . . . hernia." *Miner v.* 80 L. R. A.

Travelers' Ins. Co. 3 Ohio Dec. 239, 2 Ohio N. P. 108.

So, it is held in *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, that death from hernia resulting from accident is within an accident policy, though it makes an exception of death or disability from hernia.

So, in England death from hernia caused by external violence is within a policy insuring against accidental injuries, and is not within an exception of death from hernia, erysipelas, etc., or "any other disease or cause arising within the system of the insured before or at the time of or following such accidental injury (whether causing death or disability, directly or jointly with such accidental injury)." *Fitton v. Accidental Death Ins. Co.* 17 Q. B. N. S. 122, 34 L. J. C. P. 23.

Pneumonia caused by taking cold while confined to bed as the result of an accident, when this would not have resulted if the person had been in a normal state of health, is regarded as the effect of the accident. *Isitt v. Railway Pass. Assur. Co.* L. R. 23 Q. B. Div. 504.

An accident causing peritonitis which results in death is within a policy limiting liability to cases where an injury is the proximate cause of death, even if the insured was very liable to a recurrence of the disease by reason of former attacks. *Freeman v. Mercantile Mut. Acc. Asso.* 156 Mass. 851, 17 L. R. A. 755. See also note on "Proximate Cause of Death within the Meaning of a Life Insurance Policy," with this case in 17 L. R. A. 753.

But death from typhoid fever supervening upon an accidental injury is not within the protection of a policy which denies liability except where the injury is the proximate and sole cause of death. *Whitehouse v. Travelers' Ins. Co.* (U. S. C. C. N. H.) 7 Ins. L. J. 23. This case seems hardly reconcilable with the others.

Graves replied, "You put me out. You have not got any more to do with this than I have." Lovelace then declared he would slap Graves, and applied an opprobrious epithet to him. Lovelace then slapped and pushed Graves back until the latter struck the wall or door, which was closed; and, while they were thus together, Graves drew a pistol from his pocket, and shot Lovelace several times, in consequence of which he afterward died. Lovelace weighed 175 pounds. He would have pushed Graves, who was much lighter and smaller, out of the door, if it had been open. Lovelace did not know Graves at the time. The next day he asked what boy that was that shot him.

The foregoing gives a sufficient description of the scene, as defendant claims it occurred. The substance of the contention on that side is that Mr. Lovelace lost his life at the hands of Graves in a fight with the latter, brought on by the language and acts of the former. It was not claimed, however, that Lovelace knew that Graves was armed when the difficulty began. The defendant asserts that "it is not an accidental killing, such as to make the defendant liable, where the death was the result of a rencounter, or where the party killed was the voluntary agent in bringing on the difficulty resulting in his death, or placed himself in such a position as to induce it." On the other hand, the plaintiff insists that the occurrence was an "accident." The contract in this case is to be interpreted so as to give effect to the intention of the parties, as expressed by the language they have used. That intention is, moreover, to be construed as the reasonable and natural one imported by their words.

A pistol wound causing tetanus with great bodily pain and delirium or fever may be found to be the proximate cause of death, where a person insured against accidents, excluding suicide, sane or insane, and intentional injuries, cuts his throat in a period of delirium or uncontrollable frenzy. *Travelers' Ins. Co. v. Melick*, 65 Fed. Rep. 173, 27 L. R. A. 629.

On the other hand, death by suicide while insane, when the insanity was caused by a prior accidental fall and injury, is too remote to be regarded as caused by accident. *Streeter v. Western U. Mut. L. & Acc. Soc.* 65 Mich. 190.

So, where one took poison while insane as the result of an accident several months before, it was held that his death was not the proximate result of the accident so as to make the insurer liable on an accident policy. *Harris v. Travelers' Ins. Co.* Chicago Super. Ct. 1868, cited in 7 Am. L. Rev. 589.

d. Disease aggravated by accident.

An accident policy covering total disability only gives no right of action, where an injury within the terms of the policy caused only partial disability until it was aggravated by a subsequent injury, which was not covered by the policy. *Rhodes v. Railway Pass. Ins. Co.* 5 Lana. 71.

The death of a person resulting from a fall, when death would not have resulted if he had not had gall-stones, is not covered by a policy which excludes death "accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not." *Cawley v. National Employers' Assn. & Gen. Assur. Assn.* 1 Cal. & El. 597.

Where a person subject to kidney disease met with an accident when free from any active symp-

Rutherford, Inst. 2d Am. ed. p. 418. "In case of death by accident," is the language immediately in view. In the same contract we note that the defendant was to pay \$100 "in case of his death from natural causes." The form of the contract is very simple. It is free from those limiting terms which, in two of the three cases cited by the defendant, formed the basis of the judgments therein. We are merely called on to say whether his death was by "accident," within the intention of these parties. They did not define the term, further than its use in contradistinction to "death from natural causes" may be considered as having some significance. We hence should give the word its usual, natural, and popular meaning,—there being nothing to indicate a different purpose in its use. In that sense, was Lovelace's death an accident? We find the following definitions of "accident" in the law dictionaries: "Death by accident means death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things." Anderson (1889). "An unusual or unexpected event." Abbott (1879). "An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence." Black (1891). "An event which, under the circumstances, is unusual, and unexpected by the person to whom it happens." Bouvier (1883). "A casualty; an act of Providence; an event that takes place without one's foresight or expectation." Burrill (1887). "An extraordinary incident; something not expected."

toms of the disease, which returned again about five weeks after the accident, it was held that there was no proof that the accident was the cause of his death resulting from the disease. *McKechnie v. Scottish Assn. Ins. Co.* 17 Sess. Cas. (S. C.) 6, cited in note in 1 Beach on Insurance, § 222. What seems to be the same case is a little more fully presented in 2 Bacon on Benefit Societies, pp. 989, 990, and cited as *Anderson v. Scottish Ins. Co.* 27 Scott. L. Rep. 20, where it appears that the policy contained a provision against liability for death arising from natural disease, although accelerated by accident.

IV. Other instances.

An involuntary death by drowning is a death by accidental means. *Mallory v. Travelers' Ins. Co.* 47 N. Y. 52, 7 Am. Rep. 410; *Manufacturers' Acc. Indemnity Co. v. Dorgan*, 55 Fed. Rep. 945, 23 L. R. A. 620; *Tucker v. Mutual Ben. L. Co.* 50 Hun. 50; *Knickerbocker Casualty Ins. Co. v. Jordan* (Ohio Dist. Ct.) 11 Ins. L. J. 475; *Boyd (or McDonald) v. Refugee Assur. Co.* 17 Sess. Cas. 955, 27 Scott. L. Rep. 764; *Winspear v. Accident Ins. Co.* L. R. 6 Q. B. Div. 42, 50 L. J. Q. B. 292, 43 L. T. N. S. 450, 29 Week. Rep. 116, 45 J. P. 110; *Trew v. Railway Pass. Assur. Co.* 9 Week. Rep. 671, 30 L. J. Exch. 317, 6 Hurlst. & N. 880, 4 L. T. N. S. 833, 7 Jur. N. S. 873, reversing 5 Hurlst. & N. 211, 29 L. J. Exch. 218, 8 Week. Rep. 191; *Lancaster v. Washington L. Ins. Co.* 65 Mo. 121.

So, drowning while bathing in very shallow water, caused by sudden insensibility from unexplained causes, was held to be within an accident policy. *Reynolds v. Accidental Ins. Co.* 22 L. T. N. S. 820, 18 Week. Rep. 141.

A wound produced by an accident, which causes one to fall into the water and drown, makes a case of accidental death. *Mallory v. Travelers' Ins. Co.* *supra*.

Wharton Law Lex. (1888). The larger dictionaries of the English language furnish these, among other, definitions of "accident," viz.: "In general, anything that happens or begins to be without design or as an unforeseen effect.

Specifically, an undesirable or unfortunate happening; . . . a casualty or mishap." Century (1899). "Literally, a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; . . . often an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty; a mishap; as, to die by an accident." Webster, International (1892). "An event proceeding from an unknown cause, or happening without the design of the agent; an unforeseen event; incident; casualty; chance." Worcester (1888). On several occasions the courts have approved or quoted some of the foregoing definitions in dealing with the subject of accident insurance. *Schneider v. Provident L. Ins. Co.* (1869) 24 Wis. 80, 1 Am. Rep. 157; *Providence L. Ins. & Invest. Co. v. Martin* (1869) 82 Md. 815; *Ripley v. Railway Pass. Assur. Co.* (1870) 2 Big. L. & Acc. Ins. Rep. Cas. 741, Fed. Cas. No. 11,854; *North American L. & Acc. Ins. Co. v. Burroughs* (1871) 69 Pa. 51, 8 Am. Rep. 712; *Supreme Council O. of C. F. v. Garrigus* (1885) 104 Ind. 140, 54 Am. Rep. 298. In other cases they have freely used the word in decisions, in the broad meaning which those definitions express. *Vincent v. Stinehour* (1835) 7 Vt. 62, 29 Am. Rep. 145; *Bostwick v. Stiles* (1868) 35 Conn. 195; *Clements v. London & N. W. R. Co.* [1894] 2 Q. B. 482. Some special cases on

accident policies, different from that now before us, furnish, nevertheless, opinions of learned judges which cast some useful light on the present controversy. In *Sinclair v. Maritime Pass. Assur. Co.* (1861) 4 L. T. N. S. 15, a case wherein the court of queen's bench denied a right of recovery for death caused by a sunstroke sustained by the master of a ship in China, holding that such death was not "a personal injury arising from an accident at sea," it was said by Chief Justice Cockburn: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to arrive with perfect accuracy at the boundary line between death from accident and death from natural causes. At the same time we think we may safely assume that in the term 'accident,' as so used, some violence, casualty, or *vis major*, is necessarily involved." In *Fennick v. Schmalz* (1868) L. R. 3 C. P. 33, Willes, J., held that a snowstorm was not an accident (as mentioned in a charter party), because it is one of the ordinary operations of nature. He said it "is an incident, rather than accident." He then remarked: "An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things." In *Ripley v. Railway Pass. Assur. Co.* (1870), already cited, it is said: "In the more popular and common acceptance of the word, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." Death by drowning (*Winspear v. Accident Ins. Co.* (1880) L. R. 6 Q. B. Div. 42), and by fright (*McGlinchey v. Fidelity*

But a person found dead in a plunge bath in which the water was from 4 to 5 feet deep, and about 8 or 10 feet square, and at a temperature of more than 100 degrees, was held, in *Tennant v. Travelers' Ins. Co.* 31 Fed. Rep. 322, to have died from other causes than "external, violent, and accidental means," where he was a heavy drinker of intoxicating liquors, and the evidence showed that such a bath would be likely to bring on an epileptic fit, as he was subject to such fits. Whether this could be called an accident or not is not decided, as under the policy death must be caused by means which were also external and violent.

The rupture of the tympanum of an ear by the external violence of the water in diving is an accidental injury resulting from violent and external causes. *Rodey v. Travelers' Ins. Co.* 8 N. M. 316.

The death of a person by freezing on a prairie in consequence of the accidental breaking down of his vehicle, together with the sudden and unexpected change of the weather to great severity, is a death by external, violent, and accidental means. *North West Com. Travellers' Assn. v. London Guarantee & Acc. Co.* 10 Manitoba L. Rep. 537.

Death caused by choking on food which, in an attempt to swallow it, accidentally passes into the windpipe, is due to "external, violent, and accidental means." *American Acc. Co. v. Reigart*, 54 Ky. 547, 21 L. R. A. 661.

Death from asphyxia occasioned by deadly gas in a shallow well, into which one descends to fix a pump, is caused by "external, violent, and accidental means." *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661.

Death from the inhalation of illuminating gas while asleep, without any intention to commit suicide, is due to "external, violent, and accidental means." *Paul v. Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443, affirming 45 Hun, 313, 80 L. R. A.

Cases as to the effect of provisos against liability for inhaling gas, taking poison, etc., are not included here.

A rupture on the loin caused by jumping in great haste from a railroad car at a station, going to another depot and coming back in haste, running part of the way, is not caused by accident within the meaning of an insurance policy, when there was no stumbling, slipping, or falling or anything accidental in the movements of the person. *Southard v. Railway Pass. Assur. Co.* 24 Conn. 574. (Decision by Judge Shipman of the U. S. Dist. Ct. as arbitrator.)

Where a person on rising from bed and while in the act of putting on his stockings felt something give way inside, and died shortly afterwards, when examination showed that his colon had fallen out of place and become folded causing great distention and resulting pressure upon the heart, stopping its action, it was held that his death was not caused by "violent, accidental, external, and visible means," and within the opinion of Lord Adam the death was not accidental within the meaning of the policy. *Cliedero v. Scottish Acc. Ins. Co.* 29 Scott. L. Rep. 303. (Quoted at some length in *Beach on Insurance*, § 248.)

Injury to the retina of one's eye by rupture caused by carrying heavy baggage on a warm day is not effected by "external, violent, and accidental means," where there was nothing unusual in the transaction except the result to the eye. *Cobb v. Preferred Mut. Acc. Assn. (Ga.)* 22 S. E. Rep. 976.

Whether the rupture of a blood vessel while exercising with Indian clubs was due to "external, violent, and accidental means" was held, in *McCarthy v. Travelers' Ins. Co.* 8 Bias. 362, to depend on the question whether or not any unforeseen, accidental, or involuntary movement of the body, or any unforeseen or unexpected circumstances, in-

& *O. Co.* (1888) 80 Me. 251) have been held to be deaths by accident under policies of much narrower scope than that now before the court.

We have quoted these various cases, definitions, and comments, not with a view to approve or criticize any one of them, but to indicate the very wide range of meaning borne by the word "accident," when unaccompanied with any limitation in the context. We shall not attempt to furnish any general definition of an accident in the particular case before us, further than the conclusion we shall announce may imply. The learned counsel for defendant concedes the force of the argument deduced from the ordinary meanings of the word, but insists that they cannot apply where the insured has voluntarily assumed the risk which proves to be fatal,—in this instance by entering into the altercation which led to his death. But there is one weak point in that contention. There is no proof whatever that the insured had any cause or reasonable ground to anticipate that he would be shot or killed when he undertook to attempt to eject Graves from the hotel. There is no proof that Graves exhibited a weapon, or made any remarks indicating a purpose to shoot, before the affray. The mere fact that Lovelace engaged in or brought on a fight in the manner described did not of itself indicate that he sought death, or had reason to expect it as a consequence of his action. In *Schneider v. Provident L. Ins. Co.* (1869) 24 Wis. 28, 1 Am. Rep. 157, a party was allowed to recover upon an accident policy, though it appeared he had been negligent in attempting to board a moving train of cars. The court said: "There is nothing in the definition of the word 'accident' that excludes the negligence of the injured party as one of the elements contrib-

uting to produce the result. . . . An accident may happen from an unknown cause; but it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected by the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident." Page 80. That decision was approvingly followed in the case from the 82 Md. report already cited. In *Keene v. New England Mut. Acc. Assn.* (1894) 161 Mass. 149, a recovery on an accident policy was sustained where the assured was run down while passing over a street crossing of a railway track in front of a moving freight car, notwithstanding the policy required the assured to "use all due diligence for personal safety." In *Cornish v. Accident Ins. Co.* (1889) L. R. 23 Q. B. Div. 453, it appeared that the insured met his death by attempting, in broad daylight, to cross the main line of a railway in front of a coming train, which struck and killed him. The English court of appeal held that there could be no recovery upon a policy which excepted, from the risks insured against, accidents happening by "exposure of the insured to obvious risk of injury." But Lindley, L. J. (who delivered the leading opinion) placed the ruling upon the language just quoted, remarking, in so doing: "We accept the view of the jury that this accident may be called an 'ordinary misadventure,' but the question is whether the policy covers it." He thus characterized the mishap as an "accident," notwithstanding the gross negligence of the insured. In *Travelers' Ins. Co. v. McConkey* (1888) 127 U. S. 661, 32 L. ed. 808, where the insured had been killed by a shot (whether fired by himself or by another was in issue), the Supreme Court of the United States

terfered with the exercise, thereby producing the result. If the bursting of the blood vessel resulted merely from the exercise in the ordinary way it was held to be the result of disease and not of accident.

But death from an accidental strain while pitching hay or from an accidental blow from a pitchfork handle is within an accident policy. *North American L. & Acc. Ins. Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212.

Dislocation of the cartilage of the knee in stooping is within an accident insurance policy against any bodily injury caused by violent, accidental, external, and visible means, and excepting injuries arising from natural disease, or weakness, or exhaustion consequent upon disease, when the insured before the accident has not suffered from weakness of the knee or knee joint. *Hamllyn v. Crown Acc. Ins. Co.* [1885] 1 Q. B. 750.

The death of a person which occurred about an hour after his horse had been frightened and ran, and was brought under control after running a considerable distance, is regarded as due to "external, violent, and accidental means," whether it resulted from fright or from the exertion. *McGinchey v. Fidelity & Casualty Co.* 80 Me. 251.

Injury to the spine, caused by lifting a heavy burden in the course of business, is within the provisions of a policy of insurance against injury arising from accident, if occasioned by any external or material cause. *Martin v. Travelers' Ins. Co.* 1 Fost. & F. 605.

A person killed in jumping from a car from which other persons jumped safely at the same time may be held by the jury to have met death

by accident, as an injury results through accidental means if there is anything unforeseen, unexpected, or unusual in the act which precedes it. *United States Mut. Acc. Assn. v. Barry*, 121 U. S. 100, 32 L. ed. 60, affirming *Barry v. United States Mut. Acc. Assn.* 23 Fed. Rep. 712.

Injury while getting from the platform upon moving cars was also held accidental in *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157.

The death of a yard switchman or a yard brakeman while handling broken cars in the performance of his service is an accident. *National Ben. Assn. v. Jackson*, 114 Ill. 532.

Stepping from a car into a hole in a bridge which had not been observed was held to be an accident within the meaning of an insurance policy, in *Burkhard v. Travelers' Ins. Co.* 102 Pa. 232, 43 Am. Rep. 205.

A death caused by stumbling and falling against an engine when running to get the mail from a passing train is from "external, violent, and accidental means." *Equitable Acc. Ins. Co. v. Osborn*, 90 Ala. 201, 13 L. R. A. 207.

Falling without foresight or expectation is accidental within the meaning of an insurance policy. *Providences L. Ins. & Invest. Co. v. Martin*, 33 Md. 810.

Death is accidental when it results from a fall from a window. *Travelers' Ins. Co. v. Harvey*, 63 Va. 949.

Many other cases similar to these have arisen in which injuries have been held accidental, and in which the accidental character of the injuries was too plain for dispute, and was not involved in the questions contested.

B. A. R.

based a similar rule, denying a recovery, on the express terms of the policy, excepting from its scope "intentional injuries inflicted by the insured or any other person." A like ruling was made in construing the same language of an accident policy in this state. *Phelan v. Travelers' Ins. Co.* (1890) 39 Mo. App. 640. In other cases it has been held that death produced by the direct violence of a third party is none the less an accident, as regards the insured, because the injury was intentionally inflicted by the third party. *Hutchcraft v. Travelers' Ins. Co.* (1888) 87 Ky. 300; *Richards v. Travelers' Ins. Co.* (1891) 89 Cal. 170. But in the former case a recovery was denied because of a clause in the policy similar to that quoted above from the *McConkey Case*. It has been declared, with reference to fire insurance, that even gross negligence of the insured will not defeat a recovery in the absence of stipulations having such an effect. *Shaw v. Robberds* (1837) 6 Ad. & El. 75; *St. Louis Ins. Co. v. Glasgow* (1844) 8 Mo. 713, 41 Am. Dec. 661; *Johnson v. Berkshire Mut. F. Ins. Co.* (1862) 4 Allen, 388; *Enterprise Ins. Co. v. Parisot* (1878) 35 Ohio St. 35, 35 Am. Rep. 889. In *Supreme Council O. of U. F. v. Garrigus* (1885) 104 Ind. 133, 54 Am. Rep. 295, it was ruled that where the insured engaged in a fight without fault on his part, in consequence of which he received in-

juries resulting in his death, the latter was an "accident," within the meaning of a benefit certificate. In view of the definitions and legal precedents above quoted and cited, and of the very general terms of the policy under consideration, we conclude that its reasonable and natural meaning includes within the term "accident" such a death as Lovelace met. Whether he acted lawfully as a guest of the hotel, during the absence and illness of the proprietor, in attempting to remove Graves from the hotel office by force, we think needless to investigate. It may be assumed that by his course of conduct he voluntarily assumed the risks of a fight; but there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider his killing an "accident," in the popular and ordinary sense in which that word is generally used. It certainly was an accident so far as he was concerned. We do not doubt that such should be the construction given to the word in the contract in suit, and that, in so concluding, we give effect to the true purpose and intent of the parties to the document. The learned trial judge reached the same conclusion.

The judgment is affirmed.

Black, Ch. J., and Brace and Macfarlane, JJ., concur.

OHIO SUPREME COURT.

Phlander W. H. TUTTLE *et al.*, *Piffs. in Err.*,

Henry BURGETT, Admr., etc., of William Burgett, Deceased.

(38 Ohio St. 498.)

- *1. Where no place of performance of an obligation is agreed upon by the parties, the obligee, as a general rule, may designate any reasonable place of performance.
2. Under a mortgage conditioned that the mortgagor shall furnish the mortgagee and his wife, during life, comfortable rooms, food, clothing, medicine, and medical attendance in sickness, and provide them with the necessaries and comforts suitable for persons of their age and situation in life, no place being specified where such support shall be furnished them, they are not obliged to receive it at the house of the mortgagor, but are entitled to have it furnished at such reasonable place or places as they may select.
3. When, with knowledge of such selection, the mortgagor fails to furnish the support required by his contract, and declares his intention not to do so, or pay for any support which may be furnished by others, the condition of the mortgage is broken, and an ac-

tion of foreclosure may be maintained for the reasonable value of the support provided by others, though it was provided without the request of the mortgagor, or demand upon him to furnish the support required.

4. The oral declarations of a party to a written instrument, made before or at the time of its execution, of an intention or purpose not therein expressed, or different from that to be derived from its terms, are not within the rule which permits extrinsic evidence of the situation of the parties and of the surrounding circumstances when the instrument was executed, and are inadmissible in an action on the instrument where its reformation is not sought.

5. A grantee who has agreed to support his grantor during life, in consideration of the conveyance of the property, will not be discharged from his obligation by the bringing of a suit to set aside the conveyance and recover back the property, where the suit has been abandoned and dismissed without trial, and the grantee has not been disturbed in the possession or enjoyment of the property.

(November 23, 1895.)

ERROR to the Circuit Court for Ashtabula County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to foreclose a mortgage. *Affirmed.*

Statement by Williams, J.:

William Burgett, who was the owner of a valuable farm in Ashtabula county, and of a considerable amount of personal property, together estimated to be worth about

*Headnotes by the COURT.

NOTE.—In connection with the above case as to the construction and effect of a contract for support of persons, see also *Vandervee v. Clark* (Ind.) 8 L. R. A. 519; *McArthur v. Gordan* (N. Y.) 12 L. R. A. 667.

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\$10,000, being of advanced years, and his wife an invalid, conveyed his farm, his wife joining in the conveyance, and transferred his personal property, to his son-in-law, Philander W. H. Tuttle, upon the consideration that he would support Burgett and his wife during life, furnish them with comfortable rooms, food, clothing, medicine, and medical attendance in sickness, provide for each of them the necessaries and comforts suitable for persons of their situation in life, and at their death place a marble slab properly inscribed at the grave of each, and also pay to William Burgett \$50 a year so long as he should live.

To secure the performance of his obligation, Tuttle and his wife united in the execution of a mortgage of the farm back to Burgett. The condition of the mortgage, which, it is admitted by the pleadings, contains the entire contract relating to the support of Burgett and wife, is as follows:

"The condition of this deed is such that, whereas the said P. W. H. Tuttle has this day received the above-described lands together with an amount of personal property this day delivered, in consideration of supporting said William Burgett and Mary Burgett, during the term of their natural lives. To furnish each of them with comfortable rooms, food, clothing, medicine, and medical attendance in sickness, and at their death to place at the grave of each of them a marble slab, properly inscribed. To pay to William Burgett \$50 each year, and to carefully provide for each of them the necessaries and comforts of life, suitable for persons of their age and situation in life.

"Now, if the said P. W. H. Tuttle, his heirs, assigns, executors, or administrators, shall well and truly perform all covenants and agreements, according to the tenor thereof, to the said William Burgett and Mary Burgett, the above deed shall be void; otherwise the same shall remain in full force and virtue in law."

The deed and mortgage were executed on the 4th day of April, 1884, and soon thereafter Burgett and his wife left the farm where they had lived for many years and went to reside with Tuttle in the village of Geneva some miles distant from the farm, and remained there receiving their support from Tuttle and his wife until February following, when they became dissatisfied and went to the home of their son Henry, which was near the farm, and after staying there a short time went to the home of their son-in-law, Woodruff, and remained there until the date of their death, which occurred on the 28th day of January, 1886, both dying on the same day. While Burgett and his wife were at Henry's, he took care of them, providing everything necessary for their comfortable support, under an agreement with his father that he should be paid a reasonable compensation therefor; and they were in like manner provided for by Woodruff while they remained at his house, under a like agreement. Administration having been granted on the estate of William Burgett, Henry and Woodruff presented their claims for the support furnished by each respect-

ively, which were allowed, and suit was brought in the court of common pleas of Ashtabula county, to foreclose the mortgage for the amount due on them.

When Burgett and his wife were leaving Tuttle's house, he forbade their going, and declared, in substance, in the presence of Henry, that he would not provide support for them while they were away, nor pay for any furnished to them, and afterward gave that information to Woodruff. Tuttle alleges in his answer that he was always ready and willing to furnish and provide at his home in Geneva everything he was required to do by the condition of the mortgage, but was prevented by the absence of Burgett and his wife.

Soon after leaving Tuttle's, Burgett brought a suit to set aside the deed and mortgage and recover back the farm and personal property, charging that the conveyance and transfer were obtained by fraud and undue influence while he and his wife were incapacitated by age, sickness, and their enfeebled condition to transact business.

These charges were denied by Tuttle, and after Burgett's death the action was dismissed without trial. The bringing of that action was set up as a defense in the foreclosure suit, the claim being that it constituted an abandonment and repudiation of the contract and released Tuttle from the further performance of the condition of the mortgage. Other issues were made which it is not necessary to notice. After trial and judgment in the common pleas court the cause was taken on appeal to the circuit court, where all the issues were found for the plaintiff, and a decree of foreclosure rendered, from which error is prosecuted here. It appears from the bill of exceptions that the court, on objection made by the plaintiff's counsel, excluded evidence offered by the defendant of verbal declarations which it was claimed Burgett had made while the negotiations between him and Tuttle were in progress, to the effect that if the arrangement was consummated Burgett expected he and his wife would live at Tuttle's, in Geneva, or that they were to live there. Any further facts necessary to an understanding of the questions raised in the case will be stated in the opinion.

Mr. F. R. Smith, with Messrs. Burrows & Jerome, for plaintiffs in error:

Tuttle was not bound to support the mortgagees elsewhere than at his own home.

Parker v. Parker, 126 Mass. 488; *Currier v. Currier*, 2 N. H. 75.

In *Jenkins v. Stetson*, 9 Allen, 188, the court says: "By ceasing to receive support" the obligee intended "to get rid of the performance of her part of this mutual obligation." And such conduct on her part was held to be a waiver of her support, and estopped her from complaining that the support was not furnished.

Messrs. Howland & Starkey, for defendant in error:

The contract was silent as to the place of performance, the mortgagee therefore had the right to choose the place, putting the mortgagor to no needless expense.

Tope v. Tope, 18 Ohio, 520; *Wilder v. Whitte-*

more, 15 Mass. 262; *Hubbard v. Hubbard*, 12 Allen, 586; *Thayer v. Richards*, 19 Pick. 398; *Lucas v. Nichols*, 5 Gray, 810; *Parker v. Parker*, 126 Mass. 487; *McArthur v. Gordon*, 126 N. Y. 597, 12 L. R. A. 667; *Rowell v. Jewett*, 69 Me. 293; *Boret v. Crommie*, 19 Hun, 209; *Loomis v. Loomis*, 35 Barb. 624; 1 McVey, Dig. p. 188, ¶ 162.

The condition in this mortgage was the promise of Tuttle. If he wished to limit his liability he should have used proper words. If he desired to limit the performance of his promise to a certain place he should have named the place in the contract.

State v. Worthington, 7 Ohio, pt. 1, p. 171.

After Tuttle had broken the condition of the mortgage and was refusing to furnish support Burgett had a right to treat the contract as broken and bring his action for such relief as seemed to him then most suitable.

Hochster v. De la Tour, 2 El. & Bl. 678;

Frost v. Knight, L. R. 7 Exch. 111; *Cort v. Ambergate, N. & B. & E. J. R. Co.* 17 Q. B. 127.

Tuttle's declaration and conduct made a demand for support unnecessary and constituted a breach in law. A demand for support would have been useless.

Pettes v. Case, 2 Allen, 546; *Barnes v. Barnes*, 9 Mackey, 479.

Williams, J., delivered the opinion of the court:

In behalf of the plaintiffs in error, it is claimed (1), that under the agreement of the parties as expressed in the condition of the mortgage, Burgett and his wife were obliged to receive their maintenance and support at the residence of Tuttle, and therefore the failure or refusal to furnish it elsewhere constituted no breach of the condition; or (2), if such is not the legal effect of the condition as written, it was competent to prove by the verbal declarations of Burgett, made contemporaneously with the execution of the contract, or prior thereto, that the support and maintenance were to be provided at the house of the mortgagor; and (3), that the commencement of the suit by Burgett to set aside the conveyance was an abandonment and repudiation of the contract by him, which excused further performance of it by Tuttle.

1. The agreement as expressed in the mortgage contains no stipulation which makes it a condition to the right of the mortgagee and his wife to the support which Tuttle thereby agreed to furnish, that it be accepted at the home of the latter, or requires that it be either furnished or received at that, or any other specified place. It is silent on that subject, and creates a general obligation on the part of Tuttle to supply Burgett and wife with whatever he agreed to furnish them, without limitation as to the place where performance of the agreement should be made, or might be required. The obligation is expressed in the language of the promisor who executed the mortgage, and according to a well-established rule, should be taken most strongly against him, if there be doubt or ambiguity in its terms. If it were the intention of the parties that performance of the

obligation could be required only at a particular place, that intention could easily have been expressed, as could any other condition qualifying the rights of the promisee. As a general rule, where no place is mentioned for the performance of an obligation, it is to be performed to the obligee in person who may designate any reasonable place of performance; and that rule has been held applicable, in many cases, to contracts of the kind we have under consideration. *Wilder v. Whittemore*, 15 Mass. 262; *Crocker v. Crocker*, 11 Pick. 252; *Thayer v. Richards*, 19 Pick. 398; *Pettes v. Case*, 2 Allen, 546; *Hubbard v. Hubbard*, 12 Allen, 586; *McArthur v. Gordon*, 126 N. Y. 597, 12 L. R. A. 667; *Stillwell v. Pease*, 4 N. J. Eq. 74; *Rowell v. Jewett*, 69 Me. 293.

In some of the cases cited the question arose upon the construction of wills requiring devisees or legatees to provide support for persons named; while in others it was made on mortgages with conditions similar to that of the mortgage in question; and the rule as stated is recognized in all of them. In the case of *Wilder v. Whittemore* it was held that, "upon a mortgage conditioned that the mortgagor shall maintain and support the mortgagees during life, the mortgagee has the right to support wherever he shall choose to reside, so that needless expense be not created to the mortgagor." And in *Pettes v. Case*, the court held that the condition of a mortgage, not differing in any essential feature from the one before us, was broken when the mortgagor after knowledge that the persons entitled to support are at a reasonable place, where they intend to receive their support, declares to the person in whose family they are that he will not pay for their support at that place, and does not pay therefor, though no special demand is made upon him for the support.

It is said, in the opinion of the court, that under such a contract the mortgagor "was bound to support the mortgagees, without their making a demand for support. And they were not bound to receive support at his house, but had a right to be supported wherever they might choose to live, provided they cause no needless expense."

We concur in that interpretation, and find nothing in the obligation of the plaintiff in error which requires a different construction, or gives it any different effect. Contracts of this nature, entered into by persons of declining years when their capacity for business has in some measure become impaired, with children or relatives who receive not only a full consideration for their engagement, but usually something in way of bounty also, should receive a liberal construction in favor of such elderly people, and the courts have enforced a corresponding performance in their behalf. A comfortable support and maintenance, which Tuttle's agreement bound him to furnish, must have been understood by the parties to be such as would comfortably situate Burgett and his wife, as well as supply them with adequate food and clothing, and other necessities of life; and to afford them that comfort they should be allowed reasonable liberty in the

choice of their situation and surroundings, there being no express limitation in that respect contained in the contract. To deny them that privilege, and compel them to remain under the control of the party whose pecuniary interest is to be relieved of the burden at the earliest moment, would place them in a condition of dependence scarcely less in degree than that of persons under guardianship, and occasion a constant dissatisfaction and discomfort which would defeat an important purpose, and the real spirit of the contract, though there should be the strictest observance of its letter in the supplies provided for them; and that restraint should not be imposed unless it is made to appear with reasonable certainty that such was the agreement of the parties.

The cases of *Parker v. Parker*, 126 Mass. 438, and *Currier v. Currier*, 2 N. H. 75, are cited in support of the construction claimed by the plaintiff in error. In the former of these cases, in giving construction to a will by which the testator gave to his widow during life the use of all his property, including the homestead farm where he and his family had always lived, and to his unmarried daughter a small sum of money, "a home and maintenance during the time she remained unmarried," it was held to be the intention of the testator that the daughter should have "the home and maintenance" given her, on the farm where the family lived. It was evidently expected by the testator that the widow would remain on the homestead devised to her, and that the daughter, while she remained unmarried, should live at home with her mother. In giving that construction to the will, the court said: "Where a testator provides in his will that his wife, child, or other person shall be supported and maintained by his executor, or where the condition of a deed or mortgage recites that the grantee or mortgagor shall support the grantor or mortgagee, and the instrument does not point out that the support shall be provided in a particular place, then the party so entitled may have the support where, under reasonable limitations, he may choose to reside. But if the instrument points out the place where the support shall be furnished, it is not the right of the party entitled to receive it to demand that it shall be furnished elsewhere. Each case must be decided on its own facts, looking to the instrument and the surrounding circumstances." In the *Currier Case*, a son-in-law, in consideration of a conveyance of land made to him by his father-in-law, agreed to pay the latter's debts and provide necessary support for him and his wife; or, on failure to do so, to lease to them for life the farm where he resided; which latter clause, it was held, sufficiently indicated the home of the son-in-law as the place of performance of his agreement. The court says that where, in contracts of that description, the parents retain a life lease or mortgage interest in the farm they occupied before, "the place of performance would then seem to be the house before occupied by the parents." What would be the proper interpretation of a mortgage, securing an engagement to support

the mortgagee, taken upon lands granted to the mortgagor as the consideration of his promise, was not before the court, and the statement of what seemed to that court would be the proper construction of such an instrument concerning the place of performance is against the weight of authority, as will be seen by reference to the cases we have hereinbefore cited, which, in our opinion, establish the better rule. But conceding the force of the circumstances mentioned as indicating the home occupied by the parents, or that of the testator, as the place for the performance of such an engagement, they are without force as tending to fix any other place where the support shall be furnished, and therefore neither of the cases relied on by the plaintiff in error sustain his contention that his home in Geneva, remote from the Burgett homestead, was the place where he should perform his contract; and, as neither of the parties claim the homestead was such place of performance, the cases lose their applicability, and leave the obligation of Tuttle in that class where no particular place of performance is specified.

2. The record shows that on the trial in the circuit court, counsel for the plaintiff in error asked of one of his witnesses what Burgett said, prior to the execution of the deed and mortgage, "as to where he was to live if this contract was entered into." An objection to the question was sustained, and an exception taken, counsel stating that he expected "the answer would be that at the time the contract was made it was understood between them, and Mr. Burgett said that he expected, if the contract was made, to live at Mr. Tuttle's, in Geneva; that he was going to live with Mr. Tuttle; that one inducement in making the contract was to get off the farm." The exclusion of that testimony is assigned for error, and it is contended that it was admissible under the rule which permits proof of the circumstances surrounding the parties when a written contract is entered into.

There can be no doubt that in giving construction to a written instrument regard may be had to the situation of the parties, and the surrounding circumstances; and these may be shown by parol, to enable the court called on to interpret the instrument the better to understand its terms, and arrive at the intention of the parties when not clearly expressed. But we do not understand that the oral declarations of a party, made prior to or at the time of the execution of the instrument, of an intention or purpose not therein expressed, or different from that properly derived from its terms, are within the rule; and unless the evidence excluded by the court below had that effect, it was wholly immaterial and its exclusion of no legal significance. It was competent to show, as was done at the trial, that after the deed and mortgage were delivered, Burgett and wife went to live at the home of Tuttle; but, since by the terms of the mortgage they were entitled to receive their support and maintenance at such reasonable place as they might select, the fact that they accepted it for a time at Tuttle's house was not inconsistent

with their claim that they had a right to receive it elsewhere; nor did it establish a practical construction of the mortgage at variance with that claimed by the plaintiff in the action.

8. The claim most earnestly pressed by the plaintiff in error is, that the suit of Burgett to set aside his conveyance and recover back the property transferred to Tuttle relieved the latter from the further performance of his agreement. It may be accepted as a general principle, that where one party refuses performance of his part of an executory agreement, or denies his obligation to perform, the other party cannot be compelled to perform his part of the contract; but the application of that principle here is not so apparent. Burgett had fully performed his part of the contract made with Tuttle, by the conveyance of the farm and delivery of the personal property in accordance with its terms. Nothing remained for him to do; but the contract was executory on the part of Tuttle only. Having concluded he had been overreached in the transaction, Burgett sued to rescind and recover what he had parted with under it. Tuttle might have accepted the offer of rescission thus made, which, if followed with a reconveyance and surrender of the property, or by a decree restoring the property, would undoubtedly have discharged him from all further liability. But he resisted the suit which was abandoned and dismissed without trial, leaving the parties in the same situation as if it had never been commenced; and if the claim he now makes were sustained, he would be enabled to retain both the property and the consideration he agreed to pay for it. That, we think he cannot be allowed to do. While he retained the property his obligation to furnish a support for Burgett and his wife was a continuing one so long as they lived, which could only be discharged by performance, or voluntary relinquishment. The trial court found there had been a failure to perform; and the suit afforded satisfactory evidence of a purpose on the part of Burgett to secure the whole of the property for his use, instead of so much only as could be enforced under the mortgage, from which an intention to forego the benefits of the mortgage, if he failed to establish his right to the restoration of the property, could not reasonably be inferred. The case of *Jenkins v. Stetson*, 9 Allen, 128, on which reliance is placed by plaintiff in error, rests upon the general principle we have stated. There a suit was brought on a bond by which the plaintiff agreed to support a widow and her two daughters during their natural lives, in consideration of which the daughters agreed to leave to him and his heirs all of their personal property, including what they should receive from their father's estate. The mother and one of her daughters having died, the surviving daughter took up her residence with a brother-in-law, and afterward left her personal estate, by will, to her sisters. There was no evidence that the plaintiff had been requested to furnish any support to the daughter after she went to her brother-in-law's house, but she was re-

quested by the plaintiff to return to his house and receive her support there. It was held that, under the circumstances of that case, a failure by the plaintiff to tender the support at the brother-in-law's house was not a breach of the bond. But it was not held that the daughter was not entitled to receive it there if she had so requested, nor that a failure to so furnish after demand made would not have been a breach. The proposition declared is: "It is not sufficient proof of a breach of a bond to support another during his natural life, to show that he left the house of the person bound to furnish such support and resided elsewhere for several years, without at any time requesting him to fulfil his agreement or in any way exhibiting to him an intention or desire to hold him to the performance thereof." It will be observed that the agreement under which the party was entitled to support in that case, was executory on her part, she having agreed to leave all her personal property to the plaintiff as the consideration for his promise to support her; and that she did not perform her part of the agreement, but left her property to other persons. That feature of the case, the court says, tended "very strongly to show that it was her intention, without the knowledge or assent of the plaintiff, to avoid the obligation of the contract into which she had entered with him, and, by ceasing to receive support at his hands, to get rid of the performance of her part of this mutual obligation. Under such circumstances, a tender of performance by the plaintiff was unnecessary, and no inference of a failure or omission by the plaintiff to fulfil the agreement would have been warranted."

We see nothing in that case which conflicts with the conclusion we have reached in this one. Here the contract, as we have seen, entitled Burgett and his wife to have performance of it by Tuttle at such reasonable place as they should select, and he having declared his intention not to furnish them support while absent from his house, no demand upon him was necessary to an action on the mortgage for the reasonable value of their support by others while so absent.

Judgment affirmed.

STATE of Ohio, *ex rel.* John C. SCHWARTZ,
Plff. in Err.,
v.

Howard FERRIS.

(63 Ohio St. 314.)

***1. Funds raised by the taxation of franchises, rights, and privileges may be ap-**

***Headnotes by the COURT.**

NOTE.—For recent cases on constitutionality of statutes providing for inheritance taxes, see *State v. Alston* (Tenn.) 28 L. R. A. 178; *State v. Hamlin* (Me.) 25 L. R. A. 632; *Minot v. Winthrop* (Mass.) 26 L. R. A. 259.

For some earlier cases on the subject, see *notes to Re Howe's Estate* (N. Y.) 2 L. R. A. 324; *Re Romaine's Estate* (N. Y.) 12 L. R. A. 401.

plied to purposes of general revenue, or any other purpose authorized by statute.

2. A law of a general nature, which is in full force in every part of the state, complies with § 26 of art. 2 of the Constitution, requiring laws of a general nature to have a uniform operation throughout the state.
3. The act of April 20, 1894, entitled "An Act to Impose a Direct Inheritance Tax" (91 Ohio Laws, 166), by its exemption from taxation of the right to receive or succeed to estates not exceeding \$20,000 in value, and taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and in taxing at a higher rate per centum the right to receive or succeed to estates of larger value than to estates of smaller value, is in conflict with section 2 of the bill of rights of the Constitution of this state, which declares that "all political power is inherent in the people. Government is instituted for their equal protection and benefit;" and the whole act is therefore unconstitutional and void.
4. The first section of the 14th Amendment to the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," is not, as to the question in this case, broader than the 2d section of our bill of rights.

(June 27, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of defendant in a mandamus proceeding to compel him as probate judge to take the necessary steps to collect an inheritance tax upon the property of George K. Duckworth, deceased, as required by law. *Affirmed.*

Statement by Burket, J. :

This case was commenced in the circuit court of Hamilton county, in the name of the state on relation of John C. Schwartz, prosecuting attorney, against Howard Ferris, judge of the probate court of said county, in mandamus in the nature of procedendo, to compel the judge of said court to proceed and perform his official duties under the act of April 20, 1894, entitled "An Act to Impose a Direct Inheritance Tax" (91 Ohio Laws, 166), as applicable to the estate of George K. Duckworth, who was a resident of said county, and died on the 8th day of May, 1894, leaving an estate of over \$50,000. The petition says that letters of administration have been granted to the widow, Lucy B. Duckworth; that the prosecuting attorney has made proper application to the said probate judge for the appointment of appraisers to appraise the property of said estate for the purpose of having said direct inheritance tax assessed; that said probate judge refused, and still refuses, to make such appointment, on the ground that said statute is unconstitutional. To this petition the probate judge filed a demurrer, which was sustained by the circuit court on the ground that the statute is unconstitutional, and to which plaintiff excepted. Judgment was thereupon rendered in favor of defendant below. A petition in error was then filed in this court to reverse the judgment of the circuit court.

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Messrs. John C. Schwartz and Thomas H. Darby, for plaintiff in error:

Article 12, § 2, of the Constitution only applies to taxes on property for general revenue. *Baker v. Cincinnati*, 11 Ohio St. 540; *Western U. Teleg. Co. v. Mayor*, 28 Ohio St. 535; *Anderson v. Brewster*, 44 Ohio St. 585; *Adler v. Whitbeck*, Id. 565; *Ashley v. Ryan*, 49 Ohio St. 504; *Pittsburgh, O. & St. L. R. Co. v. State*, 49 Ohio St. 189, 16 L. R. A. 880; *Wasson v. Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795.

The direct inheritance tax is not a tax on property.

The character and purpose of a law, not less than its constitutionality, are to be determined by its operation and effect.

Wasson v. Wayne County Comrs. 49 Ohio St. 622, 17 L. R. A. 795; *State v. Hipp*, 38 Ohio St. 199.

Laws substantially the same as the one under discussion have been many times before the courts of this country, state and Federal, and in all cases save one (*Curry v. Spencer*, 61 N. H. 624), have been upheld, and they have been construed to be, not a tax on the property itself, but a bonus or price exacted from the recipient of this favor at the hands of the state.

Eyre v. Jacob, 14 Gratt. 428, 73 Am. Dec. 867; *Miller v. Com.* 27 Gratt. 116; *Peters v. Lynchburg*, 78 Va. 930; *Schoolfield v. Lynchburg*, 78 Va. 866; *State v. Dalrymple*, 70 Md. 299, 3 L. R. A. 372; *Tyson v. State*, 28 Md. 577; *Pullen v. Wake County Comrs.* 66 N. C. 361; *Mager v. Grima*, 49 U. S. 8 How. 491, 13 L. ed. 1169; *Wallace v. Myers*, 38 Fed. Rep. 185, 4 L. R. A. 171; *Scholey v. Rev.* 90 U. S. 28 Wall. 331, 23 L. ed. 99; *Re Howard*, 5 Dem. 487; *Minot v. Winthrop*, 163 Mass. 118, 26 L. R. A. 259 (1894); *State v. Hamlin*, 86 Me. 495, 25 L. R. A. 632.

Article 2, § 26, of the Constitution is not violated by this law because it has uniform operation throughout the state.

State v. Elliot, 47 Ohio St. 90; *Ex parte Falk*, 42 Ohio St. 688.

There is no other constitutional provision applicable, and in the absence of such there is no principle of equality which the courts are bound to recognize and enforce, but the remedy for unjust and discriminatory taxation is with the legislature, and not with the courts.

Kirby v. Shaw, 19 Pa. 261; *Youngblood v. Sexton*, 32 Mich. 414, 20 Am. Rep. 654; *Adler v. Whitbeck*, 44 Ohio St. 565; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 416, 4 L. ed. 603; *Yeazie Bank v. Fenno*, 75 U. S. 8 Wall. 583, 19 L. ed. 482.

In the following cases graduated taxes have been upheld:

State v. Schlier, 3 Heisk. 281; *Ould v. Richmond*, 23 Gratt. 464, 14 Am. Rep. 189; *Allen v. Drew*, 44 Vt. 187.

The question as to the apportionment of taxation in Ohio, upon other subjects of taxation than property, is a purely legislative question.

Marmet v. State, 45 Ohio St. 65; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 287, 33 L. ed. 805.

A collateral inheritance tax law is not in conflict with United States Const. 14th Amend. *State v. Hamlin*, 86 Me. 495, 25 L. R. A.

682; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 165.

Under this law the subjects of taxation are classified and the tax is uniform within these classes.

State v. Schlier, 8 Heiak. 281; *Ould v. Richmond*, 28 Gratt. 464, 14 Am. Rep. 189; *Allen v. Drew*, 44 Vt. 187.

Mr. J. K. Richards, also, for plaintiff in error.

Messrs. Thomas McDougall and Alfred C. Cassett, for defendant in error:

The inheritance tax is a tax on property for the purpose of general revenue.

The tax is either upon the person or the property, and to say that it is a tax on the "succession," as distinguished from the person or the property is to state something that is unthinkable.

Cooley, Taxn. p. 15; State Tax on Foreign-held Bonds, 82 U. S. 15 Wall. 819, 21 L. ed. 186.

A tax on property is an exaction by the state of a certain described property, irrespective of who its owner may be, and which the state collects from the property in whatever hands it may be found.

A tax on persons is an exaction by the state from certain prescribed persons, and which is irrespective of the form, substance, or situs of the property owned by such persons.

A tax on property, whose operation is to make an exaction from certain described property, shall be held to be a tax on the property itself, and shall be held within the restrictions to which such laws are subject, whatever it may be called in the act.

Pittsburgh, C. & St. L. R. Co. v. State, 49 Ohio St. 189, 16 L. R. A. 380.

The supreme court of Pennsylvania has uniformly decided this tax to be a tax on property itself.

Com. v. Smith, 5 Pa. 142; *Re Short's Estate*, 16 Pa. 68; *Hood's Estate*, 21 Pa. 106; *Strode v. Com.* 59 Pa. 181; *Clymer v. Com.* Id. 189; *Com. v. Coleman*, Id. 468; *Drayton's App.* 61 Pa. 172; *Miller v. Com.* 111 Pa. 321; *Re Bittinger's Estate*, 129 Pa. 388.

The law must be construed as it is written.

It is not within the province of the court to disregard the plain language of the statute and conjecture what the legislature might have meant.

Re Hathaway's Will, 4 Ohio St. 888; *Woodbury v. Berry*, 18 Ohio St. 456; *State v. Peck*, 25 Ohio St. 26; *Woodworth v. State*, 26 Ohio St. 196; *Grogan v. Garrison*, 27 Ohio St. 50.

The inheritance tax is a tax for the purpose of general revenue.

Pittsburgh, C. & St. L. R. Co. v. State, 49 Ohio St. 189, 16 L. R. A. 380.

The direct inheritance tax must comply with the provisions of art. 12, § 2, Ohio Const.

Zanesville v. Richards, 5 Ohio St. 589; *Hill v. Higdon*, Id. 248, 67 Am. Dec. 289; *Reeves v. Wood County*, 8 Ohio St. 833; *Baker v. Cincinnati*, 11 Ohio St. 534; *Cincinnati Gas Light & C. Co. v. State*, 18 Ohio St. 287; *State v. Frame*, 89 Ohio St. 399; *Western U. Tele. Co. v. Mayer*, 28 Ohio St. 521; *State v. Reinmund*, 45 Ohio St. 214; *State v. Hipp*, 38 Ohio St. 199; *Adler v. Whitebeck*, 44 Ohio St. 539; *Anderson v. Brewster*, Id. 576; *Marmet v. State*, 45 Ohio St. 68; *Ashley v. Ryan*, 49 Ohio St. 504.

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The direct inheritance tax law violates art. 12, § 2, Ohio Const.

Where the burden of a tax falls on the thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury.

Brown v. Maryland, 25 U. S. 13 Wheat. 436, 6 L. ed. 684; *Welton v. Missouri*, 91 U. S. 275, 28 L. ed. 847; *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Tele. Co. v. Atty. Gen.* 125 U. S. 590, 31 L. ed. 790; *State v. Hipp*, 38 Ohio St. 199.

While it purports, generally speaking, to levy a tax upon decedent's estates, it makes an unlawful exemption of estates less than \$20,000 in value.

Exchange Bank v. Hines, 8 Ohio St. 13; *Zanesville v. Richards*, 5 Ohio St. 593; *Fields v. Highland County Comrs.* 36 Ohio St. 476.

The law does not tax the property by a uniform rule or rate per cent.

Zanesville v. Richards, *supra*; *State v. Gorman*, 40 Minn. 232, 2 L. R. A. 701; *Exchange Bank v. Hines*, 8 Ohio St. 15.

Messrs. Paxton, Warrington, & Boutet, Edward S. Rawson, W. F. Ampt, and Boynton & Horr. also for defendant in error—

Barbet, J., delivered the opinion of the court:

This case has been argued with marked ability on both sides, and the arguments have greatly aided the court in reaching its final conclusions. We have carefully examined and considered all the cases cited by counsel, and many others, and shall state rather the conclusions reached than lengthy arguments in support thereof.

The 1st section of the statute in question is as follows: "Section 1. Be it enacted by the general assembly of the state of Ohio, that all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, including annuities, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of section 4183 of the Revised Statutes of Ohio, or the lineal descendant thereof, the lineal descendant of any adopted child, the wife or widow of a son, the husband of a daughter of decedent, or of any one in trust for such person or persons, shall be liable to a tax as follows, to wit: When the value of the entire property of such decedent exceeds the sum of \$20,000 and does not exceed the sum of \$50,000, 1 per cent; when it exceeds \$50,000 and does not exceed \$100,000, 1½ per cent; when it exceeds \$100,000 and does not exceed \$200,000, 2 per cent; when it exceeds \$200,000 and does not exceed \$300,000, 3 per cent; when it exceeds \$300,000 and does not exceed \$500,000, 3½ per cent; when it exceeds \$500,000 and does not exceed \$1,000,000, 4

per cent; and when it exceeds \$1,000,000, 5 per cent; 75 per cent of such tax to be for the use of the state, and 25 per cent for the use of the county wherein the same is collected; and all administrators, executors, and trustees shall be liable for all such taxes, with lawful interest, as hereinafter provided, until the same shall have been paid as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property." It is this first section that is claimed to be unconstitutional, and which was so held by the circuit court.

In view of the authorities cited, it must be conceded that the general assembly has the power to pass an inheritance tax for purposes of general revenue, unless prohibited by the Constitution of our state. Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. The right to dispose of property during the lifetime of the owner cannot be separated from the property itself, and therefore to tax the right of disposal by contract in the lifetime of the owner, even though to take effect at his death, is to tax the property itself. But the right to dispose of the property by will or descent, taking effect after the death of the owner, is not so closely connected with the right of property, and it is not so clear that such right may not be taxed. But when the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, and this is so whether the property is disposed of by the owner during his lifetime or at his death. This right to receive property is under the control of the legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the Constitution. To regulate by taxation or otherwise the privilege or right to receive property, is not in conflict with the 1st section of the bill of rights, which recognizes the inalienable right of acquiring, possessing, and protecting property. Were it otherwise, all our laws as to wills, descent, distribution, and conveyances would be unconstitutional.

It is urged, however, that the statute in question does not tax the right or privilege of receiving property, but taxes the property itself. It must be conceded that the language used in the statute is upon its face clearly a taxation of the property itself, and not of the right to acquire property. And for myself, I think this is the true construction of the act. Others of the court, however, think that when the operation and effect of the statute are considered, it may be regarded as taxing the right or privilege, rather than the property. Certain it is that the only thing that can be constitutionally taxed is the right or privilege of succession, and a statute having such taxation in view should express its purpose in words applicable to such subject-matter of taxation.

It is conceded by all parties that, if this statute imposes a tax on property, it is unconstitutional. As a majority of the court are of opinion that it is not a tax on prop-

erty, but upon the right to receive property, the statute must, as to this point, be sustained.

It is also contended that this tax is a tax on property, because it is made a lien upon the real estate received; and cases are cited sustaining this view. *Re Bittinger's Estate*, 129 Pa. 344. The statute in that case provides as follows: "The tax on real estate shall remain a lien on the real estate on which the same is charged until paid" (Pa. act May 6, 1887; Pub. Laws, 79); while the statute in this state provides simply that the inheritance tax "shall at once become a lien upon said property." But, aside from the difference in the words of the statute, there is no force in the contention. If the legislature has the power to assess a tax upon the right to receive and succeed to property, it clearly has the right to make such tax a lien upon the property received by the use of such right; and the making of such lien does not change the tax from a tax upon the right to receive to a tax upon the property received under the right.

Next, it is urged that, if the statute imposes a tax only upon the right or privilege to receive property, as the taxation thereby imposed is for general revenue, it is in conflict with section 2 of article 12 of the Constitution, which provides that laws shall be passed taxing by a uniform rule all property according to its true value in money. The claim is that for purposes of general revenue property only can be taxed. The Constitution is silent as to the application of the fund arising on taxation on subjects other than property. The Constitution being silent, it follows that, if such taxes can be levied and collected at all, their application is within the sole and exclusive power and discretion of the general assembly. The power of taxation, without limitation, is given in section 1, article 2, of the Constitution, which provides that "the legislative power of this state shall be vested in a general assembly, which shall consist of a Senate and a House of Representatives." In *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521, it was held that the general grant of legislative power vested in the general assembly by this section includes the power to collect revenue for public purposes, and the limitations on the exercise of this power are to be found in other provisions of the Constitution. In *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289, it is said by the court: "In our present Constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instrument." The power of taxation granted in the 1st section of the 2d article, being unlimited, is broad enough to include the power to tax rights, privileges, and franchises. Is there any limitation upon this power found in any other section of the Constitution? The only section which it is claimed limits this power is section 2 of article 12. That section is in the following words: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-

stock companies or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, public houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value \$200 for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published, as may be directed by law." It will be noticed that this section is not a limitation upon the power to tax rights, privileges, and franchises, because the limitation by this section imposed is as to the taxation of property; that is, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also real and personal property. Nothing whatever is said about rights, privileges, or franchises, and therefore this section cannot fairly be construed as a limitation of the power to tax rights, privileges, and franchises, unless they are property, within the meaning of this section of the 12th article. That a franchise is not property, within the meaning of said section, was held by this court, for reasons which seem unanswerable, in *Exchange Bank v. Hines*, 8 Ohio St. 1. The court says on page 8: "A corporate franchise, therefore, being a mere privilege, or right of authority by the government, is not property of any description, and consequently not subject to taxation under the above provisions of the Constitution." It will be noticed that the court here says that a franchise is not such property as can be taxed under the above provisions of the Constitution. The provisions referred to are those contained in section 2 of article 12. That a franchise is valuable, and in that sense property, has sometimes been held; but it is not property, in the sense used in said section of the Constitution, and its taxation is not by that section limited or restricted.

With the power of taxation of rights, privileges, and franchises, granted by the 1st section of the 2d article, unlimited and unrestricted by other parts of the Constitution, what authority is there to limit and restrict this kind of taxation to purposes other than for general revenue? No warrant therefor is found in the Constitution. This court, in *Exchange Bank v. Hines*, *supra*, after quoting the 2d section of the 12th article, on page 10, by Bartley, Ch. J., says: "The manifest effect of this constitutional provision is to make property the basis, and the sole basis, of taxation." Again, on page 40, the court, by Thurman, J., says: "The objects of taxation declared in that instrument are the real and personal property and choses in action in the state." The part of the Constitution under consideration was the 2d section of article 12, and nothing whatever is said about the general grant of power found in section 1 of article 2. Throughout the whole case of *Exchange Bank v. Hines*, section 2 of article 12 is regarded as the granting of the power of taxation, in-

stead of a limitation and restriction of the general power granted in section 1 of article 2. That such is not the true or correct construction of the Constitution is now universally conceded. That construction was not necessary to the decision of the question then before the court, but it did not lead to an incorrect determination of that case. It mattered not in that case whether the grant of power of taxation was found in section 1 of article 2 or in section 2 of article 12; nor whether section 2 of article 12 was a grant of power of taxation or a limitation of the power granted by the other section of the Constitution. The question for determination in that case was as to taxation of banks under section 3 of article 12, and that led to the question as to whether section 2 of that article permitted the deduction of debts from moneys and credits. The question before the court had relation to property only, and, construing section 2 of article 12 as a grant of power, instead of a limitation of power granted in another section, and as nothing except property is spoken of as taxable in said section 2, the court held that what was therein expressed as taxable by implication excluded everything else, and therefore announced the rule that under said section the sole basis of taxation is property. That property is not the sole basis of taxation under the power granted by section 1 of article 2 appears by many decisions of this court, among which are the following: *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 533; *Baker v. Cincinnati*, 11 Ohio St. 540; *Adler v. Whitbeck*, 44 Ohio St. 565; *Anderson v. Brewster*, 44 Ohio St. 585; *State v. Reinmund*, 45 Ohio St. 214; *Ashley v. Ryan*, 49 Ohio St. 504; *Mets v. Hagerty*, 51 Ohio St. 531.

The error of regarding the 2d section of article 12 as a grant of power of taxation, instead of a limitation upon that power, was carried into the decision of the case of *Zanesville v. Richards*, 5 Ohio St. 589, but was partly corrected in *Hill v. Higdon*, Id. 243, 67 Am. Dec. 289, and fully corrected in *Reeves v. Wood County*, 8 Ohio St. 333. The court, on page 592, in 5 Ohio St., by Ranney, Ch. J., says: "The public burdens are made to rest upon the property of the state, and whenever money is to be raised by taxation, the positive injunction is, that 'laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property,—according to its true value in money.'" That the public burdens are not made, by the Constitution, to rest exclusively upon the property of the state, is shown by the cases above cited, and that which is spoken of as an injunction that laws shall be passed taxing by a uniform rule all moneys, etc., is, instead of an injunction, a restriction and limitation upon the general power of taxation granted by section 1 of article 2. In the *Zanesville Case*, *supra*, the question was whether an exemption of lands, not laid out into lots, within the city of Zanesville, from all taxes except for road purposes, was constitutional. The 2d section of article 12 was again regarded as the source of the power of tax-

tion, but, as only taxes on property were under consideration, this led to no erroneous results in that case; and the court held that all lands within the city limits must be taxed for all purposes for which lots were taxed. The court says: "No tax, either for state, county, township, or corporation purposes, can be levied without express authority of law; and this section of the Constitution is equally applicable to, and furnishes the governing principle for, all laws authorizing taxes to be levied for either purpose." If by the applicability and governing principle is meant equality of taxation of property without exemption,—that is, that when some property in a city is taxed for state, county, township, or corporation purposes, all property within the city must be taxed for the same purposes without exemption,—it is correct. But if it means, as we think it does not, that subjects of value, other than what are regarded property within said section, cannot be taxed for state, county, township, or corporation purposes, it is incorrect. That the former was meant clearly appears from the subject-matter under consideration. The question as to the taxation of rights, privileges, and franchises was not under consideration, and the language used is not applicable thereto.

Speaking of the 94th section of the tax law, the court says, on page 592, that it seems to imply that municipal corporations might exist which were authorized to tax only such real estate as was laid out into lots when platted and recorded. The court does not so construe that section, and says that, if so construed, it would conflict with section 2 of article 12. The question under consideration being whether lands within the city not laid out into lots could be taxed for purposes other than road purposes, the court says: "We are clear in the opinion that if it [§ 94] means what is claimed for it, and intends to provide for the exemption of any part of the property in a municipal corporation otherwise subject to taxation, from contributing its proportion to the general revenue fund, it is in conflict with the 2d section of the 12th article of that instrument, and should be treated as a nullity." This is the first time in the line of decisions that "general revenue" is mentioned. It will be noticed that it is property, and not franchises, that cannot be exempted from contributing to the "general revenue" fund. It will further be noticed that it is not stated here that only tax on property can contribute to the general revenue fund. The full force of the decision is that property cannot be exempted from contributing to the general revenue fund. The court, in the *Zanesville Case*, says that property cannot be exempted from contributing to the general revenue fund; and when reference is made to that case in the case of *Hill v. Higdon*, *supra*, the word "property" is still retained; the court saying on page 246: "In the case of *Zanesville v. Richards*, decided at the present term, we have held that this section is equally applicable to, and furnishes the governing principle for, all laws levying taxes for general revenue, whether for state, county, township, or corporation pur-

poses; and that it requires a uniform rate per cent to be levied upon all property, according to its true value in money, within the limits of the state, or the local subdivision for which the revenue is collected." The governing principle here referred to is that all property shall be taxed according to its true value, in money, when raising revenue for state, county, township, or corporation purposes, and that there can, in such cases, be no exemption of property, except as provided in said section. This very clearly appears when the whole case is read, and by what immediately precedes the part above quoted. The question in the case was whether special assessments for street improvements were constitutional or not. There was no question involved whether or not general revenue could be raised by a tax on franchises or privileges, and what is said as to taxation for general revenue is to show that in raising general revenue there can be no exemption of property other than is provided in section 2 of article 12. And when the court says, on page 249, that "the 2d section of the 12th article has established the principles upon which all taxes for general revenue purposes must be levied," the principles referred to are the principles of equality, and that all property must be taxed, without exemption, as provided for in said section. That this is so is shown by the language used by the court, the subject-matter under consideration, and the fact that those are the only principles found in said section. General revenue is not mentioned in the section. In order to sustain assessments for street improvements, the court, in this case of *Hill v. Higdon*, abandoned the position that the 2d section of article 12 was the source of the power of taxation, and the concession was made that "the general grant of legislative authority includes the power of taxation in all its forms," and that "restrictions upon its exercise are to be looked for in other parts of the instrument." The doctrine and line of decisions, that general revenue cannot be raised otherwise than by a tax on property, are both based upon the above cases of *Exchange Bank v. Hines*, *Zanesville v. Richards*, and *Hill v. Higdon*, none of which support the doctrine, but decide that in raising general revenue all property must be taxed, without exemption, as provided in said 2d section. The cases following the above three cases refer to the doctrine as well understood and settled by those cases, without examining the doctrine anew to see whether or not it is well founded. The doctrine is not necessary to a proper decision of any of the cases in which reference is made thereto, and all of them not heretofore overruled were correctly decided without its aid, including *Wasson v. Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795; and *Pittsburgh, C. & St. L. R. Co. v. State*, 40 Ohio St. 189, 16 L. R. A. 880. In none of those cases is the doctrine sustained that general revenue cannot be constitutionally raised by taxation on franchises, rights, and privileges; but the doctrine sustained is that, when general revenue is to be raised by taxation on property, all the property of the state, county, town-

ship, or corporation must be taxed without exemption, as provided in said section 2 of article 13 of the Constitution. It follows, therefore, that imposing the tax in question upon the right to receive property does not render the act unconstitutional.

Next it is urged that the statute in question is in conflict with section 26 of article 2 of the Constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state." This section of the Constitution is not intended to guarantee the equal protection of all the inhabitants of the state but only to provide that laws of a general nature shall be in force in all parts of the state. *State v. Nelson*, 52 Ohio St. —, 26 L. R. A. 317, and the cases there cited.

In the next place, it is urged that the statute in question is unconstitutional in this: that it exempts estates of \$20,000 and under from all taxation, and in case the estate exceeds \$20,000 it taxes the entire estate without any exemption whatever; and also in this: that large estates are taxed at a higher rate per cent than smaller ones. Section 2 of the bill of rights provides as follows: "All political power is inherent in the people. Government is instituted for their equal protection and benefit." This statute is in direct conflict with this section of the bill of rights. If government is instituted for the equal protection and benefit of the people, it follows that laws which are passed under a government so instituted must likewise be for the equal protection and benefit of the people. This statute fails to protect equally the people who exercise the right and privilege of receiving or succeeding to property. The right to receive the first \$20,000 of an estate not exceeding that sum is protected from taxation, while the right to receive the first \$20,000 of an estate exceeding that sum is taxed the sum of \$200. This is not equal protection. Again, the right to receive \$50,000 worth of property of an estate not exceeding that sum is taxed \$500, while the right to receive \$50,000 of an estate exceeding that sum is \$750. This is not equal protection. The same may be said of the other gradations provided for in the statute. The right or privilege of receiving or succeeding to property is valuable in proportion to the value of the property received. It cannot be consistently said that the right to receive \$20,000 is of no value, and that the right to receive \$20,001 is of the value of \$200.01. Again, he who uses the right or privilege of receiving property of the value of \$20,001, and pays therefor a tax of \$200.01, is not equally benefited for the tax paid as he who uses the same right or privilege of receiving property of the value of \$20,000, without paying any tax whatever for the use of such right. The exemption of \$20,000, and the increase of the per cent as the value of the estate increases, renders this statute unconstitutional. Our Constitution requires equality in our tax laws, and also equality in their execution, as near as may be. The only exemption allowed as to taxation of property is personal property to the amount of \$200 to each individual, and certain other property

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devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The Constitution must be regarded as consistent with itself throughout, and as section 2 of article 13 permits an exemption from taxation of personal property not exceeding \$200, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property an exemption up to \$200 in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the Constitution, and it is this equality that is the pride and safeguard of us all. It was this principle, more than any other, that induced the decision in *Hocking Valley Coal Co. v. Rosser*, 52 Ohio St. —, 29 L. R. A. 386.

In support of the law it is urged that this exemption and gradation may be sustained upon the ground that the costs of administration in a small estate are proportionately larger than in a large one, and that therefore the small estate should be free from this taxation. The answer is that equality in taxation is required by the Constitution, and that our administration laws are enacted upon the principle of equal protection and benefit of the people, and this unequal mode of taxation is not required to remedy any defect in the burdens of these laws.

Again, it is urged in support of the law that an estate not exceeding \$20,000 is in the nature of a necessity for the support of widow and children; that the widow and children succeeding to so moderate a property ought to be exempted from paying the state anything for that privilege. The answer to this, as well as to the former proposition, is that we are not here considering the policy or equity of this exemption, but the power of the legislature to make such discrimination, when prohibited from so doing by the 2d section of the bill of rights. When this power is once conceded, the manner of exercising the same is limited only by the will of the legislature. In determining constitutional questions, courts should not attempt to solve them by reasoning only along the lines of the principles of equity, but the reasoning should be along the lines of the Constitution, for it may be that the very object of the Constitution is to abandon and cut loose from what had theretofore been regarded as equity in particular cases, or upon a particular subject-matter. The question is, therefore, not what would be equitable, but what is constitutional. Equity cannot be permitted to override the Constitution.

Again, it is urged in favor of the statute that the state has the right to say that the heir or legatee or devisee of a large property enjoys a disproportionate privilege, because what he receives is in the nature of a luxury, and luxuries ought to be subject to higher taxes. The answer to this is that the value of the right to receive is in direct proportion

to the value of the property received, and must, under the Constitution, be taxed accordingly, if taxed at all. As to the higher tax on luxuries, it may be said that such a rule might find a place in tariff legislation, where all are free to indulge in the luxuries or not, as they see fit, but that such rule can find no support in taxation under a Constitution requiring equality in taxation, and laws to be for the equal protection and benefit of all.

Again, it is claimed in favor of the law that this statute is not purely for the raising of revenue, but for the regulation of the succession and transfer of property, and that the state has a right to say that it will regulate the matter of succession to great estates by making a greater charge for the privilege, and thus discourage the holding together of great estates until death. The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances; and if further regulation is desired purely as regulation, aside from revenue, it would most likely be sought in the amendment of those statutes. The act is clearly one for taxation, and not for regulation, as shown by its provisions and title. The state finds no warrant in its Constitution for saying that it will make a greater rate of charge for the privilege of succeeding to large estates than to smaller ones, but, on the contrary, this is expressly prohibited by the requirement that laws shall be for the equal protection and benefit of the people. This requirement applies as well to laws for regulation as to laws for taxation.

It is also contended by those opposing the law that the statute is inoperative, for the

reason that it fails to provide any machinery for the collection of a tax levied on property which passes by "deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor." Whether there is sufficient machinery supplied in this and other statutes to enforce collection of such tax need not now be determined, as that question is not involved in this case, and does not go to the constitutionality of the statute, but to its enforcement, if found constitutional.

As to the 1st section of the 14th amendment to the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws," it is sufficient to say that the provisions of this section of the Federal Constitution, as to this question, are not broader than the 2d section of our bill of rights, and that therefore a statute upon this subject, authorized by our bill of rights, would not be in conflict with this section of the Constitution of the United States.

While the facts in the case of *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 160, said to have been followed and relied upon by the circuit court, bear little, if any, relation to this case, the rule of decision in that case was in line with the 2d section of our bill of rights, and was therefore very properly followed by the circuit court.

Judgment affirmed.

Shauck, J., concurs in the third and fourth propositions of the syllabus, and in the judgment of affirmance.

Minshall, J., dissents from judgment of affirmance.

ILLINOIS SUPREME COURT.

Helen Elizabeth Dunham HAWES *et al.*,
Appts.

City of CHICAGO.

(158 Ill. 653.)

1. An ordinance which is unreasonable, unjust, and oppressive will be held by the courts to be void.
2. The reasonableness or unreasonableness of a municipal ordinance is a question for the decision of the court in the light of all existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption.
3. Power to make ordinances on a given subject, conferred by the legislature without prescribing the details, must be reasonably exercised, else the ordinances will be held invalid.
4. An ordinance compelling the substitution of a cement sidewalk in the place of a plank walk in front of a vacant 20-acre lot, which had been laid less than six months before in conformity with an ordinance, and which was in good condition and in all respects safe, convenient, and sufficient for public use, is unreasonable, unjust, and oppressive, and therefore void.

(November 1, 1894.)

tution of a cement sidewalk in the place of a plank walk in front of a vacant 20-acre lot, which had been laid less than six months before in conformity with an ordinance, and which was in good condition and in all respects safe, convenient, and sufficient for public use, is unreasonable, unjust, and oppressive, and therefore void.

A PPEAL by property owners from a judgment of the Cook County Court which confirmed a special assessment for street improvement purposes. *Reversed.*

The facts are stated in the opinion.

Mr. Kirk Hawes, with *Mr. Ira J. Geer*, for appellants:

The power of the city council to declare what shall be a local improvement is an implied power, and an ordinance exercising that power, though regularly passed, must be reasonable, otherwise it is void.

Bloomington v. Chicago & A. R. Co. 134 Ill. 451; *Craw v. Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 437; *Allen v. Drew*, 44 Vt. 174; 1

NOTE.—For necessity of benefits to support assessments for local improvements, see *note to Re Madera Irrig. Dist. Bonds* (Cal.) 14 L. R. A. 755.

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Dill. Mun. Corp. §§ 819-821; Cooley, Taxn. § 668; *Corrigan v. Gage*, 68 Mo. 541; *Wistar v. Philadelphia*, 80 Pa. 511, 21 Am. Rep. 112.

The city council has no power to pass an ordinance the effect of which is to substitute improvements or to change one style of improvement for another style of the same improvement.

Wistar v. Philadelphia, *supra*; *Hammett v. Philadelphia*, 65 Pa. 165, 3 Am. Rep. 615.

Messrs. Harry Rubens, John F. Holland, Adolph Kraus, and Maher & Gilbert for appellee.

Baker, J., delivered the opinion of the court:

This is an appeal from a judgment of confirmation of a special assessment made under an ordinance of the city of Chicago passed March 7, 1892, and providing for the construction of a cement sidewalk on Fiftieth street, from Lake avenue to Drexel boulevard. The commissioners appointed to assess the cost and expenses of the improvement upon the property benefited thereby returned into court an assessment roll, in which the property here in question, then owned by John H. Dunham, since deceased, was assessed in the sum of \$1,915.50. Various objections in writing were filed by said Dunham and overruled by the court. The question of benefits was submitted to a jury, and the jury, in their verdict, reduced the assessment on the property to \$1,638.75. Motions for a new trial and in arrest of judgment, as well as motions to dismiss the petition and to cancel the assessment, were made by the objector and overruled by the court, and exceptions taken, and the court entered judgment of confirmation for the amount fixed by the verdict of the jury, and the objector perfected an appeal to this court. John H. Dunham, the objector, thereafter died, and his death was suggested, and by leave of court Helen Elizabeth Dunham Hawes and Mary Virginia Dunham, who are his heirs at law and devisees under his will, now prosecute the appeal.

It is claimed by appellants that the ordinance providing for the construction of the cement sidewalk, and under which the assessment was made, is unreasonable, unjust, and oppressive, and therefore void. The uncontradicted evidence in the case shows that the tract of land, the south 50 feet of which is assessed for this improvement, is a 20-acre tract, having a frontage of 1256 feet along Fiftieth street, where it is proposed to construct this cement sidewalk; that there is not a house or a building of any kind upon it, and that it is an unsubdivided tract of land, and the only use to which it is put is that of a field for raising hay. Only five months before the passage of this ordinance for the construction of a cement sidewalk, the deviser of the appellants in this case, in compliance with a prior ordinance of the city duly passed for that purpose, constructed and put down along the line of this street, in the very place where this cement sidewalk is to be placed, a wood sidewalk 6 feet in width, made of plank laid crosswise on stringers or joists, in strict conformity to the regulations

and requirements of the city, and this plank sidewalk, at the time this ordinance on which the present proceedings are based was passed, and at the time this case was heard in the court below, was in good order and condition. The uncontradicted evidence further shows that the street along which it is proposed to construct this cement sidewalk has never been improved by the city. It is neither curbed nor paved, sewered nor watered, surveyed nor graded. If it is to be considered as a street 66 feet wide, then there is a line of telegraph poles planted right through the center of it, and the north 83 feet of it have never been formally dedicated by the owner to public use nor condemned by any municipal corporation, and if the public have any right to it at all, it is a right by prescription or by implied dedication.

Such was and is the condition of this street in front of appellant's property, and yet, as appears from the record of the case, the common council of the city of Chicago, only five months after the construction, at a great expense, of a new plank sidewalk built in conformity with the order of the city council, 1256 feet long, passed a second ordinance ordering this new plank sidewalk torn up and a cement walk, at an assessed expense of \$1,915.50 or \$1,638.75, put down in its place. It is admitted by the city—at least not denied—that this plank or wooden sidewalk, at the time the ordinance for the cement sidewalk was passed and at the time this case was heard in the court below, was in good order and condition, and will answer equally as well, for the purposes of travel, as a cement walk. Now, can it for a moment be contended that it is not unreasonable, unjust, and oppressive to compel the owner of a vacant 20-acre lot first to construct and pay for a wood sidewalk, and then, within less than six months, and when it is in substantially as good condition as when first built, and in all respects safe, convenient, and sufficient for public use and travel, take it up, throw it away, and put down another in its place at an expense of over \$1,600? It seems to us that it cannot be, especially when we take into consideration the fact that the street has never been improved, curbed, graded, paved, or sewered. And further, it is clear, from the evidence in the case, that if this judgment should be affirmed and appellant compelled to take up the wood sidewalk and put down one of cement, the cement sidewalk will be ruined by putting in the house drains every 25 feet along the line of the street, or at least seriously injured, and whenever the street is improved and dwellings are constructed along the line of the walk the walk itself is quite likely to be destroyed.

An ordinance must be reasonable, and if it is unreasonable, unjust, and oppressive the courts will hold it invalid and void. *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Tugman v. Chicago*, 78 Ill. 405. The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained,

and the necessity or want of necessity for its adoption. *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 87; *Lake View v. Tate*, 180 Ill. 247, 6 L. R. A. 268; 1 Dill. Mun. Corp. § 327. And even where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. 1 Dill. Mun. Corp. § 328; *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278; *Dunham v. Rochester*, 5 Cow. 462; *State v. Belvidere*, 44 N. J. L. 350.

In *Cooley on Taxation* (p. 428), it is said: "A clear case of abuse of legislative authority in imposing the burden of a public improvement on persons or property not specially benefited would undoubtedly be treated as an excess of power, and void." In *Allen v. Drew*, 44 Vt. 174, the court, by Redfield, J., says: "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." In *Wistar v. Philadelphia*, 80 Pa. 505, 31 Am. Rep. 112, Chief Justice Agnew says: "But if we say the city may change its pavements at pleasure, and as often as it please, at the expense of the ground owner, we take a new step, and there must be explicit legislation to authorize such taxation. If, while the pavement is good and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be exaction—not taxation. We are not at liberty to impute such a design to the legislature, unless it has plainly expressed its meaning to do this unjust thing." And in *Wistar v. Philadelphia*, 111 Pa. 604, it is held that where a property owner has well and properly set curbstones in front of his property, at his own expense, on the proper line, in accordance with the style in common use, and they are in good order and repair, the expense of replacing them with others cannot be provided by an assessment upon his property. In *Corrigan v. Gage*, 68 Mo. 541, it was held that the ordinance for the paving of the sidewalk there in question was unreasonable and oppressive and subject to judicial inquiry, because such sidewalk was in an uninhabited portion of the city and disconnected with any other street or sidewalk, and the judgment of the court below was reversed. In *Bloomington v. Chicago & A. R. Co.* 184 Ill. 451, this court held that where the ordinance is grossly unreasonable, unjust, and oppressive, that may be shown in defense of the application for confirmation. In *Bloomington v. Latham*, 142 Ill. 462, 18 L. R. A. 487, we held that an ordinance directing that the cost of the land taken or damaged, or both, should be assessed upon and collected from the lands abutting upon the proposed alley or street, in proportion to the frontage thereof, was unreasonable and void. And in *Davis v. Litchfield*, 145 Ill. 30 L. R. A.

313, 31 L. R. A. 568, and *Palmer v. Danville*, 154 Ill. 156, ordinances levying special taxes for local improvements were held to be unreasonable, arbitrary abuses of power, and void.

The rule is, that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation, acting within the apparent scope of its authority. But in our opinion such a case appears in this record. We think that the ordinance in question, in so far as and to the extent that it affects the property of appellants, is unreasonable, unjust, and oppressive, and therefore void.

The judgment of confirmation as to the property of appellants is reversed, and the ordinance being void as to such property the cause will not be remanded.

Craig, J., dissents.

Norman N. PARKER, *Appl.*,

v.

Robert W. ORR.

(156 Ill. 603.)

1. The rule that a voter should not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot, is not changed by the Illinois ballot law of 1891, which expressly provides in section 26 that his ballot shall not be counted if he "marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled."
2. The requirement that a ballot be marked by a cross "in the appropriate margin or place opposite the name," made by the Illinois ballot law, § 23 (3 Starr & C. chap. 46, p. 570), is directory, and not mandatory, and under it the voter's intention should be given effect if it can be gathered from his ballot without laying down a rule which may lead to a destruction of its secrecy.
3. The use of a mark or character which furnishes the means to designating persons of avoiding the law as to secrecy will require the rejection of a ballot under the Illinois ballot law, though it contains no prohibition of distinguishing marks, even if the mark or character used indicates an intention to vote a particular party ticket or for certain candidates.
4. An honest attempt to follow the directions of the law requiring a cross to be made in the appropriate margin or place opposite the name on the ballot must appear in order to permit the ballot to be counted.
5. A ballot marked simply by writing the word "Democratic" at the head of the Democratic ticket, or one marked by a single

NOTE.—For marks to distinguish ballots, see note to *Rutledge v. Crawford* (Cal.) 13 L. R. A. 761; also *Sego v. Stoddard* (Ind.) 22 L. R. A. 468, and cases cited in footnotes thereto; *Tebbe v. Smith* (Cal.) 20 L. R. A. 678; *Dennis v. Caughlin* (Nev.) 29 L. R. A. 731; *Buckner v. Lynip* (Nev.) post, 364.

mark across or through the circle or square, or marked with a circle or irregular character within the circle or square, or marked with crosses opposite the names of the candidates, but entirely outside of the squares; as well as a ballot signed by the name of the voter,—must be rejected as disregarding the plain directions of the law requiring the ballot to be marked by a cross in the appropriate margin or place opposite the name, and as furnishing the means whereby the secrecy of the ballot could be destroyed.

6. Imperfect success in marking a cross in the proper place to indicate a choice of candidates, where there was a clear intention to conform to the statute, and not to distinguish the ballot, will not require its rejection.

7. A word which is read by one party as "get" and by the other as "yes," opposite a proposed constitutional amendment, is not regarded as such a distinguishing mark as to prevent counting the ballot for a candidate named on the same ballot.

8. The erasure of names of candidates by pencil marks drawn through them does not constitute a distinguishing mark which requires a rejection of the ballot as to other candidates.

9. The fact that a ballot is marked by a cross in a circle at the head of each of two tickets will not prevent counting the vote for a candidate named on one ticket for an office for which no candidate is named on the other, although it prevents counting the ballot for a candidate for any office for which both tickets present a candidate.

10. A mark on a ballot, which bears no resemblance to a cross, without any attempt to make a cross of any kind on the ballot, will not permit it to be counted.

11. A mark made with ink and somewhat blurred, even if it cannot be said to be a cross strictly speaking, if it shows an attempt to make a cross, may be sufficient to allow the ballot to be counted.

(November 1, 1895.)

APPPEAL by plaintiff from a judgment of the Christian County Court in favor of defendant in a proceeding brought to contest his right to the office of superintendent of schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. E. Harrison and Ricks & Creighton, for appellant:

The purposes of the ballot reform act of 1891 were to secure the freedom, purity, and uniformity and secrecy of the ballot in elections.

See title of act, p. 108, Sess. Laws 1891; *Sego v. Stoddard*, 186 Ind. 297, 23 L. R. A. 468; *People v. Onondaga County Canvassers*, 129 N. Y. 895, 14 L. R. A. 624; *Curran v. Clayton*, 86 Me. 42.

The election law (ballot act of 1891) is mandatory.

Parvin v. Wimberg, 180 Ind. 561, 15 L. R. A. 775; *Curran v. Clayton*, *supra*; *Ellis v. Glaser*, 102 Mich. 896, 405; *People v. Onondaga County Canvassers*, *supra*; *McCrary*, Elections, 8d ed. § 508.

The ballot reform act is a radical departure from former methods.

Whittam v. Zahorik, 91 Iowa, —; *Curran v. Clayton* and *Ellis v. Glaser*, *supra*.

The cross, made substantially as that set

forth in § 23 of the ballot reform act of 1891, is the only mark that the voter can use to express his choice, and it must be placed in the circle or square, as the law directs.

Ellis v. Glaser, *Whittam v. Zahorik*, *Curran v. Clayton* and *Parvin v. Wimberg*, *supra*; *Kirk v. Rhoads*, 46 Cal. 899; *Re Vote Marks*, 17 R. I. 812.

If another mark be used, there is nothing to certify its meaning.

Re Vote Marks, *Ellis v. Glaser*, and *Whittam v. Zahorik*, *supra*.

A ballot with a straight mark or line in party circle cannot be counted.

Ellis v. Glaser, *Curran v. Clayton*, and *Whittam v. Zahorik*, *supra*.

A ballot with a cross outside the square or circle should not be counted.

Ellis v. Glaser, *supra*.

A cross near to but outside of the square opposite the name should not be counted.

Whittam v. Zahorik, *supra*.

A cross under or above the word "Democratic" should not be counted.

Whittam v. Zahorik and *Curran v. Clayton*, *supra*.

A cipher in the circle or square should not be counted.

Whittam v. Zahorik, *supra*.

A cross made with more than two intersecting straight lines should not be counted.

Ibid.

While the intention of the voter is one of the first purposes of interpretation of ballots, yet the counting of the vote does not depend solely upon the power to ascertain and declare his choice, but also on the expression of that choice in the manner provided by statute.

Ibid.; *Curran v. Clayton*, *supra*.

Although the choice of the voter may be apparent from the face of the ticket, still the vote will not be counted if not expressed in the manner provided by statute.

Whittam v. Zahorik, 91 Iowa, —; *Ellis v. Glaser*, 102 Mich. 896, 405.

The cards of instruction by the county clerk, and circular of instruction by the secretary of state, to voters, are made by the statute official, and are binding on the voters until the court has put a construction on the law differing with them.

8 Starr & C. Rev. Stat. chap. 46, §§ 18, 83; *Parvin v. Wimberg*, 180 Ind. 561, 15 L. R. A. 775; *Ellis v. Glaser*, *supra*.

Any mark placed upon the ballot by the voter other than that provided by the statute, or any mark not necessary to the legal expression of his choice, should vitiate the ballot as a distinguishing mark, as such mark could be used for identification, and thereby violate the secrecy of the ballot and lead to the corruption of the voter.

Parvin v. Wimberg, *supra*; *Curran v. Clayton*, 86 Me. 42; *Whittam v. Zahorik*, *supra*; *Sego v. Stoddard*, 186 Ind. 297, 23 L. R. A. 468; *People v. Onondaga County Canvassers*, 129 N. Y. 895, 14 L. R. A. 624.

Messrs. J. C. McBride and Taylor & Abrams, for appellee:

If the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to

the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual validity of the election.

McCrary, Elections, last ed. § 190; Paine, Elections, § 498; *Gass v. State*, 34 Ind. 425; *Platt v. People*, 29 Ill. 54; *Barnes v. Pike County Suprs.* 51 Miss. 305; *Wry v. Booth*, 19 Ohio St. 25; *Tarbox v. Sughrus*, 36 Kan. 225; *DeBerry v. Nicholson*, 102 N. C. 465.

The policy of this state has always been toward a liberal construction of the provisions of election laws, so as to arrive at the intention of the will of the voter as expressed by him in his ballot.

Bowers v. Smith, 111 Mo. 45, 16 L. R. A. 754; *Dale v. Irwin*, 78 Ill. 180; *Beard v. State*, 24 Neb. 372.

All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.

Sanner v. Patton, 155 Ill. 558; *People v. Wappinger's Falls*, 144 N. Y. 616; *Owens v. State*, 64 Tex. 509.

When the question is for what or for whom a ballot should be counted, the intention of the voter should, if possible, be ascertained, and when ascertained it must control.

McKinnon v. People, 110 Ill. 305; *People v. Matteson*, 17 Ill. 167.

The writing of the name just above the title of the office has been held by this court to be sufficient to make it a vote for the office.

Kreitz v. Behrensmeyer, 125 Ill. 192.

The ballot having the name of Martin Lynch signed at the bottom of the ticket should be rejected.

Spurgin v. Thompson, 37 Neb. 39.

There are two classes of marks. One is where a plausible reason is or may be suggested for their existence, consistent with honesty and good faith; the other, where no such reason can be suggested. The former will rarely be allowed to invalidate a ballot, unless it appears that it was in fact used for corrupt purposes. The latter, unexplained, will generally be presumed to be for corrupt purposes.

State v. Walsh, 62 Conn. 260, 17 L. R. A. 360.

Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only.

State v. Russell, 34 Neb. 116, 15 L. R. A. 740.

The paper ballot is to prevail as the highest evidence of the voter's intention.

Heartstown v. Virginia, 76 Ill. 49; *Kreitz v. Behrensmeyer*, 125 Ill. 167.

The intention of the voter should, if possible, be ascertained, and that intention must control.

Rutledge v. Crawford, 91 Cal. 526, 18 L. R. A. 761.

Wilkin, J., delivered the opinion of the court:

This is a proceeding begun in the court below by the appellant, to contest the election of appellee to the office of superintendent of schools of Christian county. It appears from the petition filed that at the November election, 1894, Robert W. Orr was the nom-

inee of the Democratic party, Nina S. White of the Republican party, and Eugene E. Chumley of the People's party; that by the canvass of the votes cast for these candidates, Orr received 8,915, White 8,195, and Chumley 489, whereupon a certificate of election was duly issued to Orr, who qualified and entered upon the duties of the office. Other tickets on the ballot had no candidate for that office.

It is insisted by petitioner that Miss White was in fact legally elected. The grounds of the contest are, that in each voting precinct of the county the judges failed to count a certain number of votes cast for either of the candidates, which should have been counted for White; that they counted for Orr votes which should have been counted for White, and counted votes for Orr not legally cast for him. The answer denies these grounds, and avers that in each of the precincts votes were cast for Orr which should have been, but were not, counted for him; that votes cast for him were counted for White, and that votes were counted for White which were not legally cast for her. On a recount of the ballots the court found that White received 8,168 votes and Orr 8,160, to which no objection was made. There were counted to Chumley 488, and 75 by agreement rejected, as being votes for neither party, leaving 111 in dispute. Of these the court counted 85 to White, 44 to Orr, and rejected the remaining 32 altogether, thus giving Orr a total of 8,204, and White 8,203, and declaring Orr duly elected by a majority of one vote.

It is contended by counsel for appellant that under our statute only a cross can be used upon the ballots to indicate the voter's choice of candidates, which cross must be in the form indicated in the statute and placed in the circle or square, and unless the elector so marks his ballot it must be rejected. In other words, they insist that the language of section 23 of the ballot law of this state (3 Starr & C. chap. 46, p. 570), which says the voter "shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled," etc., is mandatory, and must be strictly complied with, else the ballot is void. They also insist that every mark upon a ballot cast, not necessary to indicate the voter's choice of candidates, as indicated in said section 23, should be treated as a distinguishing mark and render the whole ballot void. In support of these positions several decisions of the courts of other states are cited, but in view of the language of the statutes under which those cases were decided we do not regard them as in point here. For instance, the case of *Parvin v. Wimberg*, 130 Ind. 561, 15 L. R. A. 775, much relied upon by counsel for appellant, was decided upon a statute of that state, section 45 of which provides that in indicating the voter's choice of candidates a stamp shall be used by stamping the square immediately preceding their names, and it was held the use of the stamp and the placing it in and upon the square were mandatory. Section 23 of our statute does not say with what the cross shall be made, neither does it mention squares or circles opposite

the names of candidates, but requires the cross to be made "in the appropriate margin or place opposite the name," etc. If the desire is to vote for all the candidates of a party, the cross is to be placed at the "appropriate place preceding the appellation or title of such party," etc., nothing being said about a circle. It is true that by construing section 14, prescribing the form of the ballot, with section 28, it appears that by "appropriate margin or place" is meant the circle or square on the ballot; but there is not, as in the Indiana statute, a direct command that the cross shall be made in a square or circle. Neither does our statute, as we construe it, prescribe the form of the cross to be used. It provides that it shall be "by making . . . a cross (X) opposite the name," etc. Manifestly, placing the capital X in parenthesis was merely to indicate to the voter how the cross might be made, and it cannot be seriously insisted that the statute commands the cross to be so made. That is to say, even if it were held that the statute is mandatory, its requirements would be satisfied by complying with the language, "by making a cross," in either of three forms, viz., in the form of a capital X, as indicated in the statute; in a form similar to a capital I, or by a crossing of two lines thus X. See Webster's International Dictionary, defining "cross." There is therefore a manifest difference in the requirement that a voter shall use a stamp, furnished for that purpose, to indicate his choice of candidates, and that he shall make a cross. A failure to use the stamp is a positive violation of the law; a failure to make a distinct, well-formed cross may be the result of inability or inadvertence. It would be impracticable, therefore, to give effect to our statute construed to be mandatory as to the form of the cross to be made to indicate the voter's choice.

It has always been held in this state that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity with law, effect will be given to that intention,—in other words, that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot. See *McKinnon v. People*, 110 Ill. 805; *Bahrensmeyer v. Kreitz*, 185 Ill. 591. The ballot law of 1891 does not, in our opinion, change the rule in this regard unless to give effect to such intention would tend to destroy the secrecy of the ballot. On the contrary, section 26 expressly provides: "If the voter marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office,"—plainly meaning that if the voter's choice can be ascertained from his ballot it shall be counted, if it can be done consistently with other provisions and the object of the act. It was the intention of this amendment, as expressed in its title, to provide for the printing and distribution of ballots at public expense, for the nomination of candidates for public offices, to regulate the manner of holding elec-

tions and to enforce the secrecy of the ballot. "Wherever our statutes do not expressly declare that particular informalities do not avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention, and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials,—that is, as objects in themselves, and not merely as means." Wigmore, *Australian Ballot System*, 2d ed. p. 195. To say that any mark on a ballot other than a cross in the proper place makes it void is to go beyond the language of the statute and in direct conflict with section 26, *supra*.


The statute being directory, and not mandatory, as to the manner of voting prescribed in section 28, it remains to be determined what is its proper construction. In settling this question two objects must be kept in view, viz., the secrecy of the ballot, and the intention of the voter. It was evidently the intention of the legislature to declare what should absolutely destroy a ballot or prevent its being counted by section 26, *supra*: "If the voter marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted." Observing this mandatory language, if a voter's intention can be gathered from his ballot, without laying down a rule which may lead to a destruction of its secrecy, that intention should be given effect. Nothing is said in the act about distinguishing marks, but if a mark or character is used which, though indicating an intention to vote a particular party ticket or for certain candidates, at the same time serves the purpose of indicating who voted it, thereby furnishing the means to designing persons of evading the law as to secrecy, the ballot should be rejected. It logically follows that the voter's intention must be manifested by a cross, substantially in the place designated, which the judges of elections, or the court on a recount, can see was an honest attempt to follow the directions of the law. For instance, on one of the ballots cast at this election the voter simply wrote at the head of the Democratic ticket the word "Democratic." On others a single mark was made across or through the circle or square. On others a circle within the circle or square was made, and on still others irregular characters were so used. On one ballot crosses were made opposite the names of candidates, but entirely outside of the squares. In those there was no attempt by the voter to indicate his choice by making a cross in the appropriate place. On another, seemingly regular in other respects, the name "Martin Lynch" is signed at the bottom. These marks and names may tend to show an intention on the part of the voter to vote tickets so marked, but they disregard the plain directions of the law, and

furnish the means whereby the secrecy of the ballot could be destroyed. Therefore we think all such ballots were properly rejected by the court below. On the other hand, ballots appear in the record on which it is clear that the voter attempted to make a cross in the proper place to indicate his choice of candidates, but succeeded more or less imperfectly. It being clear, in such cases, that the intention was to conform to the statute, and not to distinguish the ballot, they were properly counted.

On one of the ballots, opposite the word "yes," on the proposed constitutional amendment submitted, the word "get," as read by counsel for appellant, was written in the square, opposing counsel insisting that the word was meant for "yes." It is insisted by counsel for appellant that this word, as used, is as much a distinguishing mark as is the name "Martin Lynch" to the ballot above referred to. We do not think so. The name signed to the ballot could serve but one purpose, namely, to indicate who voted the ballot; the word "yes" or "get" tended to indicate the voter's choice upon the proposition submitted; and that it served the further purpose of distinguishing the ballot, is, to say the least, a very remote conjecture.

On several of the ballots counted for either candidate, names of candidates were erased by drawing a pencil through them, and these, it is insisted, are invalid because of distinguishing marks. What we have already said referring to section 26 is a sufficient answer to this contention.

Applying the rules indicated, to the ballots in this record, we find that of the thirty-two rejected all were properly excluded except eight, four of which should have been counted for each of these candidates. In these the voters made a well-defined cross in the Democratic or Republican circle at the head of the ticket (four in each), but also made a cross in another circle opposite a party name on which there was no candidate for superintendent of schools. While such ballots could not be counted for candidates upon both tickets, because the voter in that case marked more names than there were persons to be elected to the office, that rule cannot apply to these candidates,—that is to say, where a voter made a cross in the Republican circle and did the same in the Independent Republican circle, on which last-named ticket there was no candidate for superintendent of schools, he did not mark more names than there were persons to be elected to that office, but expressed his choice for Miss White. And so where a voter made a cross in the Democratic circle but did the same in the People's silver circle, on which there was no candidate for the office, the vote should have been counted for Orr.

Of the disputed votes counted for Orr, one was marked in the Democratic circle with a character like this:  and had no other

marks upon it.* We are unable to discover in the mark any resemblance to a cross, or see wherein the voter attempted to make a cross of any kind, and therefore, under the rule laid down, the ballot should have been rejected.

It is earnestly insisted that another ballot counted for Orr, marked in the Democratic

circle in this way:  should have been re-

jected. The marks were made with ink, and while it is somewhat blurred, and cannot be said to be a cross, strictly speaking, still we think it shows an attempt on the part of the voter to make such a mark, and was therefore properly counted. But if it were otherwise, the result which we reach upon the whole record would not be changed, because on one of those counted for Miss White the mark

in the Republican circle is like this: 

Certainly there is no more reason for saying that one of these characters was intended for a cross than the other. We think they were both properly counted.

On three of the tickets counted for Miss White a cross was made in the Republican circle, but on one of them the name "R. W. Orr" and on the other two "Robert W. Orr" was written under the name "Nina S. White," and a cross made in the square opposite, but extending somewhat below her name. It would seem that the voter in each of these cases intended to vote the Republican ticket, except for Miss White, but to vote for Orr as against her. If the cross in the square opposite the name "White" had been made directly opposite that of Orr, the vote would, under the provisions of the statute and our recent decision in *Sanner v. Patton*, 155 Ill. 553, have been a regular vote for Orr. We are, however, of the opinion that it is, to say the least, uncertain from these ballots which of the candidates the voter intended to vote for, and therefore, under section 26, *supra*, they should not have been counted for either.

Our conclusion then is, that, in any view of the case presented, appellee was entitled to his certificate of election, having at least a majority of three votes. The judgment of the county court must therefore be affirmed.

It may properly be added that it is the duty of every voter, under this law, to ascertain and follow the provisions of the statute and the directions of the secretary of state in his instructions sent out with the ballots, and that whenever, either through negligence or wilfulness, he disregards that duty, he does so at the peril of losing his vote.

Judgment affirmed.

*The above characters are fac similes of the marks on the original ballots.

Philander M. ALDEN *et al.*, Exrs., etc., of
James S. Waterman, Deceased, *Appls.*,
v.

ST. PETER'S PARISH *et al.*

(158 Ill. 631.)

1. Gifts to charitable uses are excluded from the operation of the rule against perpetuities by the statute of 43 Ill. chap. 4, which is in force in Illinois.
2. A gift to the rector, church wardens, and vestrymen of an unincorporated religious society, in trust to pay the salary of the rectors of the parish forever, or for church purposes only, is for a charitable use.
3. Incorporation of a church society cannot be presumed merely because the statute prescribes a mode by which such societies may incorporate.
4. The fact that many unincorporated church societies have been in existence is a matter of common knowledge.
5. An unincorporated church society is not affected by a statute limiting the quantity of real estate which can be held by incorporated church societies.

(November 1, 1893.)

APPEAL by complainants from a decree of the Circuit Court for Kane County in favor of defendants in an action brought to set aside a conveyance by complainants' testator to the defendant church of certain real estate. *Affirmed.*

Statement by Carter, J.:

Appellants filed their bill in equity in the circuit court of De Kalb county, at the October term, 1888, to set aside two certain deeds and for partition of the real estate purporting to be conveyed by said deeds. A change of venue was taken to the circuit court of Kane county, where a hearing was had and the bill dismissed for want of equity.

The bill represents that on or about September 10, 1877, James S. Waterman, late of said De Kalb county, was the owner in fee simple of the following described real estate: Lots 9, 10, 11, and 12, in J. S. and J. C. Waterman's subdivision of lots 1, 2, 8, and 4, of block 24, of the original village of Sycamore, in said De Kalb county, containing $\frac{10}{16}$ of an acre of land; that on that day said James S. Waterman, and Abbie L. Waterman, his then wife, now also deceased, made and delivered to the rector, church wardens, and vestrymen of St. Peter's parish, in the city of Sycamore and the diocese of Illinois, otherwise known as "St. Peter's parish in the city of Sycamore and the diocese of Illinois," a deed of conveyance of said lots; that on the 11th day of December, 1877, said grantors also executed a deed of conveyance of a farm in said De Kalb county, containing 160 acres of land, to said grantee, the express condition in each being "the love

and affection" grantors have and bear unto the Protestant Episcopal Church and said parish. The deed of the town lots contains the following exception and reservation: "Excepting and reserving therefrom, during the lifetime of the grantors herein and the survivor of them, the rents, profits, and use and income of the two dwelling houses situated on said lots, and such suitable quantity of land immediately about them as may be necessary to the proper enjoyment of the same, with the right to improve and repair said houses, but not to remove or destroy them, said premises to be used for church purposes only, and not sold or encumbered, and shall revert to the grantors, their heirs and assigns, whenever this condition is broken." And the deed of the farm contained a condition and reservation in the following words: "This conveyance is made upon the express condition and trust that the rents, issues, and profits of the above-described land be devoted to and used for the payment, so far as it may go, of the salary of the rectors of said parish forever, and for no other purpose; and this conveyance is accepted upon the express understanding and agreement that the title hereby conveyed shall immediately revert to and be vested in the party of the first part, his heirs, executors, and administrators, when the income from said land shall be diverted to any other purpose, excepting and reserving therefrom, during the lifetime of the grantors herein and the survivor of them, the rents, profits, and use of the above-described land."

James S. Waterman died July 19, 1888, leaving a will, under which appellants were appointed and are still acting as testamentary trustees. He left also a widow surviving, who died before this bill was filed, and her representatives and devisees are now parties defendant.

The bill proceeds on the theory that said conveyances were and are absolutely void, because contrary to the laws of the state of Illinois in relation to the creation of perpetuities, and because the grantee, as a religious society, could not, under the statute, take more than 10 acres of land, and it is alleged that, by reason of the premises, Waterman, at the time of his death, still remained and was owner of all of said lands; that the said Abbie L. Waterman, widow of the said James S. Waterman, renounced, under said will, the provision therein made in her favor, and there being no issue of the said James S. Waterman, the said widow elected to take one half of all the real estate, and that she thereby became and was, at the time of her death, the owner of an undivided one half of all of said real estate; that under and by virtue of the terms of said will complainants became the holders of the legal title of an undivided one half of all of said land in trust for the uses and purposes mentioned in said will. The bill further alleges that

NOTE.—For presumption as to incorporation, see note to *Re Gibbs' Estate* (Pa.) 22 L. R. A. 276.

As to what constitutes a charity, see *Philadelphia v. Overseers of Public Schools* (Pa.) 29 L. R. A. 600; 80 L. R. A.

Webster v. Wiggin (R. I.) 28 L. R. A. 510; *Philadelphia v. Masonic Home* (Pa.) 23 L. R. A. 545; *Crerar v. Williams* (Ill.) 21 L. R. A. 454, and cases there referred to.

the said St. Peter's parish is, and was at the times of the execution and delivery of the said deeds of conveyance, a corporation formed for religious purposes under the laws of the state of Illinois for the incorporation of religious societies, and that under such laws the quantity of land mentioned and described in the deed of conveyance secondly above referred to could not, at the time of the execution and delivery of said deed, be owned or held by said St. Peter's parish, nor could the grantees in said deed take, or hold the lands therein attempted to be conveyed for the purposes therein mentioned, and that for this reason also said last-mentioned deed was and is utterly void.

The answer denied the allegation that St. Peter's parish is, and was at the time of the execution of said deed, a corporation formed for religious purposes under the laws of the state of Illinois for the incorporation of religious societies; and on its becoming known that the allegation in the bill as to the incorporation of the church could not be made clear by the proofs, the complainants filed an amendment to the bill in the following words:

"Your orators further represent that it is claimed and pretended by the said St. Peter's parish that it was never incorporated as herein charged, but your orators charge that the contrary thereof is the fact, as herein shown. Your orators charge, however, and insist, that if in fact it should appear on the hearing hereof that said St. Peter's parish was not an incorporated organization, as herein stated, nevertheless it was at and long before the times of the delivery of the said deeds, and has been continually ever since, a church organization, formed and subsisting for religious purposes only, and to promote and advance the peculiar tenets of the religious sect known throughout Illinois as the Protestant Episcopal Church, and belonging to the diocese aforesaid from and about the time of organization, to wit, 1856, and differed from other churches of this state, members of said diocese, only in the lack of such corporate entity, and in virtue and effect, and to all intents and purposes, was precisely the same as if it had been duly incorporated, excepting only the legal, technical fact that it had not complied with the statute of the state of Illinois in filing its certificate of organization with the recorder of said De Kalb county, and therefore is and was within the statute of this state and the policy of its laws prohibiting religious corporations from owning and holding lands in excess of a stated amount, or it should be held, under the law, incapable of taking or holding title to any real estate whatever."

This paragraph was demurred to and the demurrer sustained, leaving the cause to go to a hearing on the rest of the bill. The bill further alleged that the condition contained in said first-mentioned deed has been broken because the lands described have been used for other than church purposes, and that if any title ever passed by said deed, such title has, by reason of the breking of such condition, reverted, as provided in said deed.

80 L. R. A.

The parish was organized in 1856 as a part of the machinery of the diocese of Illinois. At that time its purposes were religious altogether, and it has generally been maintained as a parish and church organization since that time. Some of the early records of De Kalb county and the early records of the church were missing and could not be produced on the trial. No certificate of organization of the church was found.

Mr. William R. Plum, for appellants:

A voluntary society organized for religious purposes is entitled to no greater right to hold lands in this state than corporations authorized by law, even if in fact it can hold any land in perpetuity. Public policy at least forbids it.

Voorhees v. Reed, 17 Ill. App. 22; *People v. Chicago Gas Trust Co.* 180 Ill. 296, 8 L. R. A. 497; *Greenhood*, Pub. Pol. 2, 5; *Adams & Durham's Statutes* 1831, 45; 1835, 340, 341; 1839, 46; 1845, 342, 343, 346, 347; 1859, 298-299; 1872, 372, 373. *Tudor, Charitable Trusts*, 372, 374, 375, 1920; *Duke, Charitable Uses*, 192, 123; *Perry, Tr.* 701; *Andrews v. Andrews*, 110 Ill. 223; *Gülmer v. Stone*, 120 U. S. 586, 80 L. ed. 734; *American & F. Christian Union v. Yount*, 101 U. S. 352, 25 L. ed. 888; *Carroll v. East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Santa Clara Female Academy v. Sullivan*, 116 Ill. 382, 56 Am. Rep. 776; *Rhoads v. Rhoads*, 43 Ill. 252; *Re McGraw*, 111 N. Y. 107, 2 L. R. A. 387; *Hamsher v. Hamsher*, 182 Ill. 273, 8 L. R. A. 556; *Atty. Gen. v. Tancred*, 1 W. Bl. 90; *Philadelphia Baptist Assn. v. Hart*, 17 U. S. 4 Wheat. 1, 4 L. ed. 499.

Corporations only are capable of holding lands in perpetuity.

Atty. Gen. v. Tancred and Philadelphia Baptist Assn. v. Hart, *supra*; *Inglis v. Sailors' Snug Harbor*, 28 U. S. 3 Pet. 99, 7 L. ed. 617.

Messrs. Carnes & Dunton, also for appellants:

Under the evidence defendant church should be held to be an incorporated church under the laws of the state.

At the time of its organization it was made its duty under section 45 of the act of 1845, then in force, to file the certificate provided by that act.

Not only public officers, but everybody else, are presumed to have complied with the laws of the land until the contrary appears.

St. Peter's Roman Catholic Cong. v. Germain, 104 Ill. 440; *Andrews v. Andrews*, 110 Ill. 223; *Calkins v. Cheney*, 92 Ill. 478; *Hamsher v. Hamsher*, 182 Ill. 284, 8 L. R. A. 556; *Willard v. Methodist E. Ch. of R. C.* 66 Ill. 55; 2 Cook, Stock & Stockholders and Corp. Law, 8d ed. § 693, p. 997; *Methodist E. U. Ch. v. Pickett*, 19 N. Y. 482.

The statute should be so construed as to include religious associations who have failed to comply with the statute law in incorporating.

Castner v. Walrod, 83 Ill. 171, 25 Am. Rep. 369; *Burgett v. Burgett*, 1 Ohio, 469, 18 Am. Dec. 634; *Cruze v. Aden*, 127 Ill. 232, 8 L. R. A. 327; *Anderson v. Chicago, B. & Q. R. Co.* 117 Ill. 26; *Pecira & P. U. R. Co. v. People*, 144 Ill. 458; *African M. E. Church v. Onover*, 27 N. J. Eq. 157; *Washb. Real Prop.* 566, ¶ 32; *Robie v. Sedgwick*, 35 Barb. 323; 2 Sugden,

Vendors, 888; *Jackson, Cooper, v. Cory*, 8 Johns. 887; 20 Am. & Eng. Enc. Law, p. 804, citing authorities.

Messrs. Botsford & Wayne for appellees.

Carter, J., delivered the opinion of the court:

The trial court found that the defendant society was not a corporation, and did not come within the provisions of the statute prohibiting corporations formed for religious worship from holding more than 10 acres of land, and found also that the condition of the first deed conveying the lots in question for church purposes only, had not been broken by the renting of such lots and using the rents for church purposes. After a careful consideration of the evidence, and the law applicable thereto, we are satisfied that the case was correctly decided by the learned chancellor in the circuit court.

It has been repeatedly held by this court that the statute 43 Elizabeth (chap. 4) is in force in this state, and that gifts to charitable uses are, by force of that statute, excluded from the operation of the rule against perpetuities. *Heuser v. Harris*, 43 Ill. 425; *Andrews v. Andrews*, 110 Ill. 223; *Orerar v. Williams*, 145 Ill. 625, 21 L. R. A. 454. It is also established that a gift for the support of churches, or to pay the expense of preaching any particular religious doctrine, comes within the equity, and therefore within the spirit, of that statute, as a gift for a charitable use. *Andrews v. Andrews*, and *Orerar v. Williams*, *supra*; *Hunt v. Fowler*, 121 Ill. 269.

It is true that the questions presented for decision by this record, so far as they (or those of a kindred nature) have heretofore come before this court for consideration, have arisen under wills, and not deeds. But we do not understand the counsel for appellants to insist that the deeds in question are void on the ground that, being made to the officers of an unincorporated society in trust for such society or its members or directly to such unincorporated society, there was no grantee capable, in law, of taking by deed. If the grant were not one made as a gift for a charitable or pious use, and so not brought within the saving provisions of the statute of 43 Elizabeth, it might be contended that the deeds would be void for want of a grantee capable of taking. *German Land Assn. v. Scholler*, 10 Minn. 381. But we are of the opinion, conceding that the religious society in question was not incorporated, that the conveyances were made to the rector, church wardens, and vestrymen of the society in their official capacity, in trust for a designated charitable and pious use, and are within the provisions of the statute in question, and are not void for want of a grantee capable of taking by deed, but will be upheld and enforced in equity, unless rendered invalid upon other grounds urged by counsel and referred to below. *Judd v. Woodruff*, 2 Root, 298; 20 Am. & Eng. Enc. Law, p. 804; *Ferraria v. Vasconcellos*, 31 Ill. 25.

The conveyances in question were made to the rector, church wardens, and vestrymen of this unincorporated religious society, the one 30 L. R. A.

conveying the 180 acres being "upon the express condition and trust that the rents, issues, and profits be devoted to and used for the payment, so far as it may go, of the salary of the rectors of said parish forever," and the other, conveying the lots, being upon condition that they were to be used for church purposes only. Both were given for the consideration of love and affection for the church and parish. It is clear that these conveyances constituted a gift in trust for a charitable use. *Ferraria v. Vasconcellos*, 31 Ill. 456; 31 Ill. 26; 20 Am. & Eng. Enc. Law, pp. 805-809. And in such a case a court of equity will be inclined to lend its aid in carrying out the purpose of the donor and to give effect to the trust, if it can be done consistently with existing laws. The questions so far considered have been so often and so uniformly decided that we deem any further discussion of them, and citation of authority in support of the position here assumed, unnecessary.

It is, however, contended—and this is the principal question in the case—that this society should be held to be an incorporated church or religious society under the laws of this state, or if it be not held to be a corporation, still, inasmuch as incorporated religious societies are, by the statute, prohibited from taking or holding more than 10 (now 20) acres of land, that on the grounds of public policy the prohibition must extend to all such societies, whether incorporated or not.

In support of the first branch of this contention, it is said that by the statute in relation to the incorporation of religious societies in force at the time of the organization of the church in 1856, *viz.*, the Act of 1845, chap. 25, p. 120 (see 1 Adams & D. Real Estate Stat. p. 842), it was made the duty of the society, or its trustees, to make and file with the recorder of deeds the certificate required by section 45 of that Act, and thus become incorporated; and it is further said that because of the destruction of one of the early records of the church, and also one of the early records of De Kalb county, it is left uncertain whether the duty imposed by the statute was performed or not, and that the presumption must be indulged that the duty imposed by the statute was performed, the law complied with, the certificate made and filed, and the society thus duly incorporated. It is, however, evident that the statute in question did not make it obligatory upon all voluntary religious societies to become incorporated, but merely prescribed the mode by which they might incorporate, and there being no evidence that this society ever took any of the steps prescribed by the statute to become incorporated, or that it ever assumed to act as a corporation, it would be carrying the doctrine of presumptive evidence too far to presume such incorporation. It is a matter of common knowledge that there have been in existence in this state many such unincorporated societies, and so far as the evidence discloses this was one of them. In *Ferraria v. Vasconcellos*, *supra*, where this court held that the steps taken in attempting to incorporate a religious so-

cietly under the act of 1845 were insufficient to create a corporation, Mr. Justice Walker said (p. 456): "The statute must be at least substantially complied with in its provisions, and all of its express requirements must be observed. We have no power to dispense with such requirements, and render illegal acts valid and binding. It is not within the province of the court to question the propriety of such requirements when imposed by the legislature, and in this case they are few, simple, and easily performed. But whether they are the most salutary is not a question which we can consider; they have been imposed as a condition to the organization of these corporations, and must be performed before corporate rights can attach. And this is expressly declared to be the legislative will by the latter clause of the 49th section."

The contention that public policy requires that the statutory limitation on the power to take and hold real estate should be imposed on these unincorporated religious societies by judicial decree, is, we think, equally untenable. Upon becoming incorporated certain legal rights are acquired and certain burdens assumed, as provided by the statute. Without incorporating, these societies cannot exercise these rights that pertain to corporations, and they ought not to be required to assume the corresponding burdens,—at least unless the statute so directs. As pointed out in *Ferraria v. Vasconcellos*, *supra*, and other cases, there are marked distinctions in the

powers, property rights, and duties of the two kinds of organizations. *Robertson v. Bullions*, 11 N. Y. 248. There are many corporations closely allied to these church organizations which have been held not subject to the 10-acre limitation, yet it might, as reasonably as here, be contended that public policy requires that they be included in what is usually denominated religious corporations, or corporations organized for religious worship. *Hamsher v. Hamsher*, 132 Ill. 273, 8 L. R. A. 556; *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 784; *Germain v. Baltes*, 118 Ill. 29. In *Andrews v. Andrews*, *supra*, it was urged that public policy requires that the value as well as the number of acres should be limited, but it was there said that it was "a sufficient answer to say that the statute has authorized such bodies to acquire and hold not exceeding 10 acres of land, without any limit as to value or income." Yet 10 acres of land in some parts of the state might not be of much value, while in a large city it would be worth many millions. It is for the lawmaking power to determine what the limit shall be and upon what bodies it shall be imposed, and unless that power imposes on unincorporated religious societies the same restrictions it has placed upon those becoming incorporated, it is not within the province of the courts to do so.

The decrees of the Circuit Court will be affirmed.

WISCONSIN SUPREME COURT.

JOHN V. FARWELL COMPANY, *Appl.*,
v.

Lucy Ellen HILBERT *et al.*

(.....Wis.....)

1. A judgment by confession is irregular only, and not void, where it is founded on a valid debt and there is a sufficient warrant

of attorney and release of errors, although the answer of confession required under Rev. Stat. § 2890, to be signed by defendant or some attorney in his behalf, is signed by plaintiff's attorney in the name of another attorney at his special instance and request, as attorney for defendant.

2. The enforcement of a judgment at law will not be enjoined merely for want of jurisdiction in the court which rendered it,

NOTE.—*Injunctions against judgments entered on confession.*

- I. In favor of creditors.
- II. For irregularities.
- III. For fraud.
- IV. Judgments against public policy.
 - a. Usury.
 - b. Compounding crimes.
 - c. Gambling consideration.
- V. Judgments against sureties.
- VI. Judgments against corporations.
- VII. Judgments against partners.
- VIII. Judgments against executors and administrators.
- IX. Statute of limitations.
- X. Consideration not due.
- XI. Valid defense must be shown.
- XII. Negligence.
- XIII. Remedy at law.
- XIV. Other matters.

I. In favor of creditors.

The general rule is that no one but a judgment creditor is entitled to an injunction against judgments taken against his debtor by others, but on 80 L. R. A.

this question there is some conflict. This does not appear to have been discussed in the case of *JOHN V. FARWELL CO. v. HILBERT*, but the question there was as to the right of a general creditor to attack a judgment by confession entered against the debtor on the ground of irregularities, and the court properly held that no one but the debtor himself could attack a judgment on such grounds.

In regard to the right of a general creditor to obtain an injunction in aid of his attachment against judgments confessed by the debtor, there is a conflict of authority, the determination being largely controlled by a number of cases, on the question as to the right of a creditor to attack fraudulent conveyances, many of which are not injunction cases. Where a creditor has a lien by virtue of an attachment, the weight of authority seems to be in favor of his right to obtain an injunction, but this must be taken in connection with the rule of law in each state as to the general right of a creditor to set aside fraudulent conveyances.

Some cases hold that an attaching creditor having a lien on the property is entitled to an injunction against the proceedings on the judgment fraudu-

unless such judgment is shown to be unjust or inequitable.

(November 23, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dodge County in favor of defendants in an action brought to set aside certain judgments, and execution levies thereon, which were alleged to have been wrongfully confessed in fraud of plaintiff's rights. *Affirmed.*

Statement by Pinney, J. :

This action was brought to set aside two judgment notes and judgments entered thereon, and levies of execution made to satisfy the same, namely, a judgment note in favor of Lucy Ellen Hilbert against the defendants G. B. Hilbert and H. M. Johnson, for

\$5,423.19, dated August 27, 1893, upon which judgment was entered in her favor against them in the circuit court for Dodge county, December 30, 1893, for \$5,421.51; and a judgment note in favor of the defendant James J. Hilbert against the defendant G. B. Hilbert for \$2,105.05, dated December 11, 1893, upon which judgment was entered in his favor against said G. B. Hilbert, in the same court, on the 30th day of December, 1893, for \$2,140.60. These executions were levied by the defendant Peters, sheriff of Dodge county, on the same day. The judgments were entered upon the stock of merchandise of the defendant G. B. Hilbert, which was sold thereunder, and the money realized was \$4,500. It appeared that the plaintiff was also a creditor of the said G. B. Hilbert and H. M. Johnson for goods sold and delivered to

lently confessed by the debtor to other parties. *Blum v. Schram*, 58 Tex. 324; *People v. Van Buren*, 136 N. Y. 252, 20 L. R. A. 446; *Keller v. Payne*, 10 N. Y. S. R. 245.

In *People v. Van Buren*, *supra*, it was held that an attaching creditor is entitled to an injunction restraining an execution sale of the debtor's property on judgments fraudulently confessed, where such debtor is insolvent, distinguishing the prior case of *Thurber v. Blanck*, 50 N. Y. 30, which was a case of an attaching creditor attempting to reach equitable assets, and the statute requiring the return of an execution unsatisfied as a condition precedent. Although there is much conflict of authority in other states as to the standing of an attaching creditor, this case holds that an attaching creditor ceases to occupy the defenseless position of a creditor at large, and becomes in a certain sense invested with the privileges of a creditor whose debt has been adjudged valid, and who finds himself embarrassed in its collection by fraudulent conduct of the debtor.

And attaching creditors are entitled to an injunction against execution sale under fraudulent judgments confessed in favor of other creditors, as they cannot maintain an action of replevin against the sheriff, the writ of execution giving him the right to possession, and an action against purchasers, if insolvent, would afford no redress, and they are not entitled to appear and plead in the action at law. *Gerry v. Sharpe*, 8 Fed. Rep. 15.

And where a merchant was induced to sell on credit, and by fraud and collusion of the debtor judgment notes were given to another party, and levy made on the goods sold, this is such fraud as will entitle the vendor to an injunction against such sale. *Ibid.*

A judgment creditor is entitled to an injunction against proceedings under a judgment fraudulently and subsequently confessed by his debtor to other persons to prevent the collection of the complainant's judgment. *Oakley v. Young*, 6 N. J. Eq. 453.

And an injunction was granted at the instance of a creditor on the ground that the debtor had fraudulently executed a bond, and was about to confess judgment in order to defeat his creditor. *Mahaney v. Lazier*, 16 Md. 69.

So, judgments by confession which are fraudulent as to other creditors will authorize injunction against an execution sale of personal property, made to deprive creditors of their rights, where the debt was not yet due, and was secured by a real-estate mortgage; and the fraud will dispense with the deposit of the amount required by 2 N. Y. Rev. Stat. 190, § 147. *Burns v. Morse*, 6 Paige, 108.

And a trust fund assigned for creditors will be protected by enjoining an execution sale, under 30 L. R. A.

judgments confessed that are void under N. Y. Laws 1887, chap. 503, forbidding preferences. *Spelman v. Jaffray*, 22 Abb. N. C. 815; *Wilcox v. Payne*, 1077 *Riessner v. Cohn*, 10, 312.

So, under Illinois assignment act of 1887, § 12, providing that all preferences shall be void, judgments by confession entered just prior to an assignment for creditors and in fraud thereof may be enjoined at the instance of a creditor, where the assignee for creditors refuses to institute such suit. *Preston v. Spaulding*, 120 Ill. 214.

So, trust funds assigned for creditors will be protected by enjoining a sale under judgments confessed preferring one of the officers of a corporation. *Harding v. Flake*, 25 Abb. N. C. 848. See also *Thomas v. Watson*, Taney, C. C. 297, *infra*, IV.

And judgments by confession and the levy thereunder will be enjoined at the instance of a creditor, where the same is in contravention of the assignment act and fraudulent, and the assignee refuses to attack the same. *Lindauer v. Lang*, 29 Ill. App. 188.

An assignee for creditors is not a proper party defendant in an action by a creditor to enjoin a sale under judgments fraudulently confessed to defeat creditors, where it is claimed that the assignment is also fraudulent, as the remedy is by removing the assignee if he is not acting in good faith. *Artman v. Giles*, 155 Pa. 409.

Where a judgment against a grantor was purchased, and the grantee of an undivided part of the land told the purchaser of the judgment that it was valid, and that the amount thereof was due, asked delay in issuing execution, and thereafter the grantee, to defeat such execution, confessed a judgment to another party, having full notice of complainant's priority, the same will be set aside as a cloud on the title, preventing a sale for full value under the prior judgment. *Oakley v. Young*, 6 N. J. Eq. 453.

A partnership lien creditor may enjoin judgments confessed by his debtor to another party, where the debt was not due, as N. J. Rev. Stat. 946, § 5, prohibits a judgment on confession where it is not due. *Blackwell v. Rankin*, 7 N. J. Eq. 153. See *Christy v. Sherman*, 10 Iowa, 535, *infra*, VII.

Other cases refuse an injunction in favor of a creditor against judgments confessed by the debtor to others, and this refusal is on the ground that he is not a judgment creditor, or that he has a remedy at law, or that the judgment confessed is not fraudulent or unjust.

Attaching creditors cannot enjoin a sale under a judgment fraudulently confessed by his debtor, as they have a standing to rule the sheriff to pay the proceeds into court, and there question the validity of the confessed judgment. *Artman v. Giles*, 155 Pa. 409.

them while engaged in the mercantile business, to the amount of \$946.79, for which it had caused a writ of attachment to be issued in its action against said Hilbert & Johnson, in the same court, and delivered to the sheriff of said county to be levied on the same stock of merchandise; and it was alleged that Hilbert & Johnson, on the 80th day of December, 1898, were insolvent, and unless the court should enjoin the payment of the proceeds of said stock of goods in satisfaction of said executions in favor of the defendants Lucy Ellen Hilbert and James J. Hilbert until it could recover judgment on its demand and intervene to claim said money, the plaintiff's claim and remedy to collect it out of said stock or the proceeds thereof, would be lost. It was further alleged that said defendant Lucy Ellen Hilbert is the wife of the

defendant James J. Hilbert, and that they are the parents of G. B. Hilbert; that on or about August 20, 1892, said G. B. Hilbert and H. M. Johnson formed a partnership to carry on the mercantile business at Waupun, and that the defendant Lucy Ellen Hilbert purchased a stock of goods for her said son to start him in said business, and it was claimed that the money so used for that purpose was a gift to him; that on or about the 12th of January, 1893, said Hilbert & Johnson obtained credit of the plaintiff to the amount of \$2,417.53, upon which a balance of \$946.79 still remains unpaid, on the representation that they were the sole owners of the stock, and had paid for the same in cash, and owed no debts except such as they had incurred, since their purchase, for goods in their business, and that the said Lucy Ellen

In *Martin v. Michael*, 23 Mo. 50, 66 Am. Dec. 656, it was held that an attaching creditor before judgment was not entitled to an injunction against proceedings on the judgment confessed by his debtor to another, but in *Hulett v. Stockwell*, 27 Mo. App. 323, which was not against a judgment on confession, it was held that a landlord having a lien was entitled to an injunction to protect the removal of the property.

And in *Rollins v. Van Baalen*, 56 Mich. 610, an injunction was refused against proceedings under judgments obtained by fraudulent confession in favor of other parties against their debtors, where complainant had only a claim under attachment.

The fact that security was given and judgment confessed to a director of a corporation will not authorize setting the same aside at suit of the receiver on the ground of being fraudulent, but under *N. J. Nix*, Dig. 371, § 9, such judgment confessed in contemplation of insolvency will not be allowed to have any priority over other claims. *Stratton v. Allen*, 16 N. J. Eq. 223. See also *Kilgore v. Nicholson*, 26 La. Ann. 683, *infra*, VI.

A judgment confessed by a third party to indemnify a surety cannot be impeached in a collateral attack by a creditor of the principal where it is claimed to be fraudulent but the creditor has not established his claim or lien. *Philadelphia v. Dobson*, 10 Pa. Co. Ct. 34.

And a general creditor is not entitled to an injunction. *Kelly v. Herb*, 137 Pa. 41.

And in *Shedd v. Bank of Brattleboro*, 22 Vt. 709, it was held that irregularities in a writ of attachment, and that a judgment was confessed by one partner against all the firm, will not be ground for enjoining the judgment on complaint of a judgment creditor, as the complainant cannot take advantage of irregularities.

An injunction will not be granted in favor of a judgment creditor against a judgment confessed by one member of a firm, where the other member consents to such confession, unless the same is shown to be unjust and inequitable, as the same rule applies as in case of want of service of process, and there is a remedy in the law court. *Hier v. Kaufman*, 134 Ill. 215.

Under the Colorado statutes, giving an attaching creditor a conditional lien from the time of the levy, a partnership creditor, having levied a valid attachment on property of an insolvent firm, is entitled to an injunction against a judgment confessed by the firm to others, that is not recorded as required by the statute, and that is fraudulent. *Schuster v. Rader*, 13 Colo. 329.

In *Uhlfelder v. Levy*, 9 Cal. 607, it was said that the only exception to the rule forbidding one court to enjoin the judgment of another would be where a debtor confessed a fraudulent judgment in different

courts, and an injunction would be granted to prevent the necessity of the creditors bringing a suit in each different court.

Where a creditor obtained an injunction to set aside a judgment confessed by his debtor on the ground of fraud, and also issued an execution and levied on the property of his debtor, the court required the creditor to make an election to stay his execution during the continuance of the injunction or to dissolve the injunction, and the creditor refusing to elect, the injunction was dissolved. *Livingston v. Kane*, 3 Johns. Ch. 224.

II. For irregularities.

If the irregularity is so great as to render the judgment void, it seems that an injunction will be granted; but no one except the debtor is entitled to complain if the debt is just, and an injunction will be refused if there is an adequate remedy at law.

So, a judgment by confession upon a forged note and warrant of attorney will be void, and proceedings under an execution sale thereon will be enjoined. *Bullen v. Dawson*, 129 Ill. 633.

And an order of seizure and sale on a judgment by confession was enjoined where the confession of the judgment, power of attorney, certificate, and affidavit of the justice, taken in another state, were not in compliance with law, and the identity of the notes with this on which judgment was confessed was not shown, and there is a defense to the action. *Chambless v. Atchison*, 2 La. Ann. 433.

The execution of a void judgment entered on confession by a married woman where it is not within some of the causes allowing an action against her, will be enjoined. *Hoffman v. Shupp*, 80 Md. 611.

And under Md. act 1872, chap. 370, providing that a married woman may be sued jointly with her husband on a joint contract, a judgment by confession on a joint power of attorney on a debt that is not joint is void, and proceedings will be enjoined as to the wife. *Lowe-kamp v. Koehling*, 64 Md. 96.

An execution will not be enjoined where it issues upon confession in a supersedeas which is not dated as required by Md. Stat. 1825, chap. 223, § 2, providing that the date of confession shall be a part of entry. *Dilley v. Shipley*, 4 Gill. 43.

Under Tenn. act 1831, chap. 23, providing that judgments confessed or suffered by an administrator within six months after his qualification shall be void, and it shall be his duty to plead Tenn. act 1829, chap. 53, providing that they shall not be liable to answer in that time, a judgment taken within that time in a suit begun before the death of the obligor, where no plea was made in bar, will not be enjoined, as the word "void" is construed to mean that if judgment is taken on confession

Hilbert knew of such representations, and that the plaintiff trusted Hilbert & Johnson, relying on the same; that she conspired with them to keep secret the existence of her said judgment note against them, and that it was understood that, if the said business was not successful, she could, by collusive and fraudulent confession of judgment in her favor, absorb the stock and secure the same, or the avails thereof, to her use, and cheat and defraud the creditors of Hilbert & Johnson. Various other matters were alleged to show that the dealings of Hilbert & Johnson and of Lucy Ellen Hilbert in relation to said stock of goods were fraudulent as against the creditors of Hilbert & Johnson. It was also alleged that both of said judgments were entered by collusion by and between the said Lucy Ellen Hilbert and James J. Hilbert

and their said son, G. B. Hilbert,—C. E. Hooker, Esq., acting, in the recovery thereof, for the respective plaintiffs, so that they might secure to themselves the proceeds of said stock on said judgments, to the prejudice of all the other creditors; that the answer of confession in each of said proceedings purported to be signed by J. J. Dick, Esq., as attorney for the defendants, but were not, in fact signed by him or by any person authorized by him, or by the defendants or either of them, and that said judgments were therefore void. The defendants Lucy Ellen Hilbert and James J. Hilbert answered the complaint, putting in issue all the allegations of fraud and collusion in the complaint, and insisting that their judgments were founded upon bona fide debts for moneys advanced, and were not gifts to G. B.

or default it will be inoperative during that time. *Roche v. Washington*, 7 Humph. 142.

So, an execution on a judgment by confession which was not entered in the judgment book may be enjoined upon principles of equity, at the suit of the third party prejudiced thereby. *Schuster v. Rader*, 13 Colo. 329.

But a judgment upon a warrant of attorney to secure a contingent liability is not void or will not be enjoined on the ground that the plaintiff's affidavit annexed to the complaint was defective, where the insufficiency is not clearly shown, and complainant does not show that the judgment is wrong. *Relley v. Johnston*, 22 Wis. 279.

And judgments by confession by a corporation will not be enjoined because entered upon defective warrants of attorney, where no valid defense to the same is shown, under Ill. Rev. Stat. 1874, chap. 69, § 7, providing that only so much of a judgment at law shall be enjoined as the complainant shall show himself not equitably bound to pay; and besides there is a remedy in the court at law or by a writ of error. *Burch v. West*, 124 Ill. 258, affirming, 38 Ill. App. 369.

A judgment by confession, including an attorney's fees under an agreement that is void, will not be enjoined where there is a remedy by motion to set aside or by writ of error. *Shelton v. Gill*, 11 Ohio, 417.

A receiver of a corporation was refused an injunction against a judgment confessed by the president to a director, although it was claimed that the affidavit was insufficient; that the board of directors directing the same was not duly organized; that a director could not vote in his own favor; that the power to confess judgment was not conferred; that the bonds and warrants were not countersigned as required by the by-laws; and that the same was an unlawful preference,—there being no fraud shown, and the debt being justly due. Besides there is a remedy at law. *Stratton v. Allen*, 6 N. J. Eq. 220.

And where a judgment was claimed to be irregular an injunction was refused, as there was a remedy in the court in which it was entered. *Cammack v. Johnson*, 2 N. J. Eq. 163.

An injunction was refused a general creditor against the enforcement of a judgment confessed by his debtor to another on a just debt, although the affidavit required to enter a judgment on a bond and warrant did not set out the consideration. *Jackson v. Darcy*, 1 N. J. Eq. 194.

And that a magistrate's judgment on confession was rendered without a warrant will not authorize an execution against the same, as there is a remedy by appeal. *Brumbaugh v. Schnebly*, 2 Md. 320.

A judgment entered on confession will not be 30 L. R. A.

held to be fraudulent on the ground that it was entered up in violation of a statute requiring an affidavit that so much was due and justly owing; but as the proof shows that the amount for which the payment was rendered is not all due, the parties holding the same will be required to give bond to refund any part which is not due. *Clapp v. Ely*, 10 N. J. Eq. 173.

Under Ind. Rev. Stat. 1881, § 1490, providing that judgments by confession may be collaterally impeached by fraud by creditors of the judgment debtor, and such judgment shall be void as to such creditors, unless at the time of the rendition thereof the defendant makes affidavit that he justly owes the debt, the party is not entitled to restrain a sale of his land under a judgment confessed by another for irregularity for want of the statutory affidavit, but may restrain the sale where the judgment has been paid. *Chapin v. McLaren*, 105 Ind. 563.

The enforcement of a judgment by confession will not be enjoined on the ground that a copy of the petition was not served, under La. Code Pr. arts. 172-179, requiring citations to be served in the French language, as this does not apply to an executory petition. *Alliet v. Henry*, 2 La. Ann. 145.

In *White v. Crow*, 17 Fed. Rep. 93, which was a suit in the Federal court to redeem from a sale in the state court, and to enjoin the execution of a debt on the ground of irregularity in the confession of a judgment, it was held that the Federal court would not enjoin the officer of the state court, and as to the confession of a judgment by a corporation, the court in which the action was pending was the judge of the authority of the person who appeared for the company, whether an attorney at law or an agent, and its judgment as to his authority was conclusive; but, having the parties all before the Federal court, the right was recognized to deal with them directly without reference to the sheriff, and a decree was made authorizing a redemption.

For injunction in aid of attachment, see *note* to *People v. VanBuren* (N. Y.), 2 L. R. A. 444.

III. For fraud.

The debtor is always entitled to an injunction against judgments taken by confession against him, which are obtained by fraud, unless there is an adequate remedy at law; but in actions to enjoin a judgment a valid defense should always be shown before an injunction will be granted.

As, where the debt had previously been paid, and an injunction will be granted by a court of equal jurisdiction of another county having jurisdiction of the person, even though Ohio Rev. Stat. 5854, provides for vacating judgments in the same

Hilbert, and that they were rightfully recovered. The defendant Peters, the sheriff, answered, setting up his proceedings under the executions. It appeared from the findings of the court that H. M. Johnson sold out his interest in the partnership of Hilbert & Johnson to his partner, G. B. Hilbert, August 21, 1893, and that the latter carried on the business until the time the executions were levied, December 30, 1893; that the judgments were founded on bona fide debts actually due for moneys advanced, and which were not gifts to G. B. Hilbert, and all the charges of conspiracy, collusion, and fraud against the creditors of Hilbert & Johnson or of G. B. Hilbert were found to be substantially untrue and without foundation. It was found that the answers to the complaints in the proceedings confessing the

judgments, purporting to be signed by J. J. Dick, as attorney for the defendants therein, were not signed in the proper handwriting of said J. J. Dick, but were signed by C. E. Hooker in the absence of said J. J. Dick, for and at the special instance and request of J. J. Dick, he having duly authorized such signing, and also ratified the same. Judgment was rendered dismissing the plaintiff's complaint on the merits, with costs, from which the plaintiff appealed.

Mr. E. D. Doney for appellant.

Messrs. C. E. Hooker and J. J. Dick, for respondents:

Mere irregularity in obtaining a judgment is not good ground for its collateral impeachment.

Adams v. White, 23 Fla. 352.

court that are obtained by fraud, as this is only cumulative. *Darst v. Phillips*, 41 Ohio St. 514.

And an injunction was granted where the majority of the trustees of a religious society gave a judgment note to persons who had a claim against the society, and also included in such note the amount of certain claims in favor of such parties personally, for the purpose of encumbering the church property and subjecting it to a sale, for this was a fraud; and this was done although the society might have had the judgment vacated on motion. *United Brethren Ch. v. Vandusen*, 37 Wis. 54.

So, a judgment obtained by an unauthorized appearance of strangers will be enjoined on the ground of fraud whatever may have been the original intention of the party, although courts of law have concurrent jurisdiction; but this will not deprive a court of equity of its jurisdiction. *Truett v. Wainwright*, 9 Ill. 418.

Or, where a judgment was confessed only as a security for what might thereafter be found due, and the claims were fraudulently enlarged. *Keighler v. Savage Mfg. Co.*, 12 Md. 383, 71 Am. Dec. 600.

And a judgment entered on confession, agreed and intended only as a conditional judgment, where the justice had no power to enter a conditional judgment, was enjoined as void. *Gwinn v. Newton*, 3 Humph. 710.

Or where the same was excessive, and obtained by fraud and misrepresentation from an ignorant and illiterate party, and a good defense is shown to that action. *Shufeldt v. Gandy*, 25 Neb. 602.

And fraud in procuring an assignment of a judgment confessed to indemnify the sheriff and a release of errors, so as to prevent prosecution of error, will justify enjoining the judgment. *Lyon v. Tallmadge*, 14 Johns. 501, reversing *Lyon v. Richmond*, 2 Johns. Ch. 51.

In *Lyon v. Tallmadge*, 1 Johns. Ch. 184, a similar bill between the same parties, not charging fraud, was dismissed.

An injunction was granted against suing out execution on a judgment on confession on a bond of £1,200 into which the plaintiff had entered partly in consideration of the defendant returning as so much cash a post obit formerly granted by the plaintiff (an expectant heir) in discharge of a debt of inconsiderable amount, on the understanding that the principal was not to be called for until the death of plaintiff's father. *Annesley v. Bookes*, 3 Meriv. 226, note.

IV. Judgments against public policy.

a. Usury.

Injunctions have been granted against judgments entered on confession that are contrary to public policy or statute on account of usury, where 30 L. R. A.

the principal and interest are tendered. *West v. Beanes*, 3 Harr. & J. 638; *Fanning v. Dunham*, 5 Johns. Ch. 142, 9 Am. Dec. 283.

And an assignee for creditors may obtain an injunction against a judgment by confession entered against his assignor containing usury, even if the defense of usury was not made at law, as equity will relieve on the ground that usurious contracts are contrary to public policy, and Md. act 1845, abrogating the penalty of the act of 1704, still leaves such contracts as to usury void. *Thomas v. Watson*, Taney, C. C. 297.

But a surety is not entitled to an injunction on the ground of usury against a judgment confessed by him and his principal, where the principal is not made a party defendant in the injunction suit. *Boughton v. Allen*, 11 Paige, 321.

And in *Shelton v. Gill*, 11 Ohio, 417, it was held that where the warrant of attorney shows that the judgment confessed is usurious, the remedy by motion to set aside the judgment or by a writ of error will prevent an injunction on the ground of usury.

In *Brown v. Swann*, 36 U. S. 10 Pet. 497, 9 L. ed. 508, it was held that after a judgment is allowed to be taken without defense against usury the defendant is not entitled to an injunction, and a bill of discovery in usury against a judgment confessed with a saving of the defendant's equity, although Va. Stat. Nov. 23, 1798, § 8, provides for a bill in chancery, and that the lender shall be obliged to accept principal without interest. And although there was annexed to this judgment a reservation in terms for a resort to equity, the court had no authority to make it a part of the record, for the right to resort to equity exists independently of any reservation of the courts of common law, and the defense should have been made before judgment,—reversing *Swann v. Brown*, 4 Cranch, C. C. 247.

In *Wistar v. McManes*, 54 Pa. 318-323, 36 Am. Dec. 700, it was held that the denial of a motion to enjoin a judgment on confession and determine usury is not a bar to an equitable action for discovery. But as to *res judicata* this was overruled in *Frauenthal's Appeal*, *infra*.

In *Frauenthal's Appeal*, 100 Pa. 290, it was held that the decision on a rule to show cause why an execution should not be stayed, will prevent an injunction on the same grounds, against an execution sale (overruling *Wistar v. McManes*, *supra*, which was based on *Simpson v. Hart*, 14 Johns. 63), holding that a decision of a court of law upon a summary application is not such *res judicata* as to preclude chancery from examining the question, stating that no notice was taken in *Wistar v. McManes* of the fact that in New York, as well as in England, separate courts of chancery then existed,

A judgment rendered without a finding against parties before the court, and respecting a matter within its jurisdiction, is voidable only, and not absolutely void.

Doty v. Sumner Bros. 12 Neb. 878.

Where proceedings in attachment are irregular and amendable, but not void, and no objection is made thereto by the defendant, such proceedings cannot be questioned collaterally by third parties.

Connolly v. Miller (Neb.) 84 N. W. Rep. 76. See also *Dullard v. Phelan*, 83 Iowa, 471.

A decree cannot be attacked collaterally on the ground that it exceeds the relief asked for.

McCrillis v. Harrison County, 68 Iowa, 592; *Ketchum v. White*, 72 Iowa, 198; *Eureka Iron & S. Works v. Bresnahan*, 66 Mich. 489.

and the equity powers of the common-law courts were confined to narrow limits.

b. Compounding crimes.

Injunctions will be granted against the enforcement of judgments confessed that are contrary to public policy, as for compounding a crime.

In *Given's Appeal*, 121 Pa. 280, it was held that proceedings on a judgment by confession and execution will be enjoined in Pennsylvania where the consideration was stifling a prosecution for forgery, as such agreements subvert public justice. The court followed *Wistar v. McManes*, *supra*, and referring to *Frauenthal's Appeal*, 100 Pa. 290, it was said that in that case equity jurisdiction was recognized, but that the injunctions would not be granted when the matter was *res judicata*.

A judgment confessed by a person under a charge of arson in favor of his prosecutor on the representation that it would not be enforced if he suffered corporal punishment in consequence of the prosecution, was enjoined, but as it appeared that the prosecutor was not guilty of misconduct, but acted only on duress, and did nothing wrong except in the single fact of taking judgment from a man in the plaintiff's situation, and as the guilt of the complainant is clear, the judgment should stand a security for the debt, which may be recovered in an action of trespass. *Heath v. Cobb*, 8 Dev. Eq. 187.

c. Gambling consideration.

Where the consideration was a gambling debt an assignee for creditors was entitled to an injunction against the judgment entered on confession against his assignor. *Thomas v. Watson, Taney, C. C.* 297.

In *Wilkerson v. Whitney*, 7 Mo. 295, it was held that Mo. Rev. Code 1825, p. 410, providing that judgments given, granted, drawn, or executed contrary to the gambling act might be set aside by a court of equity, applies only to judgment by confession from the terms of it, and Mo. Rev. Code 1835, p. 290, providing that a judgment, when the consideration is a gambling debt, is void, and the defense may be made at law, is construed to mean also judgment by confession, and no other, and a failure to make a defense at law that the consideration of the judgment was a gambling debt will prevent an injunction where the judgment was not by confession.

V. Judgments against sureties.

A surety is entitled to an injunction against the enforcement of a judgment entered on confession against him on a proper showing.

As, where the surety was discharged by an extension of time for a consideration paid by the principal to the plaintiff before judgment without the surety's consent. *Montague v. Mitchell*, 28 Ill. 481.

And the same was held although the warrant of 30 L. R. A.

Pinney, J., delivered the opinion of the court:

We think that the findings of the circuit court against the substantive allegations of the plaintiff's complaint, except one, and that the judgments attacked by the plaintiff were founded upon bona fide debts of the defendants G. B. Hilbert and H. M. Johnson and of G. B. Hilbert, were warranted by the evidence. Certainly, there was no preponderance of evidence against its conclusions. The findings of fact must, therefore, be accepted as verities, and it would serve no useful purpose to set forth the substance of the evidence, or enter upon any discussion of it. The only question that remains for consideration is whether the plaintiff was entitled to

attorney provided that no bill in equity should be filed to interfere in a manner with the operation of the judgment entered by virtue thereof. *Kennedy v. Evans*, 31 Ill. 258.

But in *Glider v. Merwin*, 6 Whart. 523, it was held that a surety cannot obtain an injunction against a judgment confessed, on the ground that since the judgment he has discovered that he was relieved by an extension granted by the principal where he has an adequate remedy in the court at law by application to open the judgment.

For judgments against surety, see also *Philadelphia v. Dobson*, 10 Pa. Co. Ct. 84, *supra*; *L. Boughton v. Allen*, 11 Paige, 331, *supra*, IV.; and *Harner v. Price*, 17 W. Va. 523, *infra*, IX.

VI. Judgments against corporations.

Where a board of directors had authorized the president of the company to confess a judgment for the debt, and it was not shown that the creditor knew that the company was insolvent at the time, and the authority to confess the judgment was legal, a stockholder will not be entitled to an injunction against the judgment. *Kilgore v. Nicholson*, 26 La. Ann. 638.

In Pennsylvania a corporation may prefer a creditor by confession of judgment, and the same will not be enjoined where confessed by a foreign corporation, although the general law of the state where incorporated prohibits a preference, but it can have no extraterritorial effect. *Pairpoint Mfg. Co. v. Philadelphia Optical & Watch Co.* 161 Pa. 17; *Lowry v. Philadelphia Optical & Watch Co.* Id. 123.

And a judgment by confession against a corporation will not be enjoined in a collateral attack on the ground that the officer had no authority to confess judgment, as this is not a sufficient charge of fraud to obtain relief, and there is a remedy in the court at law to vacate the same. *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. N. S. 5.

And the execution sale of corporate property upon a judgment bond preferring directors will not be enjoined, where it is not shown that the corporation was insolvent at the time, and fraud is not shown. *Neal's Appeal*, 129 Pa. 64.

But in *Cape Sable Co.'s Case*, 3 Bland, Ch. 606, it was held that a judgment confessed by the president of a flourishing corporation where the confession was not under seal, and was irregular, would be enjoined at the instance of the parties representing one third of the stock, where it was claimed that the judgment was through a fraudulent combination to sacrifice the property of the company.

For judgments against corporations, see also *Harding v. Fiske*, 25 Abb. N. C. 343, *supra*, I.; *Stratton v. Allen*, 16 N. J. Eq. 222, *supra*, I. and II.; *Buroh v. West*, 134 Ill. 253, *supra*, II.

VII. Judgments against partners.

An injunction will be granted against the en-

any relief against the judgments by reason of the fact, found by the circuit court, that the answers of confession upon which these judgments were entered were not signed by the attorney, J. J. Dick, whose name appears thereto, in his own proper handwriting, but that his name was signed thereto by C. E. Hooker, the attorney for the plaintiffs entering the judgments, "in the absence of said J. J. Dick, for and at the special instance and request of J. J. Dick, he having duly authorized such signing, and ratified the same." The statute (Rev. Stat. § 2896) provides that, in the entry of judgments by confession, "the plaintiff shall file with his complaint an answer signed by the defendant, or some attorney in his behalf, confessing the amount

claimed in the complaint, or some part thereof." The plaintiff insisted that the judgments were void, though the answers were so signed at Mr. Dick's special instance and request, and such signing had been ratified by him. The method in which the answers of confession were signed was clearly irregular, and one not to be encouraged; but we think it was an irregularity merely. There was in each case a sufficient warrant of attorney, and a release of errors, and the judgments were founded on valid debts. The circuit court would not have been justified in setting them aside on the ground alleged, on motion of the judgment debtors, or on petition of a judgment creditor, unless it were shown that they were unjust or inequitable,

enforcement of a judgment confessed by one partner against the firm without the consent of his copartners, as such confession is beyond the power vested in partners generally. *Christy v. Sherman*, 10 Iowa, 636. See also *Blackwell v. Rankin*, 7 N. J. Eq. 153, and *Shedd v. Bank of Brattleboro*, 33 Vt. 709, *supra*, I.

But in *McGee v. Bank of Mt. Pleasant*, 7 Ohio, pt. 2, p. 175, it was held that where one partner makes a bond on the warrant of attorney to confess a judgment under seal, and in the name of the firm upon which judgment is taken, without the knowledge of the other partner as to such confession, the remedy by motion to vacate prevents an injunction against the judgment.

And in *Cammack v. Johnson*, 3 N. J. Eq. 163, a dormant partner was refused an injunction against a judgment confessed by the other partners for a valid debt, where the dormant partner was unknown at the time of the judgment.

For judgments against partners, see also *Blackwell v. Rankin*, 7 N. J. Eq. 153; *Shedd v. Bank of Brattleboro*, 33 Vt. 709, and *Hier v. Kaufman*, 124 Ill. 215, *supra*, I.; *Schuster v. Bader*, 13 Colo. 329, *supra*, I and II.

VIII. Judgments against executors and administrators.

A judgment confessed by an executor on the consideration to obtain time for the payment of money will not be enjoined on the ground that it was to have been a confession of judgment, to be paid when he should have assets, but which condition was not proved to have been a part of the agreement for such confession. *Freelands v. Royall*, 3 Hen. & M. 575.

And an injunction will not be granted to an administrator after two judgments *de bonis testatoris* and *de bonis propriis* have been successfully recovered at law, where a judgment was confessed intending to reserve the right of appeal, which was not done, as he did not attend court, on account of his wife's illness. *Bostwick v. Perkins*, 1 Ga. 136.

In *Brenner v. Alexander*, 16 Or. 249, it was said that an administrator confessing judgment admits that there are assets, and he cannot thereafter have such judgment enjoined on ascertaining subsequently that there is a deficiency; but if he had not confessed judgment it was said that he would not have been estopped.

So, where an administrator *de bonis non* made a defense to a writ of *scil. fa.*, issued to revive a judgment against the former administrator, but voluntarily confessed absolute judgment of fiat, and four years afterwards asked for an injunction on the ground that he was mistaken as to the amount of assets, the injunction was refused on the ground that a court of equity will not relieve for negligence or mistake of law, unless the alleged mistake

is conclusive as to the existence of the legal right. *Kearney v. Sasser*, 37 Md. 264.

For judgments against administrators, see also *Roche v. Washington*, 7 Humph. 142, *supra*, II.; *Gardiner v. Hardey*, 12 Gill & J. 365, *infra*, X.

IX. Statute of limitations.

And an injunction was granted where a judgment was confessed upon a note which was barred on its face by the statute of limitations.

As where the confession was made by one who was not an attorney of the defendant whose counsel was absent, and the party himself was unable to attend court on account of sickness, and there was a valid defense against the debt, and no steps had been taken to collect the debt for twenty-one years. *Cheek v. Taylor*, 23 Ga. 127.

So, where a note was made in Wisconsin, and the maker and holder were residents of that state, and in a suit in Illinois a judgment was obtained by confession, as the defense of limitation would have been a good defense in Illinois, it was held in an action in Wisconsin upon a transcript of the Illinois judgment, that as the latter court must have vacated the judgment or granted a perpetual injunction, this last power may be lawfully exercised by the courts of equity where suit was brought for the purpose of enforcing it. *Brown v. Parker*, 26 Wis. 21.

But the mistake of law of a surety in confessing a judgment for a debt barred by limitation will not entitle him to an injunction against the judgment. *Harner v. Price*, 17 W. Va. 523.

X. Consideration not due.

Injunctions will be granted against judgments entered on confession where there was no consideration, or the debt was not due.

So, a purchaser of land under title bond is entitled to an injunction against the collection of a judgment obtained on a purchase-money note by confession in another county entered without notice, where the vendor has not complied with the terms of his bond, and the vendee has never taken possession. *Cooper v. Tyler*, 46 Ill. 422, 95 Am. Dec. 442.

And where confession of the judgment was made with a reservation of the right to have the case heard in equity, the same may be enjoined where there is a total failure of consideration. *Daveiss v. McKee*, 1 Bibb, 381.

So, where a judgment is entered by confession, as a security for an unascertained debt, an injunction will be granted against the enforcement of the same if the proof is clear. *Young v. Reynolds*, 4 Md. 375.

And where an executrix in good faith confessed a judgment against the estate, the subsequent discovery of a receipt for the debt, of which she had

and nothing was shown against them. *Marshall & Lisle Bank v. Milwaukee Worsted Mills*, 84 Wis. 23, 27; *Horning v. E. Griesbach Brew. Co.* 84 Wis. 71; *F. Mayer Boot & S. Co. v. Falk*, 89 Wis. 216. Granting that the judgments were void for want of jurisdiction, the result would have been the same. Courts of equity will not enjoin a judgment at law merely for want of jurisdiction in the court in which the judgment is rendered, and where a party can say nothing against the justice of a judgment equity will not interfere, but

leave him to contend against it at law as best he can. 2 Story, Eq. Jur. § 898; *Stokes v. Knarr*, 11 Wis. 390. Courts of equity interfere in such cases only to prevent injustice, and upon equitable grounds. *Walker v. Robbins*, 55 U. S. 14 How. 584, 14 L. ed. 552; *Knox County v. Harshman*, 133 U. S. 152, 33 L. ed. 586. It follows that the judgment of the circuit court was rightly given, dismissing the plaintiff's complaint upon the merits.

The judgment of the Circuit Court is affirmed.

no knowledge at the time of confession, will entitle her to an injunction against the same. *Gardner v. Hardey*, 12 Gill & J. 365.

Under Ill. act Feb. 18, 1867, providing that an execution issued upon a judgment obtained by confession, upon a demand not due, may be enjoined until such demand shall have become due, a judgment so obtained should be enjoined, although the debt existed prior to this act, and, as chancery does not act by piecemeal, although one of the notes was due, proceedings on the judgment will be enjoined until the whole becomes due. *Wood v. Child*, 20 Ill. 309.

XL. Valid defense must be shown.

Before an injunction will be granted against judgments entered on confession, a valid defense must be shown. *Killgore v. Nicholson*, 26 La. Ann. 633; *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. N. S. 5; *Neal's Appeal*, 129 Pa. 64, *supra*, IV.; *Robbins v. Mount*, 3 Ga. 74, *infra*, XII.; *Freeland v. Royall*, 2 Hen. & M. 575, *supra*, VII.; *Chambless v. Atchison*, 2 La. Ann. 483; *Beiley v. Johnston*, 22 Wis. 279, and *Burch v. West*, 134 Ill. 258, *supra*, II.; *Hier v. Kaufman*, 184 Ill. 215, *supra*, I.; *Stratton v. Allen*, 16 N. J. Eq. 229, *supra*, II.

The payment of a mortgage for an unadjusted balance will not authorize an injunction against the enforcement of a judgment by confession for the remainder, entered with the reservation of the right to reduce the amount, where no errors in the amount are shown. *Gear v. Parish*, 46 U. S. 5 How. 163, 12 L. ed. 100.

And an injunction will not be granted where a judgment is confessed, and there is no fraud or collusion on the part of plaintiff, or some equity shown arising subsequent thereto. *Moore v. Barclay*, 23 Ala. 739; *Ramseur v. Brownell* (Ark.) 12 S. W. Rep. 200; *Ashton v. Parkinson*, 8 Phila. 333.

An injunction will not be granted to stay proceedings on a judgment confessed on the faith of an oral agreement to stay execution, where complainant did not use his remedy at law to have the execution recalled. *Moulton v. Knapp*, 85 Cal. 335, 88 Cal. 446.

An injunction will not be granted against a judgment by confession, on the ground that a note was given to and held by the judgment creditor which is claimed to be a novation, where such note was delivered prior to the judgment and was tendered back to the debtor. *Sallis v. McLearn*, 23 La. Ann. 192.

And where a confession of judgment has been entered by mistake, thereby preventing a review, an injunction will not be granted against the same where a valid defense to the action is not shown. *Farmers' Bank v. Vanmeter*, 4 Rand. (Va.) 558.

The burden of proof is on the party attempting to enjoin a judgment on confession, where it was claimed the warrant of attorney was forged, and, no error in the decision of the court refusing the injunction being shown, the decision will be affirmed. *Daly v. Ogden*, 26 Ill. App. 319.

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Where an injunction was sought on the ground that a confession of judgment was obtained by the promise to give credit for all errors, which was afterwards refused, an injunction will not be granted where such errors are not established. *Boone v. Poindexter*, 12 Smedes & M. 640.

And a judgment confessed as a compromise will not be enjoined on the ground that complainant claims he was entitled to credits before judgment, where no cause for equitable relief is shown. *Morehead v. D. Ford*, 6 W. Va. 316.

XII. Negligence.

A party guilty of negligence is not entitled to an injunction against a judgment that might have been prevented by the use of diligence. *Harner v. Price*, 17 W. Va. 523.

And an injunction will not be granted where complainant was negligent, as where a judgment was confessed with an intention to enter an appeal, and one of the defendants was sent, within the proper time, to enter such appeal, but was prevented by the ignorance of the clerk, and the time elapsed so that an appeal could not be taken, if there is no special equity in the defense. *Robbins v. Mount*, 3 Ga. 74.

XIII. Remedy at law.

An injunction will not be granted if there is an adequate remedy at law. *Southern Porcelain Mfg. Co. v. Thew*, 5 S. C. N. S. 5, *supra*, VI.; *McGee v. Bank of Mount Pleasant*, 7 Ohio. pt. 2, p. 175, *supra*, VII.; *Burch v. West*, 134 Ill. 258, *supra*, II.; *Shelton v. Gill*, 11 Ohio, 417, *supra*, IV.; *Brumbaugh v. Schenely*, 2 Md. 320; *Cammaek v. Johnson*, 2 N. J. Eq. 163, *supra*, II.; *Stratton v. Allen*, 16 N. J. Eq. 229; *Artman v. Giles*, 155 Pa. 409, *supra*, I.

The remedy at law by motion to set aside an execution that has been levied, or to stay process for a year, will prevent an injunction against proceedings on a judgment obtained on confession on an agreement to stay process for a year, where such agreement was violated by the creditor. *Moulton v. Knapp*, 85 Cal. 335.

XIV. Other matters.

Under Nix. (N. J.) Dig. 97, § 11, providing that no injunction shall issue to set aside proceedings at law in any personal action after judgment on the application of a defendant, unless a deposit be made, or security given, an injunction will not be granted against a judgment entered by confession unless such conditions precedent are complied with. *Mariatt v. Perrine*, 17 N. J. Eq. 49.

And an injunction will not be granted to maintain, as a set-off, a claim for unliquidated damages, although it was claimed that the plaintiff in the judgment on confession was a nonresident. *Smith v. Washington Gaslight Co.* 31 Md. 12, 100 Am. Dec. 49.

There are many cases in which judgments by confession are attacked by a motion or suit to set aside, involving similar questions as in this note, but no cases are included except those in which the remedy by injunction is sought.

L. T.

KANSAS SUPREME COURT.

ELI D. SMALL *et al.*, *Plffs. in Err.*,

v.

Rebecca SMALL.

(.....Kan.....)

***Subject to certain limitations not applicable to this case, and as against any post mortem claim of his widow, a married man, in Illinois or in Kansas, may during coverture give away to his children absolutely the bulk of his property, when the known effect of the gift will be to deprive the widow of the fair share of the property which otherwise would have fallen to her.**

(November 9, 1896.)

ERROR to the District Court for Jackson County to review a judgment in favor of plaintiff in an action brought to enforce plaintiff's alleged rights as widow of Daniel Small, deceased, in property which he had conveyed during his lifetime in alleged fraud of her rights. *Reversed.*

Statement by **Martin**, Ch. J. :

On January 27, 1859, at Findlay, Ohio, Daniel Small married Rebecca Cone, the present defendant in error, as Rebecca Small. He was the father of five children by a former marriage, namely, Eli D., Daniel J., John D., William B., and Susan, now Susan McKenney; the oldest, Eli D., being about seventeen, and the youngest, the daughter, about three and one half years of age; and his home was at Wilmington, Will county, Ill. He had accumulated about \$30,000, but Rebecca Cone's belongings were of trifling value. She went from Findlay to Wilmington, and took charge of the children, who soon became very much attached to her, and she was devoted to their welfare, and the relations of the entire family were always very harmonious up to the death of Daniel Small, which occurred April 14, 1888. The business of Daniel Small was the loaning of money on his own account. As early as 1869, Daniel Small conceived the idea of giving or leaving the bulk of his fortune to his said five children in equal shares (there being no issue of his second marriage) after providing a sum sufficient for the maintenance of his wife during her widowhood, but nothing in that direction was done until March 19, 1878, when he made an assignment of all the notes, bonds, mortgages, and securities held by him on or against persons or property in Illinois, and amounting to about \$100,000, to his brother, Darius Small, of Herkimer county, N. Y., in trust for said five children, the trustee being authorized to collect the notes and securities and reinvest the proceeds in other interest-bearing securities or real estate

in or outside of the state, and to divide the same, with the accumulations, at his death in equal shares, among said children. By the terms of this trust assignment Darius Small was authorized to appoint some discreet person, a resident of Will county, as his attorney in fact, to assist in carrying out the trust; and on the same day Darius Small accepted the trust, and also appointed Eli D. Small as such attorney in fact. Daniel Small had all these notes and securities in a safe. He took them out, and handed them to Darius Small, who in turn delivered them to Eli D. Small, and he put them back in the safe in the same condition as before. Darius Small was on a visit to his brother at the time, and in a few days afterwards he returned to New York, and never had anything more to do with the trust, except that on January 22, 1879, he executed a further power of attorney to Eli D. Small, authorizing him to sell and convey any real estate situated in Kansas or elsewhere, the title to which might be vested in him as such trustee. Daniel Small continued managing the investments as before, but Eli D. Small assisted him. Most of the notes secured by mortgages on real estate were taken in the name of Darius Small, trustee, and on payment of the same it was the custom for Eli D. Small to satisfy the mortgages as attorney in fact; but the loans made on personal security were principally in the name of Daniel Small. In 1879, and subsequently, part of what was called the "trust fund" was invested in two ranches (one of them consisting of between 3,000 and 4,000 acres in Jackson and Shawnee counties, Kan.; and another one, of more than 1,000 acres, in Wabaunsee county, Kan.) and in improving the same, and the title to these lands was taken in the name of Darius Small, trustee of Daniel Small, but Darius Small knew nothing of the transaction, and the lands were selected by Daniel Small, Eli D. Small, and the other sons. Part of the fund was also loaned through the American Bank in North Topeka, established by the sons. They, or some of them, resided upon the ranches, and the funds for their improvement were furnished in a large measure through the bank. In July, 1886, Daniel Small executed a quitclaim deed to his four sons and his daughter for said Kansas lands, and shortly afterwards Eli D. Small, as attorney in fact for Darius Small, executed deeds to Daniel Small and John D. Small for the large ranch in Jackson and Shawnee counties, and a deed to William B. Small for the smaller ranch in Wabaunsee county. About the same time, Susan McKenney quitclaimed her interest in the land to her brothers, and John D. Small and Daniel J. Small conveyed a one-third interest in the large ranch to Eli D. Small. The sons executed a promissory note to their sister for \$8,740.25, an amount equal to one fifth of the money invested in the lands and the improvements. Rebecca Small did not join in the conveyance with her husband, and she knew nothing about it at the time, but was informed of the transfer to the sons

*Headnote by **MARTIN**, Ch. J.

NOTE.—In connection with the extensive review of the authorities to be found in the above case, see *Walker v. Walker* (N. H.) 27 L. R. A. 799, and cases there cited.

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some time in the autumn of 1886. She never resided in Kansas, but had been on visits with her husband to the sons, and knew that they occupied the lands. For several years prior to September 12, 1882, Daniel Small had loaned or advanced money in unequal amounts to his sons, and on or about that day he paid them the residue of what would make \$20,000 each, and he charged the same on his book as advancements. At the same time he had each of his sons to sign a paper, agreeing that in the final division their sister, Susan, should have an equal one-fifth share with them, including said advancements. Susan was then married to W. J. McKenney of Brooklyn, N. Y., and her father afterwards advanced to her the sum of \$15,500, which was principally used in the purchase of a home in Brooklyn. Rebecca Small knew that money was furnished to Susan for the purchase of a home, but she did not know of the advancements to the sons, and was not consulted in reference thereto. About January, 1888, Daniel Small was taken sick, and his son Daniel J. Small went from Kansas to Wilmington, and remained there until October, 1888. Susan McKenney was also there for some weeks before and after her father's death. When Daniel Small realized that he could not live much longer, he told his son Daniel J. to go to Judge Parks, a lawyer at Joliet, who was familiar with his affairs, and to tell him that if the trust arrangement of 1878 was not ironclad he wanted it made so, as he desired to leave \$20,000 as a fund for the support of his widow, and that all the rest of his personal property should go in equal shares to his children, including the \$20,000, the income only of which should be used for the support of his widow. Judge Parks suggested that he thought this could not be accomplished by will without the consent of Rebecca Small, but that all the notes and securities might be given away absolutely to the children in his lifetime, the remainder of the property to be disposed of by will; and he accordingly drew up two papers, one being in form a will, and the body of the other instrument reading as follows: "Conscious that I am now suffering from a malady likely to prove fatal, and deeming it expedient to make final distribution and disposition of my personal estate (save what I propose to set apart for the benefit of my wife) in my lifetime, I have determined to carry out my long and well-considered purpose by an immediate transfer and delivery of the same, consisting for the most part of securities, to my son Daniel J. Small, who is now with me, in trust, to divide equally amongst my five children, Daniel J., Eli D., John D., William B., and Susan McKenney, share and share alike. In execution whereof, in consideration of love and affection, I do hereby assign, transfer, and set over to said Daniel J. Small, in trust, as aforesaid, all my right, title, and interest in and to the notes, mortgages, and securities mentioned and described in the schedule hereto subjoined; to have and to hold to him and his personal representatives for the purpose above set forth." The will, as drawn, recites that the testator had already, by ad-

vancements and recent gifts to his children, disposed of all his personal estate except about \$20,000, and that, being desirous of making a reasonable and adequate provision for the support of his wife, Rebecca Small, by whom he had no children, he did give and bequeath to his executor \$20,000 as a fund to invest and reinvest in good interest-bearing securities at his discretion, and from the interest received therefrom to pay her the annual sum of \$1,200 in such periodical instalments as he might see fit during her natural life, and upon her death to divide said fund among said five children, share and share alike; said provision for the widow to be in lieu and discharge of all her rights of dower, save in his real estate, which, together with his household furniture, and such articles of personal property as he had not in the will or otherwise disposed of, he left to the disposition of the law, Daniel J. Small being named as sole executor and trustee. On these papers being exhibited to Daniel Small, he directed that the will be changed so that the payments to Rebecca Small should continue only while she remained his widow, and in the event of her death or marriage the fund to be divided among the five children. The will was changed according to his desire, and a schedule of the notes, securities, etc., amounting to a little more than \$100,000, having been made, was attached to the instrument of gift, and the notes and securities were delivered to Daniel J. Small, he having received written authority from his brothers and his sister to receive in their name and behalf any gift which their father might desire to make. The will and the instrument of gift were executed on March 26, 1888, and Daniel J. Small retained possession of said notes and securities until his father's death and afterwards, as also the \$20,000 additional selected for the widow. The will was admitted to probate in Will county, Ill., April 21, 1888. Rebecca Small did not know of said trust arrangement of March 19, 1878, until after this action was commenced, the children having been requested by Daniel Small not to mention it to her, or in her presence. She did not know of the advancements of \$20,000 each to the sons for a like reason, and she was kept in entire ignorance of the gift instrument and the will of March 26, 1888, until shortly before the will was probated. She knew that her husband had a large amount of money and property, but she was told by Daniel J. Small and Judge Parks, before the probate of the will, that Daniel Small had given substantially everything away except the \$20,000 left for her support by the will. It does not appear that she made any inquiry as to the particular disposition of the property, although she was much dissatisfied with the provision made for her. She obtained a certified copy of the will in October, 1888, and then consulted an attorney as to her rights. On May 9, 1888, she entered into a written agreement with all the children, wherein they agreed that she should have \$1,400 a year, payable in monthly instalments, in consideration of concessions made by her in relation to certain real and personal property which, under

the will, would become as intestate property, this being allowable under the laws of Illinois. Daniel J. Small paid and Rebecca Small received the monthly instalments required by said contract from its date until very shortly before this action was commenced, when she, through her attorneys, tendered back to Daniel J. Small the amount received and interest thereon. Under the law of descents in Illinois, where a husband dies intestate, leaving surviving him a widow and children, the widow is entitled to one third of the personal estate as her absolute property. Advancements to children and lineal descendants are considered as part of the estate, so far as it regards the division and distribution thereof among the issue, and is to be taken by the child or descendant towards his share of the estate; but he is not required to refund any part thereof, although it exceeds his share. Any provision made by will for the widow, if not otherwise expressed therein, bars her of dower in the lands of the deceased, unless such provision be renounced within one year, in which case she is entitled to dower in the lands and to one third of the personal estate after the payment of all debts. But Rebecca Small never made any renunciation. On April 2, 1890, Rebecca Small commenced her action against Eli D. Small, John D. Small, William B. Small, Daniel J. Small, and Daniel J. Small as executor of the last will and testament of Daniel Small, deceased, for the cancellation of the several instruments referred to, except the trust agreement of March 19, 1878 (of which she was ignorant), and for an accounting as to all property received by the defendants from Daniel Small or his estate, praying that she be adjudged the owner of an undivided half of all said lands in Kansas, asking also for her share of the rents and profits thereof, and her share of the rents and profits of certain real estate in Illinois, and for decree of partition of the Kansas lands. The case was tried at November term, 1890. The court held that the plaintiff below could not recover any part of the Kansas lands, but that all the transactions were fraudulent as to her, and as to any interest she might have had in the estate of her husband upon his death the latter is to be held as having died intestate, and rendered money judgments against the defendants below aggregating \$72,809.78. The defendants below prosecute their petition as plaintiffs in error in this court, and a cross petition in error has also been filed by Rebecca Small.

Messrs. Waggener, Horton, & Orr, with Messrs. Douthitt, Jones, & Mason, for plaintiffs in error:

The provisions of the Illinois statute do not include the heirs or widow of a deceased person claiming rights under the statute of Illinois relating to the descent of property.

Sutherland, Stat. Constr. §§ 268-277; *Re Perry*, Kan. Sup. Ct. (MSS.); *White v. Ivey*, 54 Ga. 156; *State v. McGarry*, 21 Wis. 496.

There was no fraud, in fact or in law, alleged or established upon the trial.

Padfield v. Padfield, 78 Ill. 16, 63 Ill. 210 (1875).

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Whatever may be the decisions in any other state as to the power of the husband to make such a final disposition of his property as disclosed in this case to his children before his death, those decisions cannot affect the statute as construed by the supreme court of Illinois, or the disposition made by Daniel Small of his personal property before his death, under the laws of Illinois.

Wörner, Am. Law of Administration, last ed. p. 187, ¶ 91; *Williams v. Williams*, 40 Fed. Rep. 531.

If a sale or gift will bind the grantor it will bind his heirs.

Carithers v. Weaver, 7 Kan. 110; *Buffington v. Grosvenor*, 46 Kan. 730, 18 L. R. A. 283.

The husband may dispose of his personal property by voluntary gift during the coverture without his wife's consent, and freed from every post-mortem claim by her.

Lines v. Lines, 142 Pa. 149; *Ellmaker v. Ellmaker*, 4 Watts, 91.

As Daniel Small legally disposed of his property, the court, in its findings of fraud, made a wrong application of the law.

Williams v. Williams, *supra*; *Decker v. Waterman*, 67 Barb. 480; *Lightfoot v. Colgin*, 5 Munf. (Va.) 63; *Pringle v. Pringle*, 59 Pa. 281; *Dickerson's Appeal*, 115 Pa. 195; *Dunnoch v. Dunnoch*, 3 Md. Ch. 140; *Cameron v. Cameron*, 10 Smedes & M. 393, 48 Am. Dec. 759; *Samson v. Samson*, 67 Iowa, 253; *Coffin v. Coffin*, 23 N. Y. 9, 80 Am. Dec. 285; *Thornton, Gifts & Advancements*, 189.

A court of equity will not entertain jurisdiction to set aside the probate of a will on the ground of fraud, mistake, or forgery, this being the exclusive jurisdiction of the probate court.

Ellis v. Davis, 109 U. S. 435, 37 L. ed. 1006; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054; *Christmas v. Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Mazwell v. Stewart*, 89 U. S. 22 Wall. 77, 22 L. ed. 564; *Ritter v. Hoffman*, 35 Kan. 215; *Snow v. Mitchell*, 37 Kan. 636; 2 Pom. Eq. Jur. § 918, p. 407; *Tarver v. Tarver*, 84 U. S. 9 Pet. 174, 9 L. ed. 91; *Collets v. Woods*, 63 Ill. 285; *Post v. Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Johnson v. Beasley*, 65 Mo. 250, 37 Am. Rep. 276; *Gaines v. Chew*, 43 U. S. 2 How. 619, 11 L. ed. 402; *Vanderpool v. Van Valkenburgh*, 6 N. Y. 190; *Gilman v. Gilman*, 52 Me. 165, 38 Am. Dec. 502; 2 Story, Eq. Jur. 1575; 1 Redf. Wills, 873 *et seq.*; 2 Redf. Wills, 47; 3 Redf. Wills, § 2, subd. 1; 1 Wms. Exrs. 549, and notes; 1 Wörner, Am. Law of Administration, § 145; *Duson v. Dupré*, 32 La. Ann. 896; *Powell v. Brunswick County Supers*, 150 U. S. 438, 37 L. ed. 1134; *Higgins v. Reed*, 48 Kan. 373; *Baker v. Baker*, 51 Ohio St. 217; *Re Taylor's Estate* (Pa.) 13 L. R. A. 855, as to gifts of checks; Fiero, Special Actions, chap. 23.

The advancements made by Daniel Small to his children in his lifetime were actually and legally made, and in no event can be brought into hotchpot for the purpose of augmenting the widow's share.

Thornton, Gifts & Advancements, § 605, p. 601; *Richards v. Richards*, 11 Humph. 429; Wörner, Am. Law of Administration, § 554; Wms. Exrs. *1500; *Grattan v. Grattan*, 13 Ill. 167, 65 Am. Dec. 726; *Andrews v. Hall*, 15 Ala. 85.

The provision of the Kansas statute concerning the real estate of the husband does not apply "when the wife at the time of the conveyance is not, or never has been, a resident of this state."

Buffington v. Grosvenor, 46 Kan. 780, 13 L. R. A. 282.

In some of the states dower is allowed to the wife by statute, as construed by the supreme courts thereof, in the personal property of the husband. Not so in Illinois.

Padfield v. Padfield, 78 Ill. 16.

The district court of Jackson county, Kansas, had no jurisdiction of the subject-matter of this case; had no jurisdiction to set aside the will of Daniel Small or the probate thereof; and had no jurisdiction to disturb or interfere with the settlement of the estate of Daniel Small, deceased, which is primarily exclusive in the probate court of Will county, Illinois.

Ellis v. Davis, 109 U. S. 485, 27 L. ed. 1006; *Simmons v. Saul*, 188 U. S. 439, 34 L. ed. 1054; *Kieley v. McGlynn*, 88 U. S. 21 Wall. 508, 23 L. ed. 599.

Under the statutes and decisions of Illinois, Daniel Small in his lifetime had the legal and undisputed right to give and dispose of his personal property to his children, free from any claim of his wife. If he had such legal and undisputed right, then no fraud can be predicated upon any act of his during his lifetime, in so giving and disposing of his personal property.

Padfield v. Padfield, 68 Ill. 210, 78 Ill. 322, 78 Ill. 16; *Pringle v. Pringle*, 59 Pa. 281; *Dickerson's Appeal*, 115 Pa. 198; *Lines v. Lines*, 143 Pa. 149; *Holmes v. Holmes*, 8 Paige, 368; *Richards v. Richards*, 11 Humph. 429; *Buffington v. Grosvenor*, 46 Kan. 780, 13 L. R. A. 282; *Butler v. Butler*, 21 Kan. 521, 30 Am. Rep. 441; *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256; *Williams v. Williams*, 40 Fed. Rep. 521.

Under the 4th subdivision of the statute of Illinois, Mrs. Rebecca Small was not entitled after the death of her husband to any part of his personal estate, not bequeathed to her, unless he died intestate, or unless she renounced her right to take under the will of her husband, which will was duly executed, and, after the death of her husband, was legally probated.

Akin v. Kellogg, 119 N. Y. 441; *Cowdrey v. v. Hitchcock*, 108 Ill. 262; *Cribben v. Cribben*, 136 Ill. 609; *Warren v. Warren*, 148 Ill. 641.

The gift and actual delivery of the personal property on the 26th of March, 1888, by Daniel Small to his children, was not a testamentary disposition of his property.

McCarty v. Kearnan, 86 Ill. 291; *Carthy v. Connolly*, 91 Cal. 15; *Lines v. Lines*, 143 Pa. 149.

Meers, Valentine, Godard, & Valentine, A. D. Walker, and Hayden & Hayden, for defendant in error:

It is admitted that the estate has been fully and finally settled, except with reference to the plaintiff's claim.

This gave the plaintiff the right to sue the heirs in the manner she did, even if she did not have such right without such final settlement.

Shoemaker v. Brown, 10 Kan. 883; *Johnson v. Cain*, 15 Kan. 587; *Gafford v. Dickinson*, 37 Kan. 287; *McLean v. Webster*, 45 Kan. 644; *Re Hyde*, 47 Kan. 277.
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While the so-called trust assignment purports upon its face to be founded upon a valuable consideration, yet the undisputed testimony shows that it was in fact executed without any consideration whatever therefor.

A false recital respecting the consideration of a written instrument is, when the bona fides of such instrument is called in question, a badge of fraud.

Bump, Fraud. Conv. 40.

A deed purporting to be founded on a valuable consideration cannot be set up as a gift.

Hildreth v. Sands, 2 Johns. Ch. 35; *Bump, Fraud. Conv. 579*, and cases cited.

The fact that an alleged advancement is secretly made, and all knowledge thereof purposely concealed from the wife, is of itself sufficient to raise a presumption that such advancement was intended as a fraud upon her rights.

Pomeroy v. Pomeroy, 54 How. Pr. 223; *Reynolds v. Vance*, 1 Heisk. 844; *Oranson v. Oranson*, 4 Mich. 230, 66 Am. Dec. 534; *Sarnbon v. Lang*, 41 Md. 118; *White v. Dougherty*, Mart. & Y. 308, 17 Am. Dec. 802.

The fraudulent intent on the part of Daniel Small and the defendants below to defeat the marital rights of Mrs. Small is necessarily presumed from their knowledge that such rights would be defeated by the several gifts of which we complain.

Nichols v. Nichols, 61 Vt. 426.

Fraud is not purged by circuitry.

*Broom, Legal Maxims, *210.*

Acts such as were perpetrated in the present case, which violate justice, good morals, public policy, and the spirit, if not the letter, of the laws both in Kansas and Illinois and elsewhere, are certainly fraudulent.

Klemp v. Winter, 28 Kan. 699.

The interest which a husband or wife has in the property of the other while both are living is a present and existing one, and one that is substantial in its character, and one that will authorize an action by the one injured or threatened with injury, for the maintenance and protection of his or her rights or interests or the redress of his or her grievances.

Kan. Stat. of Descents & Distributions, §§ 8, 28; Kan. Stat. relating to Wills, § 85; Ill. Stat. Record, pp. 65-67; *Busenbark v. Busenbark*, 83 Kan. 572; *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256; *Munger v. Baldrige*, 41 Kan. 236; *Buzick v. Buzick*, 44 Iowa. 259, 24 Am. Rep. 740; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Kitts v. Wilson*, 180 Ind. 492; *Stroup v. Stroup* (Ind.), 27 L. R. A. 523; *Clifford v. Kampe*, 84 Hun. 393; *Tyler v. Tyler*, 126 Ill. 525; *Scott v. Magloughlin*, 33 Ill. App. 162, affirmed in 183 Ill. 83; *Petty v. Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Johnson v. Johnson* (Ky.) 2 S. W. Rep. 487; *Gregory v. Filbeck*, 12 Colo. 379.

There are three things highly favored in law, —life, liberty, and dower.

Co. Litt. 124b; *Kennedy v. Nedrow*, 1 U. S. 1 Dall. 415, 1 L. ed. 202; *Osterhout v. Osterhout*, 80 Kan. 746; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75.

Neither one, from the time of the marriage contract, can transfer any interest in his or

her property in fraud of the marital rights of the other.

Green v. Green, 84 Kan. 740, 55 Am. Rep. 256; *Beere v. Beere*, 79 Iowa, 555; *Murray v. Murray*, 90 Ky. 1, 8 L. R. A. 95; *Chandler v. Hollingsworth*, 8 Del. Ch. 99; *Swaine v. Perine*, 5 Johns. Ch. 483, 9 Am. Dec. 818; *Brown v. Bronson*, 85 Mich. 415; *Jones v. Jones*, 64 Wis. 301; *Smith v. Smith*, 6 N. J. Eq. 515; *Littleton v. Littleton*, 1 Dev. & B. L. 327; *Pomeroy v. Pomeroy*, 54 How. Pr. 228; *Petty v. Petty*, *supra*; *Achilles v. Achilles*, 151 Ill. 186; *Walt*, *Fraud. Conv.* § 70.

Wherever a husband fraudulently or in contravention of law or public policy disposes of his property, real or personal, for the purpose of preventing his wife from receiving her fair proportion thereof after his death, as provided by law, the wife or widow may follow the property and recover her share thereof or its value from any person who participated in the fraud or received its benefits, and who is not an innocent holder for value.

Nichols v. Nichols, 61 Vt. 426; *Thayer v. Thayer*, 14 Vt. 107, 89 Am. Dec. 211; *Jenny v. Jenny*, 24 Vt. 824; *Manikee v. Beard*, 85 Ky. 20; *Kelly v. McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Re Hummel's Estate*, 161 Pa. 215; *Sanborn v. Lang*, 41 Md. 107; *Oranson v. Oranson*, 4 Mich. 230, 66 Am. Dec. 584; *Brown v. Bronson*, 85 Mich. 415; *Chandler v. Hollingsworth*, 8 Del. Ch. 99; *Murray v. Murray*, 90 Ky. 1, 8 L. R. A. 95; *Swaine v. Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 818; *McClurg v. Schwartz*, 87 Pa. 521; *Jiggitts v. Jiggitts*, 40 Miss. 718; *Littleton v. Littleton*, and *Stroup v. Stroup*, *supra*; *Davis v. Davis*, 5 Mo. 183; *Tucker v. Tucker*, 29 Mo. 350; *McGee v. McGee*, 4 Ired. L. 105; *Pomeroy v. Pomeroy*, *supra*; *Reynolds v. Vance*, 1 Heisk. 844; *Gilson v. Hutchinson*, 120 Mass. 27; *Kitts v. Wilson*, and *Jones v. Jones*, *supra*; *McCammon v. Summons*, 2 Disney (Ohio) 596; *Walt*, *Fraud. Conv.* § 70; 35 Cent. L. J. 365; *Jones v. Brown*, 84 N. H. 439; *Johnson v. Johnson* (Ky.) 2 S. W. Rep. 487; 3 Pom. Eq. Jur. § 1883.

Advancements are a part of the estate for the purposes of the subsequent and final division, partition, or distribution of the estate.

Gen. Stat. 1889, ¶¶ 2617, 7244; Ill. Laws, Record, p. 71; *White v. White*, 41 Kan. 556; *Chicago Lumber Co. v. Tomlinson*, 54 Kan. 770; *Murray v. Murray*, 90 Ky. 1, 8 L. R. A. 93; *Littleton v. Littleton*, *supra*.

Gifts *inter vivos* in fraud of a wife's rights are void.

Re Hummel's Estate, and *Murray v. Murray*, *supra*; *Buzick v. Buzick*, 44 Iowa, 259, 24 Am. Rep. 740; *Nichols v. Nichols*, *Jenny v. Jenny*, *Sanborn v. Lang*, *Oranson v. Oranson*, *Jiggitts v. Jiggitts*, *Jones v. Jones*, and *Reynolds v. Vance*, *supra*.

Gifts *causa mortis* are void if made with the intention of defrauding the widow.

Baker v. Smith (N. H.) 23 Atl. Rep. 82; *Jones v. Brown*, *supra*; *Dunn v. German-American Bank*, 109 Mo. 90; *Nichols v. Nichols*, *supra*; *Kerr*, *Fraud & Mistake*, 217; *Tucker v. Tucker*, 29 Mo. 350, 82 Mo. 464.

A gift made under such circumstances, and with such intent and purpose, would, if the element of fraud were eliminated, be treated as a *donatio causa mortis*.

Meach v. Meach, 24 Vt. 591; *Grymes v. Hone*, 80 L. R. A.

49 N. Y. 17, 10 Am. Rep. 813; *Standand v. Willott*, 8 Macn. & G. 664; *Gardner v. Parker*, 8 Madd. 184.

Gifts by will, where they are made with the intention of defrauding the widow, or where they are in contravention of law or public policy, are as void as if made in any other form.

Section 4 of the Illinois statute of frauds applies to fraudulent transfers of property made by a husband with intent to defeat the wife's suit for alimony.

Tyler v. Tyler, 126 Ill. 525.

One cannot hold property which he receives as a mere gratuity or as heir if the property was conveyed to him to defeat the wife of the deceased of her right to dower.

Jenny v. Jenny, and *Reynolds v. Vance*, *supra*; *Killinger v. Reidenhauer*, 6 Serg. & R. 581; *Gilson v. Hutchinson*, 120 Mass. 27; *Green v. Seaver* (Vt.) 10 Atl. Rep. 742; *Osterhout v. Osterhout*, 80 Kan. 746; *Buzick v. Buzick*, 44 Iowa, 259, 24 Am. Rep. 740; *Munger v. Baldridge*, 41 Kan. 248.

While the husband has the unquestionable right to sell and dispose of his personal property as he pleases, when he pleases, to whom he pleases, and without the signature, assent, or even knowledge of his wife, provided it is all done in good faith, yet he has no power to sell or otherwise dispose of his personal property for the purpose of defrauding his wife or of depriving her of her interest therein at the time of his death.

Beere v. Beere, 79 Iowa, 555; *Re Hummel's Estate*, 161 Pa. 215; *Baker v. Smith* (N. H.) 23 Atl. Rep. 82; *Dunn v. German-American Bank*, 109 Mo. 90; *Murray v. Murray*, 90 Ky. 1, 8 L. R. A. 93; *Straat v. O'Neil*, 84 Mo. 68; *Tyler v. Tyler*, 126 Ill. 525; *Manikee v. Beard*, 85 Ky. 20; *Littleton v. Littleton*, 1 Dev. & B. L. 327; *McCammon v. Summons*, 2 Disney (Ohio) 596; *White v. Dougherty*, Mart. & Y. 808, 17 Am. Dec. 802; 1 Am. Lead. Cas. Real Prop. 384; *Jiggitts v. Jiggitts*, *supra*; *Reynolds v. Vance*, 1 Heisk. 844.

Transfers of real estate made directly or indirectly by the husband without the consent of the wife are void as against the wife.

Nichols v. Nichols, 61 Vt. 426; *Sanborn v. Lang*, 41 Md. 107; *Davis v. Davis*, 5 Mo. 183; *Tucker v. Tucker*, 29 Mo. 350; *McGee v. McGee*, 4 Ired. L. 105; *Kitts v. Wilson*, 130 Ind. 492; *Johnson v. Johnson* (Ky.) 2 S. W. Rep. 487; *Tobey v. Tobey*, 100 Mich. 54; *Scott v. Magloughlin*, 88 Ill. App. 162, affirmed in 183 Ill. 33; *Fields v. Fields*, 2 Wash. 441; *McClurg v. Schwartz*, 87 Pa. 521; *Gilson v. Hutchinson*, 120 Mass. 27.

The defendants below as joint tortfeasors and joint recipients of the fruits of the fraud found by the court below are jointly and severally liable to plaintiff below for the whole amount of which she has been wrongfully deprived by means of the fraudulent acts.

Palmer v. Stevens, 100 Mass. 461; 1 Foster, Fed. Pr. § 50; *Tucker v. Tucker*, 29 Mo. 350.

On petition for rehearing.

The gifts made contemporaneously with the will were made in the anticipation of the donor's speedy demise, and because he could

not lawfully dispose of such property by will, and they should be treated as gifts *causa mortis*.

Meach v. Meach, 24 Vt. 591; *Tucker v. Tucker*, *supra*; *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 813; *Stanisland v. Willott*, 8 Macn. & G. 664; *Gardner v. Parker*, 3 Madd. 184.

If treated as gifts *causa mortis*, they are not valid as against the claim of the widow.

Hatcher v. Buford, 60 Ark. 169, 27 L. R. A. 507; *Tucker v. Tucker*, and *Baker v. Smith*, *supra*; *Jones v. Brown*, 34 N. H. 439; *Dunn v. German-American Bank*, 109 Mo. 90.

Martin, Ch. J., delivered the opinion of the court:

Many questions respecting rights as well as remedies have been presented, and very ably argued orally and in the voluminous briefs of counsel, but we have found it necessary to decide only one of them. The underlying question is whether, under the laws of Illinois or of Kansas, the several gifts and advancements made by Daniel Small to his children are to be treated as fraudulent and void as to his widow. Most of these gifts and advancements were made without the knowledge of Rebecca Small, and Daniel Small appears to have enjoined upon his children that the subject should not be mentioned to her, nor in her presence. Secrecy is often called a badge of fraud, but it is not fraud itself. If a man's disposition of his property is fair and lawful, the concealment of the transaction cannot render it fraudulent. If the rights of the children were dependent only upon the trust agreement of March 19, 1878, it is doubtful if they could stand the test of law and equity, for, notwithstanding the trust appeared upon its face to be a valid disposition of the property and securities therein mentioned, such as would be binding upon Daniel Small, yet the trusteeship of Darius Small seems to have been only nominal, and Daniel Small virtually controlled the property, and did as he pleased respecting it, just as he had done before; his son Eli D. Small, the nominal attorney in fact of the trustee, merely assisting in the transaction of the business of collecting and reinvesting. If Daniel Small had died while the securities were in this condition, and the Kansas lands in the name of Darius Small as trustee, probably it should be said that all belonged in equity to Daniel Small, and formed part of his estate upon his death; but a considerable portion of the so-called "trust fund" was invested in the Kansas lands and improvements thereon, and both Daniel Small and the trustee, through his attorney in fact, conveyed the lands to the sons and the daughter absolutely in 1886. The advancements were made in 1882 and prior thereto, and we suppose they formed part of said trust fund and its accumulations; and nineteen days before the death of Daniel Small he made the final gift, exceeding \$100,000. On April 1, 1888, two weeks before his death, Daniel Small had no control, in law or equity, of the money advancements, the Kansas lands, nor the notes, securities, etc., which were the subject of the gift of March 26, 1888. All were valid as to him,

and he could not have recovered a dollar thereof from his children. Upon his death they therefore formed no part of his estate, unless, upon some established principle of law or equity, his widow had a right to so consider them. And this brings us to the main question in the case, namely, Under the laws of Illinois and of this state may a married man, during coverture, as against any post mortem claim of the widow, give away to his children the bulk of his property when the known effect of so doing is to diminish the share which she would have been otherwise entitled to upon his death? In this state there are some limitations upon the right of disposition of real property by a husband where the wife is a resident of this state; but section 8 of our act concerning descents and distributions (Gen. Stat. 1889, §2599), which allows to the widow one half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, not sold at judicial sale, and not necessary for the payment of debts, and to which the wife has made no conveyance, provides, further, that the wife shall not be entitled to any interest under said section in any lands to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not, and never has been, a resident of this state. And in *Buffington v. Grovesnor*, 46 Kan. 730, 13 L. R. A. 262, it was held that this proviso is constitutional. Under this decision Rebecca Small is cut off from any claim of right, title, or interest in the Kansas lands, and the court below was correct in so holding.

The advancements of money and the gifts of notes and securities of March 26, 1888, were made in Illinois, and, if lawful there, we should probably so consider them here, even though invalid if made in this state; and this leads us to a consideration of the laws of Illinois applicable to this subject. The controversy constituting the subject-matter of the cases of *Padfield v. Padfield* in its several aspects was three times before the supreme court of Illinois, and received very full consideration. 68 Ill. 210, 72 Ill. 322, and 78 Ill. 16. It was finally held in the last suit, which was brought by the widow, that any disposition of personal property and credits by a husband in good faith, where no right or interest is reserved to him, either present or ultimate, though made to defeat the rights of his wife, will be good against her; and that there is nothing in the statute respecting the estates of deceased persons that in the slightest degree prevents the husband from disposing of his personal property free from any claim of his wife, whether by sale, gift to his children, or otherwise, in his lifetime. The court quotes approvingly from a note in Kerr on Fraud and Mistake (page 220) as follows: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life independently of the concurrence, and exonerated from any claim of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition

by the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her." And the court refers to *Dunnock v. Dunnock*, 8 Md. Ch. 140; *Cameron v. Cameron*, 10 Smedes & M. 394, 43 Am. Dec. 759; *Lightfoot v. Colgin*, 5 Munf. 42; *Stewart v. Stewart*, 5 Conn. 317; and *Holmes v. Holmes*, 3 Paige, 363,—as fully supporting the doctrine. The court further says: "Again, the act of 1861, known as the 'Married Woman's Law,' confers upon *femes covert* the power of disposing of their separate property, absolutely and as they may choose, free from the control of their husbands. It was manifestly the intention of the general assembly to confer on married women the same, and no greater, rights, in regard to their property, as were possessed by their husbands. It would be singular, and we cannot suppose that the legislature could have intended to confer other or greater power on the wife than upon the husband. To hold that a *feme covert* has a vested interest in her husband's personal estate, that he is unable to divest in his lifetime, would be disastrous in the extreme to trade and commerce. Owing to commercial necessities, personalty must be left free for exchange, and, to be so, some one must be vested with full power to sell and transfer it free from latent and contingent claims." It is contended by counsel for Rebecca Small that section 4 of the Illinois statute of frauds was amended in 1874, after the rights in the *Padfield Cases* had vested, so that gifts made with intent to defraud "creditors or other persons" (the last three words having been added) were declared void, and that a widow comes within the designation of "other persons," and therefore the doctrine in the last *Padfield Case* is changed by statute; and that this is recognized in *Tyler v. Tyler*, 136 Ill. 525. In that case it appears that William A. Tyler, in anticipation of proceedings by his wife against him for separate maintenance, in Broome county, N. Y., went to Conneaut, Ohio, and assigned and delivered to his son, John B. Tyler, a large amount of notes, bonds, and mortgages, and also indirectly transferred to him certain lands. The suit was brought by the wife soon after the transfer. Afterwards William A. Tyler commenced an action in Illinois against his son to compel a reassignment of said notes, bonds, and mortgages and a reconveyance of the lands; but it was held by the supreme court of Illinois that the action could not be maintained, said William A. Tyler having transferred the property with intent to defraud the wife, and to render any judgment for separate maintenance ineffectual, the wife coming within the designation of "other persons" in said section 4 of the statute of frauds as amended. The *Padfield Cases* are not overruled, distinguished, nor otherwise referred to, but the case follows *Draper v. Draper*, 68 Ill. 17, where it was held that a conveyance, after bill filed for divorce and alimony, with intent to deprive the wife of alimony, was fraudulent, and should be set aside. The phrase "other persons" probably would not include a widow seeking to enforce her rights under the statute of descents and distribu-

tions. When general words follow particular and specific words, the former must be confined to things of the same kind. *Sutherland*, Stat. Constr. §§ 268, 273, 277; *Guptil v. McFee*, 9 Kan. 30, 37; *White v. Isely*, 84 Ga. 189, 199; *State v. McGarry*, 21 Wis. 496, 498. The word "creditors" serves to limit and control the generality of the following words "other persons" so as to include only those of like or similar kind and nature to creditors.

There seems to be a distinction between the rights of a widow and those of a wife driven by the aggressions of her husband to a suit for alimony or separate maintenance. In the latter case the wife is seeking to establish an unliquidated claim against her husband for money or property, and her relation to him is that of a quasi creditor. This dissimilarity is pointed out by Agnew, J., in *Bouslough v. Bouslough*, 68 Pa. 495, 499, as follows: "So the rule that forbids the wife to avoid the voluntary assignment or gift of her husband must change when her relation to him changes. There is no reason why a wife whose husband has deserted her, and refused to perform the duty of maintenance, or who, by cruel treatment, has compelled her to leave his house and commence proceedings for divorce and maintenance, should not be viewed as a quasi creditor in relation to the alimony which the law awards to her. So long as she is receiving maintenance, and is under his wing as it were, she is bound by his acts as to his personal estate; but when she is compelled to become a suitor for her rights, her relation becomes adverse, and that of a creditor in fact, and she is not to be balked of her dues by his fraud." Recognizing this distinction, it would seem that Rebecca Small, while residing with her husband in the most amicable relations, could not have maintained an action to set aside or annul the advancements and gifts to the children, nor to compel either her husband or the children to account to her for the same; and, as these advancements and gifts were valid as to her and valid as to Daniel Small when made, they formed no part of the estate at his death. But we need not go so far in this case. The reasoning in *Padfield v. Padfield*, *supra*, as to the married woman's law in Illinois is of much force here. In some states property acquired during coverture is known as "community property," and partakes to some extent of the nature of partnership property between husband and wife; but our legislation is in the opposite direction, manifesting a purpose to maintain, as far as practicable, the separate rights of husband and wife as well to accumulations during as before the existence of the married relation, and each is entitled to dispose of his or her own goods and chattels, with a slight modification as to mortgaging the same. Some of our former decisions have accorded in spirit with the doctrine established in Illinois. *Butler v. Butler*, 21 Kan. 521, 525, 526, 30 Am. Rep. 441; *Munger v. Baldrige*, 41 Kan. 241-244. The cases of *Busenbark v. Busenbark*, 83 Kan. 572, and *Green v. Green*, 34 Kan. 740, 55 Am. Rep. 256, both relate to protection of the husband and wife re-

spectively during coverture from fraudulent alienation of real estate by the other, and are only remotely analogous to the case now under consideration. In *Williams v. Williams*, in the circuit court of the United States for the district of Kansas (40 Fed. Rep. 521), Foster, J., delivering the opinion of the court, said: "The main question, in its broadest sense, is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be that if such gift is bona fide, and accompanied by delivery, the widow cannot reach the property after the donor's death. . . . Neither the wife nor children have any tangible interest in the property of the husband or father during his lifetime, except so far as he is liable for their support, and hence he can sell it or give it away without let or hindrance from them. Of course the sale or gift must be absolute and bona fide, and not colorable only. And if the sale or gift would bind the grantor it would bind his heirs." We are aware that the authorities are not all in harmony upon this subject, but the cases as-

serting a contrary doctrine are generally under statutes or customs different from those of Illinois and Kansas, and we think the weight of authority in states having statutes upon this subject of the same general nature as our own establishes the doctrine herein announced. We cite some authorities in addition to those hereinbefore given, viz.: *Pringle v. Pringle*, 59 Pa. 281; *Lines v. Lines*, 142 Pa. 149; *Richards v. Richards*, 11 Humph. 429; *Sanborn v. Goodhue*, 28 N. H. 48, 59 Am. Dec. 898; *Ford v. Ford*, 4 Ala. 142, 146; *Smith v. Hines*, 10 Fla. 258, 285; *Stewart, Husb. & W.* § 301; *Thornton, Gifts*, § 488. We are of opinion that the rights of Rebecca Small are controlled by the will and the contract of May 9, 1888. If there was any real estate or personal property in Illinois or elsewhere not disposed of by the will nor included in the contract, of course she is entitled to her proper share of the same.

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

All the Justices concur.

Rehearing denied December 21, 1895.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MISSOURI PACIFIC RAILWAY COMPANY, *Pf. in Err.*,
v.

George MEEH.

(59 Fed. Rep. 753.)

1. Filing a plea to the merits before filing a plea in abatement to the jurisdiction of the court, upon the ground of citizenship, is not a waiver of the question of jurisdiction under the act of Congress of March 3, 1875, § 5, making it the duty of the Federal circuit courts to dismiss or remand a suit not involving a dispute properly within the jurisdiction.

2. Two states cannot by joint action create a corporation which will be regarded as a single corporate entity, and for jurisdictional purposes a citizen of each state which joined in creating it.

3. The result of creation by one state of a corporation of a given name, and the declaration of the legislature of an adjoining state that the same legal entity shall be or become a corporation of that state, and be entitled to exercise within its borders all of its corporate functions by the same board of directors, is not to create a single corporation, but two corporations of the same name having a different paternity.

4. An interstate corporation having but one board of directors, formed by process of consolidation or otherwise, acts in each of such states as a domestic, and not as a foreign, corporation.

5. A Federal court has no jurisdiction of an action by a citizen of the state against a consolidated railway company organized under the statutes of that and adjoining states, for personal injuries inflicted within the state, as such corporation is a domestic corporation for jurisdictional purposes.

(September 2, 1895.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Mr. B. P. Waggener, for plaintiff in error:

When a consolidated company is formed by union of several corporations chartered by different states, it is a citizen of each of the states which granted the charter to any one of its constituent companies, and when sued in one of those states it cannot claim the right of removal on the ground that it is also a citizen of another state.

Fitzgerald v. Missouri P. R. Co. 45 Fed. Rep. 812; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *St. Louis, A. & T. H. R. Co. v. Indianapolis & St. L. R.*

NOTE.—As to residence or citizenship of corporations for purposes of jurisdiction, see note to *Stephens v. St. Louis & S. F. R. Co.* (C. C. W. D. Ark.) 14 L. R. A. 184.

60 L. R. A.

Later decisions of the Supreme Court of the United States on the subject are found in the L. C. P. Co.'s Digest of the United States Supreme Court Reports, vol. 2, pp. 174, 175.

Co. 9 Biss. 144; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co. 118 U. S. 290, 30 L. ed. 83; *Pacific Railroad v. Missouri P. R. Co.* 23 Fed. Rep. 565; *Central Trust Co. v. St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551.

It is the duty of a Federal appellate court to take notice, of its own motion, that the record does not show jurisdiction in the court below, and thereupon to remand the cause.

Grand Trunk R. Co. v. Twitchell, 59 Fed. Rep. 727; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462; *Grace v. American C. Ins. Co.* 109 U. S. 278, 27 L. ed. 932; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *Jackson v. Ashton*, 88 U. S. 8 Pet. 148, 8 L. ed. 898; *Scott v. Sandford*, 60 U. S. 19 How. 398, 15 L. ed. 691; *Piquignot v. Pennsylvania R. Co.* 57 U. S. 16 How. 104, 14 L. ed. 863; *Outler v. Rae*, 48 U. S. 7 How. 729, 12 L. ed. 890; *United States v. Huckabee*, 58 U. S. 16 Wall. 414, 21 L. ed. 487; *Barney v. Baltimore*, 78 U. S. 6 Wall. 280, 18 L. ed. 825; *Thompson v. Central Ohio R. Co.* 78 U. S. 6 Wall. 184, 18 L. ed. 765; *Williams v. Nottawa*, 104 U. S. 209, 26 L. ed. 719.

Messrs. Fenlon & Fenlon, for defendant in error:

A plea in abatement after the defendant has pleaded to the merits is too late.

Cook v. Burnley, 78 U. S. 11 Wall. 659, 20 L. ed. 29; *Sheppard v. Graves*, 55 U. S. 14 How. 509, 14 L. ed. 519; *D'Wolf v. Rabaud*, 26 U. S. 1 Pet. 476, 7 L. ed. 227; *Eddy v. Lafayette*, 49 Fed. Rep. 810, 4 U. S. App. 247.

A corporation is the creature of the state bringing it into existence; it cannot migrate nor have a citizenship in two or more states at the same time, for the purpose of avoiding the process of the Federal courts therein, any more than an individual can be a citizen of two or more states at the same time, and for the same reason.

Bank of Augusta v. Earle, 38 U. S. 18 Pet. 519, 10 L. ed. 274; *Louisville, C. & C. R. Co. v. Letson*, 48 U. S. 2 How. 497, 11 L. ed. 353; *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 405, 15 L. ed. 451; *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 65, 20 L. ed. 354; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 363, 34 L. ed. 363; *Ang. & A. Priv. Corp.* §§ 404, 405.

Thayer, Circuit Judge, delivered the opinion of the court:

The question for consideration in this case is whether a citizen and resident of the state of Kansas can maintain in the circuit court of the United States for the district of Kansas a suit against a railroad company for personal injuries sustained within the state of Kansas in consequence of the negligent conduct of the said railroad company, it appearing that, when the injuries were so sustained, said railroad company was duly incorporated under the laws of Kansas, and was operating a line of railroad in that state, and that it was also duly incorporated under the laws of the states of Missouri and Nebraska. The question arises in this wise: George Meeh, the defendant in error, sued the Missouri Pacific Railway Company, the plaintiff in error, in the circuit court of the

United States for the district of Kansas, alleging that he was a citizen and resident of the state of Kansas, that the defendant company was a citizen and resident of the state of Missouri, and that he (the plaintiff) had sustained certain personal injuries, to his damage in the sum of \$10,000, in consequence of the negligent operation by the defendant company of one of its trains near the town of Admire, in Lyon county, Kan. At the return term, on April 7, 1894, the defendant company appeared, and filed an answer to the complaint, which alleged, among other things, that it was a railway corporation "duly chartered, incorporated, and organized under and by virtue of the laws of the states of Kansas, Nebraska, and Missouri, and, as such corporation, operates a line of railway into and through the counties of Lyon and Leavenworth, in the state of Kansas." Later, on June 8, 1894, it filed a plea to the jurisdiction, alleging that the plaintiff was "a resident, citizen, and inhabitant of the state of Kansas, and the said defendant, the Missouri Pacific Railway Company, was a corporation made up by the consolidation of three or more separate and distinct corporations, one incorporated under the laws of the state of Missouri, another under the laws of the state of Kansas, and another under the laws of the state of Nebraska, and that its articles of incorporation have been duly filed with the secretary of state of the state of Kansas, and it was at the date of the institution of this suit, and still is, a corporation incorporated under the laws of each of the states of Missouri, Kansas, and Nebraska, and the requisite diverse citizenship does not exist to give this court jurisdiction, and there is no Federal question involved." No action appears to have been taken on this plea. Later, on June 11, 1894, the defendant company filed an amended answer to the complaint, the second and third paragraphs whereof were as follows:

"Second. For further answer defendant says that this court has no jurisdiction to hear, try, and determine the matters herein; that at the commencement of this action, and prior to the alleged injuries complained of by the plaintiff, the plaintiff was, and ever since has been, a citizen, resident, and inhabitant of the state of Kansas; that at the commencement of this suit the defendant was, and ever since has been, a corporation chartered and incorporated under the laws of each the states of Missouri, Kansas, and Nebraska; that the said Missouri Pacific Railway Company was originally incorporated under the laws of the state of Missouri, but subsequently, and before the institution of this action, the said company, as so incorporated under the laws of Missouri, was duly and legally consolidated under the laws of Kansas with certain railway companies duly and legally incorporated under the laws of the state of Kansas, and subsequently such consolidated company was also consolidated under the laws of Nebraska with certain corporations incorporated under the laws of Nebraska, and such consolidated company then and there took the name of the Missouri Pacific Railway Company, the de-

fendant herein; that the said defendant as consolidated had and has but one board of directors, and operates its system of railroad into and through the states of Missouri, Kansas, and Nebraska; and said defendant at the commencement of this suit was, and ever since has been, a resident citizen and inhabitant of the state of Kansas.

"Third. Defendant further says that this court has no jurisdiction to hear, try, and determine the question in controversy; that the state of Missouri is not included in or a part of the district of Kansas."

The plaintiff demurred to the second and third paragraphs of the amended answer, for the reason that the same were not sufficient in law, and the circuit court sustained the demurrer. Subsequently there was a trial before a jury, and a verdict was returned and a judgment entered in favor of the plaintiff.

Preliminary to a discussion of the main question in the case, noted above, we will notice two points urged by counsel for the defendant in error.

It is insisted that the jurisdictional question was waived, and does not arise upon the present record, because the defendant company filed a plea to the merits before filing a plea in abatement to the jurisdiction of the court. This point is not well taken, and must be overruled. It is true that it was once held that an objection to the jurisdiction of the court upon the ground of citizenship, in actions at law, should be made by a plea in abatement, and that, if a plea to the merits or the general issue was filed, it was a waiver of the plea in abatement, and that a plea of the latter character came too late and was of no avail if filed after or in connection with a plea to the merits. *De Sobry v. Nicholson*, 70 U. S. 8 Wall. 420, 18 L. ed. 263; *D'Wolf v. Rabaud*, 26 U. S. 1 Pet. 476, 7 L. ed. 227; *Smith v. Kernochen*, 48 U. S. 7 How. 198, 216, 12 L. ed. 666, 678; *Sheppard v. Graves*, 55 U. S. 14 How. 505, 510, 14 L. ed. 518, 520 *Wickliffe v. Owings*, 58 U. S. 17 How. 47, 15 L. ed. 44; *Conard v. Atlantic Ins. Co.* 26 U. S. 1 Pet. 886, 450, 7 L. ed. 189, 217. But this rule was abolished by section 5 of the act of March 3, 1875 (18 Stat. at L. p. 473, chap. 137), which makes it the duty of the Federal circuit courts to dismiss a suit at any time, or to remand it to the state court if it was originally removed therefrom, when it appears "to the satisfaction of the court . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable" by the Federal courts. By virtue of this statute, the time within which an objection to the jurisdiction may be taken is not limited as heretofore. The right to make such an objection is not waived by filing a plea to the merits, but the objection may be taken at any time after the suit is brought, in any appropriate manner, either by motion or plea; and it is the duty of the Federal courts at all times either to dismiss or to remand a cause for want of

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jurisdiction apparent on the face of the record. *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 373, 34 L. ed. 368, 387; *Manfield, O. & L. M. R. Co. v. Swan*, 111 U. S. 379, 28 L. ed. 462; *Barth v. Coler*, 9 C. C. A. 81, 19 U. S. App. 646, and 60 Fed. Rep. 466.

It is further insisted in behalf of the defendant in error that, when the demurrer to the second paragraph of the answer was sustained, the answer simply alleged that the Missouri Pacific Railway Company was a corporation duly incorporated under the laws of Kansas "at the commencement of the suit," and that this averment in the answer did not meet the general allegation of the complaint that the defendant company "was a citizen and resident of the state of Missouri." We need not stop to decide whether this view is sound or unsound, because the second paragraph of the answer containing the plea to the jurisdiction was immediately amended by leave of court so as to state that the Missouri Pacific Railway Company was a Kansas corporation, operating a line of road in that state, when the alleged injuries were sustained, as well as when the suit was commenced; and the case went to trial on the amended special plea alleging this fact, which was neither denied by the reply nor the sufficiency thereof challenged by demurrer. The case was obviously tried by the circuit court, and the demurrer to the second and third paragraphs of the answer was obviously sustained, on the ground that the fact that the defendant company had been incorporated in Missouri as well as in Kansas entitled a citizen of Kansas to sue it in the Federal circuit court of that state for an act of negligence there committed. We must accordingly consider and decide whether that view is tenable.

At this day it must be regarded as settled beyond doubt or controversy that two states of this Union cannot by their joint action create a corporation which will be regarded as a single corporate entity, and, for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity. This was decided in *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286, 297, 17 L. ed. 130, 133, where Mr. Chief Justice Taney, speaking for the Supreme Court, said: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state, and neither

state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States."

The doctrine of this case was afterwards reaffirmed in *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 283, 20 L. ed. 571, 575, where Mr. Justice Field used the following language, speaking of a corporation that had been duly incorporated under the laws of Illinois and Wisconsin: "But it is said—and here the objection to the jurisdiction arises—that the defendant is also a corporation under the laws of Illinois, and therefore is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *Ohio & M. R. Co. v. Wheeler* [supra]."

These cases have since been referred to, and the doctrine enunciated therein has been approved, in *Muller v. Doves*, 94 U. S. 444, 447, 24 L. ed. 207, 208; in *Pennsylvania R. Co. v. St. Louis, A & T. H. R. Co.* 118 U. S. 290, 298, 30 L. ed. 88, 88; and in *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 856, 876, 877, 34 L. ed. 868, 868, 869. They have also been cited and followed by the supreme courts of Michigan and Illinois in *Chicago & N. W. R. Co. v. Auditor General*, 53 Mich. 91; in *Racine & M. R. Co. v. Farmers' Loan & T. Co.* 49 Ill. 331, 348, 95 Am. Dec. 595; and by Judge Caldwell on the circuit in *Fitzgerald v. Missouri P. R. Co.* 45 Fed. Rep. 813.

Chief Justice Cooley remarked in *Chicago & N. W. R. Co. v. Auditor General*, supra, that "it is impossible to conceive of one joint act, performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

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And in the case of *Quincy Railroad Bridge Co. v. Adams County*, 88 Ill. 615, 619, Mr. Justice Breese said, speaking of a corporation that had been incorporated both by the states of Illinois and Missouri: "The states of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state. As argued by appellee, the only possible status of a company acting under charters from two states is, that it is an association incorporated in and by each of the states, and when acting as a corporation in either of the states it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits. We do not, and cannot, understand that appellant derives any of its corporate powers from the legislature of the state of Missouri, but wholly and entirely from the general assembly of this state."

Assuming, then, that there are three distinct legal entities known as the Missouri Pacific Railway Company,—one a corporation of Missouri, another a corporation of Kansas, and another a corporation of Nebraska,—we turn to consider whether, on the state of facts disclosed by this record, the circuit court of the United States for the district of Kansas had jurisdiction of the case at bar. We think that this question was practically decided in the cases heretofore cited. Thus, in *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 283, 20 L. ed. 571, 575, the plaintiff, who was a citizen of Illinois, sued the railway company, which had been incorporated by the states of Wisconsin and Illinois, in the courts of Wisconsin, for a negligent act committed in Wisconsin. Subsequently the plaintiff removed the case to the circuit court of the United States for the district of Wisconsin, and the question arose whether the latter court had jurisdiction. It will be noticed that in the paragraph of the opinion above quoted Mr. Justice Field said: "The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state whatever its status or citizenship may be elsewhere."

So, in the case of *Ohio & M. R. Co. v. Wheeler*, 66 U. S. 1 Black, 286, 17 L. ed. 180, the plaintiff company described itself as a corporation created and existing under the laws of the states of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler, describing him as a citizen of Indiana, in the circuit court of the United States for the district of Indiana; but the supreme court held that the action could not be maintained, saying in substance that in the character in which the company had sued, as a corporation of Indiana and Ohio, it could not maintain a suit against

a citizen of Ohio or Indiana in a circuit court of the United States. The decisions in *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 186 U. S. 856, 865, 84 L. ed. 868, 864, and in *Muller v. Dows*, 94 U. S. 444, 447, 24 L. ed. 207, 208, do not conflict with the prior decisions of the Supreme Court of the United States, for in the former of these cases the New Hampshire corporation, the Nashua Railroad, which had been created a corporation of the state of Massachusetts, sued the Massachusetts corporation in the circuit court of the United States for the district of Massachusetts, to adjust certain differences that had arisen, growing out of a contract in which the two companies had dealt with each other as separate legal entities; and it was held that the suit could be maintained. So, in *Muller v. Dows* two citizens of New York and a citizen of Missouri united in bringing a suit against two railroad corporations in the district of Iowa. Both of the defendant corporations were incorporated under the laws of Iowa, but one of them, by consolidation proceedings, had also become a corporation of the state of Missouri. This fact was supposed to destroy the jurisdiction of the court. But the supreme court held otherwise, saying that the consolidated company "in the state of Iowa [where sued] . . . was an Iowa corporation existing under the laws of that state alone." The rule, we think, that may fairly be extracted from these cases, is this: That whenever a corporation of one state, by legislative sanction, becomes also a corporation of another state, either by the process of consolidation or otherwise, whatever acts it subsequently does or performs in the latter state it does and performs as a domestic, and not as a foreign, corporation. It derives all of its powers to act as a corporation in the state of its adoption from local laws. If it is there sued for an act done within the state, it is sued and must answer as a domestic, and not as a foreign, corporation. The same thought was expressed by Mr. Justice Breese in the passage quoted from *Quincy Railroad Bridge Co. v. Adams County*, *supra*, when he said: "The only possible status of a company acting under charters from two states is, that it is an association incorporated in and by each of the states; and when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits."

Nor is there anything new or strange in the view that a foreign corporation, when created a corporation by the laws of some other state, must thereafter act in the latter state and be there dealt with as a domestic corporation. It was long ago said in *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 181, 19 L. ed. 857, 860, that a "corporation, being the

mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Instead of merely licensing a foreign corporation to operate a railroad or to transact any other business within its borders, a state may, for reasons of its own, adopt the foreign corporation by creating it a domestic corporation with the same franchises and powers that it exercises in the state which originally created it, or with powers that are less or more extensive. When a state pursues the latter course, and adopts the foreign corporation as one of its own creation, it follows, we think, that all of its subsequent acts and transactions within the state of its adoption are the acts of a domestic corporation, that the franchises and powers there exercised were conferred by local laws, and that process served upon its officers or agents within the state is served upon the domestic corporation rather than upon the foreign corporation of the same name.

It follows from what has been said that the parties to the suit at bar must be regarded as citizens and residents of the same state. The averments contained in the amended answer are sufficient to show that the Missouri Pacific Railway Company, which figured as the defendant in the circuit court and as the plaintiff in error here, is in reality a domestic corporation of the state of Kansas. The injuries complained of were inflicted upon a citizen of the state of Kansas while the defendant company was operating its road in that state. Under these circumstances, we hold that the circuit court of the United States for the district of Kansas had no jurisdiction of the case, and that, upon the state of facts disclosed by the present record, the suit should have been dismissed.

The judgment of the Circuit Court is accordingly reversed, and the case is remanded to that court for a new trial.

KANSAS SUPREME COURT.

City of ARGENTINE, *Pf. in Err.*,
v.
ATCHISON, TOPEKA, & SANTA FÉ R.
CO.

(.....Kan.....)

*A city of the second class is vested with power to construct at its own expense, or to require the construction by a railroad company at its expense, of a viaduct or bridge over railroad tracks within the city, where the safety and convenience of the public make it necessary; and, when it is deemed to be just that the cost of such a structure should be divided between the city and the railroad company, the city may contribute or bind itself to pay a share of such cost.

(October 5, 1895.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover money which defendant had contracted to contribute toward the building of a bridge. *Affirmed.*

The facts are stated in the opinion.

Messrs. Waters & Waters for plaintiff in error.

Messrs. A. A. Hurd and Mills, Smith, & Hobbs, for defendant in error:

The acceptance of the terms of the Ordinance No. 240 by the railroad, and the building of the viaduct, were a dedication of it to the public as a street.

Elliott, Roads & Streets, p. 91; *Grinold v. Huffaker*, 47 Kan. 703; *Dubuque v. Maloney*, 9 Iowa, 451, 74 Am. Dec. 353; *Oincinnati Trustees v. White*, 81 U. S. 6 Pet. 431, 8 L. ed. 452; *Brooks v. Topeka*, 84 Kan. 231.

The city had ample power to pass the ordinance and enter into the contract it did for the building of the viaduct.

Elliott, Roads & Streets, p. 28; *State v. Gorham*, 37 Me. 461.

It would be contrary to equity and good conscience for the city to repudiate the payment of the amount it agreed to pay, and it is estopped from so doing.

Brown v. Atchison, 39 Kan. 37; *Sherman Center Town Co. v. Morris*, 43 Kan. 282; *Hutchinson & S. R. Co. v. Kingman County Comrs.*, 48 Kan. 70; *Stewart v. Wyandotte County Comrs.*, 45 Kan. 708; *Sleeper v. Bullen*, 6 Kan. 300; *East St. Louis v. East St. Louis Gaslight & Coke Co.*, 96 Ill. 415, 38 Am. Rep. 97; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 469; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659.

Johnston, J., delivered the opinion of the court:

This action was brought by the Atchison, Topeka, & Santa Fé Railroad Company against the city of Argentine to recover \$3,000, being a share of the cost of two viaducts constructed in the city of Argentine

*Headnote by **JOHNSTON, J.**

NOTE.—For liability for expense of changing street grade to avoid railroad grade crossing, see also *Kelley v. Minneapolis (Minn.)*, 28 L. R. A. 32, and *note*.

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by the railroad company, and which the city had agreed to pay. It appears that prior to the settlement of Argentine the railroad company had established large yards, with many tracks, at that location, and that afterwards people settled and built homes on both sides of the railroad yards. Two streets were laid out and opened across the yards, which the inhabitants of the city used in going from one side of the yards to the other. When the city reached a population of 5,000, and had within its limits a smelter and a number of elevators, making a great deal of business in the yards, crossing over the same at grade was deemed to be inconvenient and dangerous. An ordinance was then adopted by the city directing the railroad company to construct a viaduct over all the railroad tracks operated by it, at a point near a certain avenue, to be selected by the city council, and which was to be 20 feet wide, and, with the approaches, would be about 1,333 feet long. It was to be constructed according to certain plans and specifications which had been prepared, at an estimated cost of \$15,000. A further provision was that the railroad company should also build a foot viaduct over the same tracks at another point; and it was provided that, on the completion of both viaducts in accordance with the plans and specifications, the city of Argentine should pay to the railroad company \$3,000 of the cost thereof. It was provided that, on the completion of the viaducts, they should be public highways, to be used by the public instead of the grade crossings, and should be forever maintained and kept in repair by the city, without expense to the railroad company. Other provisions were made with respect to the change of the grade of the streets to correspond with the approaches to the viaducts, as well as for the reconstruction or widening of the same in certain contingencies, and for the laying of water and gas mains under the tracks of the railroad company. It was finally ordained that if, within thirty days after the passage of the ordinance, the railroad company should file in the office of the city clerk a written acceptance of the provisions of the ordinance, it should then become a contract between the city and the railroad company, binding upon both parties. Within the time limited, the terms and conditions of the ordinance were accepted by the railroad company. The city selected the locations for the viaducts, and they were built by the railroad company in compliance with the provisions of the ordinance, and with the plans and specifications which had been prepared, at an actual cost to the railroad company of about \$15,700; and, if the usual charges for transportation of material were made, it would add to the amount named from \$1,600 to \$2,000. The city and its officers knew of the building of the viaducts, and no legal steps were taken to prevent it, and since then the viaducts have been in constant use by the inhabitants and others for teams, vehicles, and pedestrians. At a special election in the city, bonds to pay the \$3,000 claim of the railroad

company, and for the construction of certain sewers and the building of a city hall, were voted upon. The bonds have been issued and sold for such purposes. Taxes have been levied in the city to pay these bonds, and the sum of \$3,000 is in the hands of the city treasurer, set apart as the viaduct fund, having been derived from the sale of the bonds voted for the purpose of paying the \$3,000 claim of the railroad company. The claim was duly presented in writing by the railroad company to the mayor and council, with a full account of the items thereof, duly verified as required by law, but payment was refused by the city, when the present action was brought. The railroad company recovered the full amount claimed, and the city complains and presents the single proposition that it had no power to make the contract which was made with the railroad company.

Argentine is a city of the second class, and, although there is no statute which in express terms provides for the building of viaducts in cities of that class, there appears to be ample authority for such a city to build or require the building of viaducts or bridges over railroad tracks where the convenience and safety of the public make it necessary. In the act governing cities of the second class, authority is given to open and improve streets, avenues, and alleys, and to build bridges, within the city. Gen. Stat. 1889, ¶ 788. It is also provided that the city may provide for the passage of railways through the streets and grounds of the city, regulate depots, depot grounds, the crossing of railway tracks, the running of railway engines, cars, and trains within the limits of the city, and make any other and further provisions to prevent accidents at crossings and on the tracks of railways. Paragraph 821. In addition to these, there are provisions vesting the care, management, and control of the city in the mayor and council, authorizing them to open, widen, extend, or otherwise improve the streets and avenues of the city, and to prevent all encroachments upon them, and granting authority to them to enact all such ordinances as they shall deem expedient for maintaining the good government and welfare of the city, its trade and commerce. Paragraphs 787, 811, 812, 824. Under these general provisions, we think there is ample power in a city of the second class to construct or require the construction of viaducts over railroad tracks. In addition to these, however, there is express authority given for the construction of bridges. In the more enlarged sense of that word, viaducts over railroad tracks are included. Worcester defines the word "bridge:" "A pathway erected over a river, canal, road; etc., in order that a passage may be made from one side to the other." Webster defines it as "a structure, usually of wood, stone, brick, or iron, erected over a river or other watercourse, or over a ravine, railroad, etc., to make a continuous roadway from one bank to the other." The last-named authority defines the word "viaduct" as "a

bridge." According to modern usage, the term "bridge" may be appropriately applied to the viaducts which were constructed by the railroad company; and we think it may be fairly said that the term was used in that sense in the statute. Gen. Stat. 1889, ¶ 788; *State v. Gorham*, 37 Me. 461.

It is conceded by the city that it had the power to compel the railroad company to build the viaducts wholly at the expense of the company, and that the city can build them at its own expense under the provisions mentioned there can be little doubt. As the city may construct them entirely at its own expense, no reason is seen why it may not contribute a part of the expense of viaducts determined to be necessary. The questions of necessity and expediency of viaducts, the character and cost of those which the safety and convenience of the public may require, and the means of providing them, including what proportion of the expense should be borne by the city and what by the railroad company, are for the determination of the mayor and council, rather than the court. The fact that the city can compel the railroad company to build a viaduct upon certain conditions at its own expense does not prevent the city from sharing the expense under other circumstances where it is deemed to be just that a division of the expense should be made; and that question, like the others which have been mentioned, so far as the municipality is concerned, rests with the legislative authority of the city.

It is contended that the viaduct is not a public highway, but is constructed over the private property of the railroad company, and for this reason, also, the power of the city is questioned. The viaducts were to be constructed at a place to be designated by the city, and to connect with the streets on each side of the tracks and yards. They were supported by posts of iron, resting on foundations of masonry, braced with iron bolts and sway rods, so as to make a safe and substantial structure. It was provided that the viaducts, when constructed, should be and remain public highways, for the use of the public. The railroad company, having accepted the provisions of the ordinance and constructed the viaducts over its yards, has effectually dedicated the land as a public highway, and would be estopped from interfering with the easement so long as it is maintained as a public highway.

Our opinion is that the district court reached a correct conclusion in holding that the city had the power to contract with the railroad company for the construction of the viaducts, and that it is liable for the share of the cost of the same which it agreed to pay. It is unnecessary to determine the validity of the provisions as to future maintenance, and upon that question we express no opinion.

The judgment of the District Court will be affirmed.

All the Justices concur.

NORTH CAROLINA SUPREME COURT.

William F. PICKETT, Admr., etc., of Albert Williams, Deceased.

WILMINGTON & WELDON RAILROAD COMPANY, Appt.

(.....N. C.)

1. He who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible for injuries resulting from his failure to exercise reasonable care.
2. The failure of an engineer to perform his duty to maintain a reasonably vigilant lookout along the track in front of the train renders the railroad company liable for killing a human being lying on the track apparently helpless from any cause, when the engineer could have seen him by the exercise of ordinary care.
3. It is proper to instruct the jury that plaintiff's negligence is immaterial if they find that the defendant's negligence was the proximate cause of the injury.
4. The qualification of a witness to give an opinion is for the court to decide.
5. An instruction that the measure of damages for the loss of a human life is the net moneyed value of the intestate's life to those dependent upon him is not sufficient to cure a refusal to instruct that it would be the present value of accumulations arising from his net income based upon his expectancy of life.
6. A new trial solely for the purpose of inquiring as to the damages may be granted on a reversal for errors affecting damages only.

(November 12, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Duplin County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed in part.*

The facts are stated in the opinion.

Messrs. W. R. Allen and H. L. Stevens for appellant.

Messrs. A. D. Ward and N. J. Rouse for appellee.

Avery, J., delivered the opinion of the court:

The most important question presented by the appeal is whether the court erred in refusing to instruct the jury that if the plaintiff's intestate deliberately laid down upon the track, and either carelessly or intentionally fell asleep there, the defendant was not liable, unless the engineer actually saw that he was lying there in time, by the reasonable use of the appliances at his command, to have stopped the train before it reached him. In the headnote to *Smith v. Norfolk & S. R. Co.* 114 N. C. 729, 25 L. R. A. 237, it seems that

the intelligent reporter deduced from the opinion of the court the principle that, while the mere going upon the track of a railroad is not contributory negligence, any injury subsequently inflicted by a collision with a passing train is deemed to be due to the carelessness of the person who goes upon it, unless it is shown that he looked and listened for its approach. While such an abstract proposition may be fairly drawn from the reasoning upon which the opinion is founded, the new trial was in fact awarded, because the court below refused to instruct the jury that if the plaintiff's intestate was drunk, though he was lying apparently helpless upon the track, the defendant was not liable, unless its engineer actually saw that he was in danger in time to avert the injury by reasonable care. The learned counsel who argued this case for the defendant, without citing *Smith's Case* in support of his contention, obviously invoked the aid of the principle there decided when he rested his argument upon the proposition that one who carelessly or purposely falls asleep on a railway track is not only negligent in exposing himself upon first going there, but that, though he afterwards becomes utterly unconscious, there is, in contemplation of law, a continuing carelessness on his part up to the moment of a collision, which is, concurrently with the fault of the defendant, a proximate cause of an ensuing injury, or operates to acquit the carrier of what would have been culpable carelessness and a *causa causans* if the injury had been inflicted on a horse, a pig, a cow, or a person rendered insensible in any other manner than by drunkenness or deliberately or carelessly falling asleep. So that we are again called upon to review *Smith's Case*, and to determine whether we will modify the principle there laid down, or extend its operation to other cases coming within the reason upon which it is founded.

The language of Judge Cooley which is cited in *Clark v. Wilmington & W. R. Co.* 109 N. C. 449, 14 L. R. A. 749, is that, "if the original wrong only becomes injurious in consequence of intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." If, in the case at bar, the plaintiff's intestate was in fault in lying down upon the track, and his carelessness culminated in doing so, then it is clear that the engineer was in fault in failing to keep a proper lookout if he could by doing so have seen the deceased in time through the reasonable use of the appliances at his command to have averted the injury, and his carelessness, of course, intervened after that of plaintiff's intestate. If he had looked and stopped the train, the collision would have been prevented, notwithstanding the previous want of care on the part of the boy who was killed.

In *Herring v. Wilmington & R. R. Co.* 10 Ired. L. 402, 51 Am. Dec. 895, this court followed what was at the time the generally

NOTE.—As to necessity of lookout on railroad train, see note to *Smith v. Norfolk & S. R. Co.* (N. C.) 25 L. R. A. 237.

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accepted doctrine,—that persons who went upon railroad tracks at places other than public crossings were trespassers, to whom the carrier owed no duty of watchfulness, and for whose safety it was in no wise liable, unless its engineer actually saw that there was danger of injury from a collision, and wilfully refused to use means by which he could have averted it. In *Gunter v. Wicker*, 85 N. C. 310, this court gave its sanction to the principle first distinctly formulated in *Davies v. Mann*, 10 Mees. & W. 545, that "notwithstanding the previous negligence of the plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages." This doctrine was subsequently approved in *Sautter v. New York & W. S. S. Co.* 88 N. C. 123, 48 Am. Rep. 736; *Turrentine v. Richmond & D. R. Co.* 92 N. C. 638; *Meredith v. Cranberry Coal & I. Co.* 99 N. C. 576; *Roberts v. Richmond & D. R. Co.* 88 N. C. 560; *Farmer v. Wilmington & W. R. Co.* Id. 564; *Bullock v. Wilmington & W. R. Co.* 105 N. C. 180; *Wilson v. Norfolk & S. R. Co.* 90 N. C. 69; *Snowden v. Norfolk Southern R. Co.* 95 N. C. 98; *Carlton v. Wilmington & W. R. Co.* 104 N. C. 365; *Randall v. Richmond & D. R. Co.* 104 N. C. 410. And it was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to exercise reasonable care in keeping a lookout, not only for stock and obstructions, but for apparently helpless or infirm human beings on the track, and that the failure to do so, supervening after the negligence of another, where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury.

It was after all of these precedents following *Gunter v. Wicker*, *supra*, that the court in *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, was confronted with the question whether a railway company was liable where, by ordinary care, its engineer could have stopped its train in time to prevent its running over a man lying asleep upon its track, under the doctrine of *Gunter v. Wicker*, or whether, the accident having occurred at a place other than a public crossing, the company could be held answerable, under the rule as stated in *Herring v. Wilmington & R. R. Co.* only where it was shown that the engineer actually saw the trespasser, and had reasonable ground to comprehend his condition. Upon mature consideration, the court overruled *Herring's Case*, and stated the rule applicable in such cases to be that "if the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or see a human being, who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it." This rule was approved in express terms in *Meredith v. Richmond & D. R. Co.* 108 N. C. 618; *Linkle v. Richmond & D. R. Co.* 109 80 L. R. A.

N. C. 472; *Clark v. Wilmington & W. R. Co.* 109 N. C. 444, 445, 14 L. R. A. 749; *Norwood v. Raleigh & G. R. Co.* 111 N. C. 240; *Cawfield v. Asheville Street R. Co.* 111 N. C. 600.

In *Smith's Case*, *supra*, the same questions were again presented, and this court was asked to overrule the doctrine of *Deans v. Wilmington & W. R. Co.* and reinstate *Herring v. Wilmington & R. R. Co.* as authority. The court declined to overrule *Deans's Case* and others which had followed it, but held that in so far as the opinions purported to bring within the protection of the rule a person who is lying upon the track, in an insensible state brought about by drunkenness, they were entitled only to the weight of dicta. No member of the court adopted this particular view but the chief justice, who delivered the leading opinion. The other members of the court were either in favor of sustaining without any modification, or of overruling *in toto*, the principle as enunciated in *Deans's Case*. The learned counsel for the defendant now contends that one who deliberately incurs the risk of lying down upon the track is no more entitled to the protection of the law than a drunken person, and that, where he is killed, his personal representative cannot invoke the benefit of a rule which subverses the purpose of shielding even brutes from the same unnecessary peril. At common law, in England, the owner of cattle was required to keep them in or restrain them from trespassing on the lands of others. 2 Shearm. & Redf. Neg. §§ 418, 626, 627. But in this country the rule has been either modified by statute or in a much larger number of states entirely disregarded, because the reason upon which it was founded, under different conditions, had ceased to operate. 2 Shearm. & Redf. Neg. §§ 419-422. The principle deduced from *Davies v. Mann*, as is said by discriminating law writers, is that "the party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." 1 Shearm. & Redf. Neg. p. 165. This rule has now been adopted in almost all of the southern and western states, but has been construed in some of them and by a number of text-writers as applying to injuries done by moving trains only, where the engineer actually sees an animal or a person. But this court, soon after adopting the rule laid down in *Davies v. Mann* (in *Gunter v. Wicker*, *supra*), construed it in its application to animals in *Wilson v. Norfolk & S. R. Co.* 90 N. C. 69 (followed by *Snowden's*, *Carlton's*, *Bullock's*, and *Randall's Cases*, *supra*), to mean that an engineer was not only negligent in failing to avert an injury to animals actually seen, but those which might by proper vigilance have been seen by him, in time by the use of the appliances at his command, and without peril to the safety of persons on the train, to avert the accident.

It is settled irrevocably in North Carolina that a railway company is answerable in damages for an injury to any valuable domestic animal due to the failure of the engineer to exercise reasonable care in observing the track

in his front, and to passengers on a train when caused by a want of similar vigilance on the part of the same servant in keeping an outlook for obstructions. The question presented in this case, therefore, as in *Smith's Case*, is whether, by any sort of legal fiction, we can hold a servant faultless for failure to see one who has voluntarily fallen upon the track, and yielded to the influence of sleep, or who, overcome with drunkenness, lies prostrate in the way of a train when either or both are sandwiched between obstructions; also, animals, children, or persons unconscious from sickness, or known by the engineer to be deaf, whom the law declares it is his duty to see, if it is possible for him, by the exercise of ordinary care, to do so. The opinion of the court in *Smith's Case* not only concedes, but adduces much authority to sustain, the correctness of the ruling in *Deans v. Wilmington & W. R. Co.* and the later opinions approving it, as therein interpreted, but proceeds upon the idea that, in so far as any previous opinion had stated that a railway company owed the duty of watchfulness to drunken persons lying on its track, or became liable for failure to discharge it, unless actually seen by the engineer, they were *dicta* only. It was true, however, as to *Deans's* and *Clark's Cases*, that there was some evidence tending to show that, in the one instance, the person who fell asleep on the track was drunk, and, in the other, that the man killed was intoxicated when he went upon the trestle.

To illustrate the operation of the conflicting rules as they now stand, suppose that the engineer is approaching a straight cut, through which he can see for one fourth of a mile, or for a sufficient distance to stop his train without breach of his duty to those on it before reaching the cut, and that at the entrance nearest him a sleeping child, 10 feet further a cow, and 10 feet further still a large boulder with a drunken man, or one who has deliberately laid down, resting, asleep, and unconscious, upon it, are ranged successively. Suppose, then, that the engineer carelessly fails to look out and see the sleeping child, the cow, or the boulder, and, by successive collisions, kills the child, the cow, and the man on the boulder, and the train is wrecked by striking the boulder, so that a number of passengers are likewise killed. The result would present a legal paradox under the law as it now stands. The servant who represents the company would render it liable for his omission of the duty of keeping a lookout, for which the company could be mulcted in damages by the personal representatives of the child and of the passengers and by the owner of the cow, and yet, though the engineer could not discharge the duty, which never ceased, of watching for the boulder without seeing the drunkard or the sleeping man, the failure to see either is, in contemplation of law, no culpable breach of duty. The learned counsel for the defendant has given, it seems to us, quite as cogent reasons for holding that a railroad company is absolved from duty to one who wilfully or carelessly exposes himself to peril by sleeping upon a track as to one

who falls down in a state of utter unconsciousness, superinduced by drinking, and cited equally as strong and numerous authorities in support of his contention. But the reasons and the authority relied upon emanate generally from courts which hold that both persons and animals upon a track are trespassers, and entitled to consideration only where actually seen in time to save them. It is not strange that courts, where it is held that railway companies owe no duty to any one who goes on their track and is not seen, should have sought support for their position where a drunken man happened to be the victim of carelessness, in the theory that he was deemed to be still concurring up to the time of the accident, and was less deserving of consideration than a sober trespasser. But it must not be forgotten that in the last analysis, notwithstanding the additional reason assigned, the drunkard in the states holding to the principle that we have repudiated, is excluded from the right to recover because he is a trespasser, just as his sober neighbor would be barred of the right if he were injured by his side, and, when actually seen, the same duty of protection arises as to both.

The admitted test rule to which we have adverted, that he who has the last clear chance notwithstanding the negligence of the adverse party, is considered solely responsible, must be applied in contemplation of the law which prescribes and fixes their relative duties. The law, as settled by two lines of authorities here, imposes upon the engineer of a moving train the duty of reasonable care in observing the track; and if, by reason of his omission to look out for cows, horses, and hogs, he fails to see a drunken man or a reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of duty. If he is guilty of a breach of duty, we cannot controvert the propositions which necessarily follow from the admission that but for such omission, or if he had taken advantage of the last clear opportunity to perform a duty imposed by law, the train would have been stopped and a life saved. It cannot be denied that in a number of the states which have adopted the doctrine of *Davies v. Mann*, it has also been held that both man and beast were trespassers when they went upon a railway track, and, except at public crossings or in towns, it was not the duty of the engineer to exercise care in looking to his front with a view to the protection of either. Where the law does not impose the duty of watchfulness, it follows that the failure to watch is not an omission of duty intervening between the negligence of the plaintiff in exposing himself and the accident, unless he be actually seen in time to avert it. The negligence of the corporation grows out of omission of a legal duty, and there can be no omission where there is no duty prescribed. But, when this court declared it the duty of an engineer to exercise reasonable care in looking out for animals on the track, it became equally a duty as to all those classes of persons who, if actually seen by him, would be entitled to demand that he use all the means at his com-

mand to avert injury to them. Where the rule prevails that no liability attaches for a failure of the engineer to keep a lookout except in towns and at crossings, the same test is applied by the courts. So soon as the duty arises, the failure to perform it, if intervening after the negligence of a person in exposing himself to peril, is held to be the last clear opportunity to discharge it, and therefore the proximate cause of the injury, if it could have been averted by the use of the means at his command after the law required him to have seen it. As we hold that the duty on the part of the engineer of watchfulness to protect life is an ever present one, attending him everywhere, and extending to the people in the remote country as well as in the towns, it necessarily follows that the opportunities that grow out of duty performed are coextensive with the duty prescribed, and may arise wherever it exists.

We are of opinion that when, by the exercise of ordinary care, an engineer can see that a human being is lying apparently helpless, from any cause, on the track in front of his engine, in time to stop the train by the use of the appliances at his command, and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty. If, by the performance of that duty, an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies v. Mann* and *Gunter v. Wicker*, the breach of duty was the proximate cause of any injury growing out of such accident; and, where it is a proximate cause, the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results. The court committed no error of which the defendant could justly complain in stating the general rule which we have been discussing.

Considered in connection with other portions of the charge, the statement of the distances, as proved by defendant's witnesses, was but a fair submission of the view argued by defendant's counsel, and affords no ground for exception. Under the general principle laid down in *Emery v. Raleigh & G. R. Co.*, 102 N. C. 236, and the numerous cases which have followed it, it was within the sound discretion of the court to frame the issues, and the defendant must show that the exercise of that discretion operated to his injury, if he would assign it as error. But in *Scott v. Wilmington & W. R. Co.*, 96 N. C. 428, and *Denmark v. Atlantic & N. C. R. Co.*, 107 N. C. 185, and other cases, it has been declared that the judge was clothed with discretion to submit one, two, or three issues, where the controversy hinges upon a controverted allegation of negligence, as he might think best, provided he should give appropriate instructions. Where the first issue

(here the second) raises not only the question whether the defendant was negligent, but also whether it was the proximate cause, the judge is at liberty to tell the jury if they should find that the defendant was negligent, and its negligence was the proximate cause of the injury, it was immaterial to determine whether or not the plaintiff had been previously negligent.

The question propounded to the witness Wilson was intended to elicit an opinion, which it was the province of the court to decide that he had not qualified himself to give. *State v. Hinson*, 103 N. C. 874.

The court below was requested, however, in substance, to instruct the jury that the measure of damage for the loss of a human life was the present value of the net income which would be ascertained by deducting the cost of living and expenditures from the gross income, and that the jury could not allow more than the present value of accumulations arising from such net income, based upon the expectancy of life. The court, in lieu of the instruction asked, told the jury that the measure of damage was the reasonable expectation of pecuniary benefit from the continued life of the deceased to those who would have been dependent on him had he continued to live out his natural life; that the expectation of one-seventeen years old would be forty-four and two-tenths years, and the damage would be the net moneyed value of intestate's life to those dependent upon him had he continued to live out his appointed time. Though the court stated the abstract proposition, as we find it formulated in the books, in the first clause of that portion of the charge relating to damages, we think that the substitution of the subsequent portion of it for the more specific instruction to which the defendant was entitled, and for which he asked, was erroneous. The instruction given, viewed without reference to the prayer of the defendant, was objectionable, in that it left the question of the date which should be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that the net income would be estimated as of the period when those dependent on him would have realized the benefits of his labor had he not come to an untimely end.

We are of opinion, therefore, that, following as a precedent *Tillett v. Lynchburg & D. R. Co.*, 115 N. C. 662, a new trial should be granted for the error complained of, only as to the issue to which the erroneous instruction related. The jury found the fact upon full instruction as to the law in connection with other issues, which left the defendant no just reason to complain. But another opportunity must be given to assess the damage in the light of a more explicit statement of the law applicable. A new trial is granted, therefore, solely for the purpose of inquiring as to damages. The case will be remanded to the end that the jury may ascertain what is the present value of intestate's life.

Partial new trial.

COMMERCIAL & FARMERS' BANK

v.

W. H. WORTH, State Treasurer, *Appl.*

(.....N. C.....)

1. A committee appointed by the general assembly to make an examination and find the facts from the evidence, with authority to make the report after adjournment of the assembly, cannot draw per diem or mileage after such adjournment, unless the resolution appointing it provides therefor.
2. A resolution by the general assembly providing that a committee created thereby shall find the facts from the evidence in an examination to be made by it, set out the evidence in full, and report such facts to the general assembly "if it is possible to do so before its adjournment, and if not then said report shall be made to the supreme court," confers on such committee no power to act after adjournment of the general assembly except to make the report.
3. A state treasurer properly refuses to pay a warrant drawn on him by the auditor for an illegal claim under Code, § 8856, subsec. 2, requiring him to pay "all warrants legally drawn on him by the auditor."

(October 22, 1895.)

A PPEAL by defendant from a judgment of the Superior Court for Wake County in favor of plaintiff in a mandamus proceeding to compel defendant to pay an order for money, directed to him by the state auditor. *Reversed.*

The case is stated in the opinion.

Mr. W. A. Guthrie for appellant.

Messrs. T. R. Purnell and J. N. Holding for appellee.

Clark, J., delivered the opinion of the court:

It is not controverted that the legislature may create a special commission, as, for instance, to examine the treasury accounts, and require that it shall consist of members to be designated from its own body, and fix its compensation. Code, §§ 8860, 8861. Such special commissioners are not disqualified to hold other offices, as members of the general assembly, for instance, being expressly excepted by art. 14, § 7, of the Constitution. Nor can it be denied that the legislature has power to authorize a committee of their body to sit during vacation, and fix its compensation. The question before us does not turn upon the power of the legislature, which is undeniable, but upon the construction of their action. The uniform action of Congress and the legislature, so far as our researches extend, has been to expressly authorize such committee to "sit in vacation." Inasmuch as the existence of all committees, in the absence of legislation, necessarily determines upon the adjournment of the body to which they belong, certainly there must be an explicit enactment that the sessions of the committee can be held after such adjournment,

or, at least, a clear, unmistakable implication to that effect from the words used in the act or resolution creating the committee. We do not find such to be the case here. The resolution (Laws 1895, p. 502) simply provides that the committee "shall find the facts from the evidence, and report said facts, and also set out the evidence in full in said report, and make their report to the general assembly if it is possible to do so before its adjournment." So far there is nothing to distinguish this committee from any other, or to prolong its existence beyond the adjournment of the body to which it belonged. Then follow the only words which can be construed to give such power: "And, if not, then said report shall be made to the supreme court." This confers no power on the committee to do any act after the general assembly should adjourn, except to make their report if it should not be ready. There is no explicit provision or clear implication that the committee should take any other action. Had the legislature so desired, it would, according to precedent, have provided that the committee could sit in vacation, as they plainly provided that they could report in vacation, if necessary, which necessarily seemed to be considered doubtful. When a committee is empowered to sit in vacation, the resolution must provide the compensation, and for the expenses of the same; otherwise, there is no authority of law for their payment. Certainly, the members cannot draw per diem as members of the legislature; for, by the Constitution (art. 2, § 28), the per diem is allowed only during the session of the general assembly, and is limited to sixty days, which the members of this committee had already drawn, as well as their mileage allowed them in such capacity. We must look to the resolution itself for any authority for payment of either compensation or expenses. That provides only for "the necessary expenses of the said committee while actually engaged in said investigation." Since, as stated above, the meaning of the resolution was that the investigation should be made during the session, merely leaving the report to be filed (if it should be necessary) after adjournment, the necessary expenses would seem to be those of making the investigation; *i. e.* summoning and expense of witnesses, stationery, etc. But it is not required here to say what would be embraced in necessary expenses, for this warrant on its face is for "per diem and mileage." The per diem is compensation which is not provided for by the resolution, and the mileage is not necessary for members who are simply to remain over a short while to file a belated report, since they drew mileage as members to return home. Whether the reasonable board bills of the committee while detained in making up the report would not be included in "necessary expenses" is not before us, but probably that would be conceded. It was urged on one side that, this resolution being passed so short a time before adjournment, the legislature must have intended the committee to sit during vacation; and, on the other side, that, the resolution having been introduced long before,

NOTE.—The rarity of decisions upon the rights and powers of legislative committees makes the above decision somewhat noteworthy. See also the case of *Purnell v. Worth*, *post*, 262.

As to contempt of such committee, see *Re Gunn* (Kan.) 19 L. R. A. 512.

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its passage at this late hour indicated an intention that the committee should get rid of the matter by simply reporting that it could not investigate for lack of time. There is nothing in the resolution to show how long or how short the investigation would be. We are authorized to make no surmises. The legislature had power to authorize the committee to sit in vacation and to allow compensation to the members of it. They chose not to do so. They only authorized such continuance for the purpose of filing the report and necessary expenses. The failure to authorize per diem or some compensation is additional evidence that the committee was expected to finish its labors (except, possibly, as to filing the report) while the assembly were still in session.

It was strenuously, and it would seem seriously, argued before us that, the auditor having given his warrant, the treasurer had no choice but to pay it. The auditor gives no bond, and if the treasurer must pay any and every warrant that is presented to him, the state treasury is at the mercy of the judgment of that officer, who might mistake or misconceive (as in this instance) the meaning of an act. The laws of this state do not bear that construction. The auditor examines the items and amounts, and passes upon them, and can require the claimant to be sworn and examined as to the correctness of the account. Code, § 3850, subsec. 17. If he finds the amount correct, and, further, that payment is provided for by law (Id. § 3850, subsec. 9), he is required to draw his warrant on the treasurer for payment thereof, but he is also required to put in the face of each warrant drawn by him the act authorizing such payment. This is to give notice to the treasurer that he may act understandingly, for he is not required to pay any and every warrant which the auditor may sign, but only "to pay all warrants legally drawn on the treasurer by the auditor." Id. § 3856, subsec. 8. Should the treasurer have reasonable doubts, he should consult the attorney general, or, if he think proper, refuse payment, as in this case, and let the matter be determined by the courts. Our government is one of checks and balances. It is not intended that payments out of the public funds should be made on the judgment of the public treasurer alone or the auditor alone. The auditor examines as to the amounts and the performance of the work. It would seem that as to the facts his finding is conclusive (Id. § 3850, subsec. 5); certainly it is sufficient protection, in the absence of any collusion or notice of fraud, to the treasurer. But the auditor goes further. He examines as to whether the payment of the claim is authorized or provided for by law. If he so finds, his conclusion as to the law is not binding on, nor is it a protection to, the treasurer. The auditor is required to set out the act providing for payment in the face of the warrant (Id. § 3850, subsec. 9); and, on the application of such statute, the treasurer must also pass before payment; and he has authority to take the opinion of the attorney general (Id. § 3863, subsec. 4), or he can act without it at his own risk, either in paying or refusing

payment of a warrant which, in his judgment, is not authorized by any statute. It is thus that the lawmaking power hedges about the safekeeping of the public funds. The treasurer's bond (Id. § 3857) is a safeguard, not only against his misuse or misappropriation of the funds committed to him, but against his payment of illegal claims; for the bond provides for the "faithful execution of the duties of his office," and one of those duties is to pay out no money except on warrant drawn by the auditor, and to pay all legal warrants drawn by him. Illegal warrants, not authorized by law, the treasurer pays at his peril. The duty of the special commissioners appointed under section 3861 of the Code is not limited merely to examining whether all warrants are signed by the auditor,—a very simple matter,—but they are required by that section to examine also to see whether such payments were authorized by law as well as by the auditor. In directing the mandamus to issue, *there was error*.

T. R. PURNELL, *Appt.*,

v.

W. H. WORTH, State Treasurer.

(.....N. C.....)

A committee appointed by the legislature to make an examination, and find the facts from the evidence, and report the facts and the evidence in full, is not entitled to an attorney as a necessary expense.

(October 29, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Wake County refusing a mandamus to compel defendant to pay an order which had been directed to him by the state auditor. *Affirmed*.

The facts sufficiently appear in the opinion.

Messrs. Thomas R. Purnell and J. N. Holding, for appellant:

The auditor is the only officer invested with discretion to examine and liquidate claims against the state.

Boner v. Adams, 65 N. C. 639; *Belmont v. Reilly*, 71 N. C. 260; *Burton v. Furman*, 115 N. C. 171.

The treasurer has no discretionary power but must pay all warrants legally drawn.

Code, § 3851, subsec. 7; *Burton v. Furman*, *supra*.

The supreme court cannot "audit and liquidate" a claim against the state but only give a recommendatory judgment.

Const. art. 4, § 9; *Baltzer v. State*, 104 N. C. 265; *Bain v. State*, 86 N. C. 49; *Clodfelter v. State*, 86 N. C. 51.

Special members of the general assembly have been appointed at every session giving the provisions a legislative construction which must be respected.

Opinion of the Judges, 114 N. C. 925.

The general assembly is presumed to have acted properly.

Lawson, Presumptive Ev. 58; *Carr v. Coks* 116 N. C. 223, 28 L. R. A. 737.

Effect will be given to manifest intent in a written Constitution or statute.

Cooley, Const. Lim. *55, and notes; *McAdoo v. Benson*, 63 N. C. 464.

Mr. W. A. Guthrie for appellee.

Clark, J., delivered the opinion of the court:

The other points arising in this case are disposed of in *Commercial & F. Bank v. Worth* (N. C.) 23 S. E. Rep. 160. The sole point remaining to be decided in this case is whether an attorney is a "necessary expense" for a committee, for we put out of view for this purpose the admitted fact that these services were rendered after the adjournment of the legislature, and we have held that the committee were authorized to sit after that time only for the purpose of making their report. The legislature have unquestionably authority, should they deem it necessary, to authorize a committee to employ counsel. But they did not do so. There is no implication even that this committee should employ counsel. On the contrary, the committee were not authorized to pass

upon any legal question or make any judicial determination. Their duties were those of a jury, to "find the facts from the evidence, and report said facts, and also set out the evidence in full in said report." There is certainly no indication here of a necessity for the assistance of counsel "learned in the law." It is witnesses "learned in the facts" only who are needed. But we would not be understood as holding that, if the committee had been called on by the terms of the resolution to pass on legal questions, in such case counsel would have been a necessary expense. *Non constat* but the committee might be composed of lawyers, or the assembly might be willing to trust the committee's legal judgment in the first instance, since the reports of committees are subject to the action of the house appointing them. The plaintiff's remedy, if any, to procure compensation for his legal services, is by application to the next general assembly. His honor rightly held that the employment of counsel was not provided for by the resolution.

No error.

TENNESSEE SUPREME COURT.

C. K. MURPHY *et al.*

v.

Samuel PORTRUM, *App't.*

(.....Tenn.....)

1. A decree for the adoption of an illegitimate child with capacity to inherit without legitimating the child, may be rendered under a petition which asks for both legitimization and adoption.
2. The next of kin of the father of an illegitimate child that has been adopted with capacity to inherit, but not legitimated, have no inheritable blood as to such child.
3. Property descended from the father to an illegitimate child who has been adopted but not legitimated will, like other property of the child, descend on his death intestate to his mother in preference to the father's next of kin, under the general provisions of Mill. & V. Code, § 2773, as to inheritance from an illegitimate child by the mother.

(November 14, 1895.)

A PPEAL by defendant from a decree of the Court of Chancery Appeals affirming a decree of the Chancery Court in favor of plaintiffs in a proceeding to quiet title to certain real estate; the plaintiffs claiming under a conveyance from the mother of an illegitimate child of property which she had taken as his distributee, although the property had come to

NOTE.—For note upon inheritance by, from, or through illegitimate persons, see *Croan v. Phelps* (Ky.) 23 L. R. A. 753.

As to legal status of adopted child, see note to *Warren v. Prescott* (Me.) 17 L. R. A. 435.

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him from one who had adopted him. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. D. Huffmaster and Shields & Mountcastle for appellant.

Messrs. James G. Rose and W. S. Dickson for appellee Murphy.

Wilkes, J., delivered the opinion of the court:

The very interesting question is presented in this case as to the effect of certain proceedings had in the circuit court of Hamblen county to have Charles J. Portrum adopted and legitimated as the child of John Portrum; the query being whether the property of said Charles J., upon his death without issue, brothers, or sisters, went to his mother, Catherine Noe, or to the brothers and sisters of John Portrum, the adopting parent. Complainants are purchasers from Catherine Noe, the mother of the said Charles J., and the defendants are the brothers and sisters of John Portrum, the adopting father. The bill was demurred to, and demurrer overruled; the chancellor being of opinion that the mother inherited the property from her son, and had good title to it. Defendants refusing to answer or make further defense, final decree was entered fixing the rights of the parties, and defendants appealed and assigned errors. The cause has been heard by the court of chancery appeals, and that court has affirmed the chancellor's decree, and defendants have appealed to this court.

The facts are that John Portrum died intestate and unmarried, leaving brothers and sisters and other collateral kin, and also

Charles J. Portrum, reputed to be his son, and so recognized and acknowledged by him; the mother being Catherine Noe, an unmarried woman. John Portrum, at the December term, 1877, of the circuit court of Hamblen county, instituted proceedings in that court to have said Charles J. legitimated and adopted as his lawful heir. Petition was filed, summons issued and was served on the mother and child, guardian *ad litem* was appointed, and the cause was heard. The decree sets out the petition in full, the substance being that petitioner was desirous of adopting and legitimating said Charles J., so as to create the relation of parent and child between him and petitioner; the child being then about four years old, and living with its father, and the mother being in poor circumstances, and having relinquished her claims to the custody of the child. The prayer was for a proper judgment of legitimation and adoption, fully legitimating the child, and making it the child of petitioner, by the name of Charles John Portrum, giving to the child all the rights and privileges of a legitimate child, with capacity to inherit and succeed to the real and personal estate of petitioner, as his heir and next of kin, and for general relief. The decree recites that the court was fully satisfied with the reasons assigned in the petition for the adoption of the child as prayed for in the petition by the name of Charles John Portrum, and adjudges and decrees that his adoption as prayed for be sanctioned by the court, and proceeds to vest the child with all the rights and privileges of a child of said John Portrum, with capacity to inherit and succeed to the real and personal estate of said John Portrum, as his heir and next of kin, in case of his intestacy, and changing his name to Charles John Portrum, etc. Upon the death of John Portrum his adopted son, Charles, took possession of his estate, and subsequently died, unmarried and intestate, and without issue; and his mother, the said Catherine Noe, claims the property, against the brothers and sisters of the adopting father, and has sold two pieces of the real estate to complainants Murphy & Rippetoe.

The first error assigned is that the judgment of legitimation or adoption was invalid; and, second, that if valid the mother could not inherit from the child property derived from the adopting parent, but the property would go to the next of kin of the father, John Portrum. There can be no question but that under Mill. & V. Code, §§ 4881, 4885-4891, the circuit court of Hamblen county had jurisdiction of proceedings to legitimate and adopt children, in proper cases; that the parties were properly before the court by subpoena; and that the decree and record are sufficiently formal to comply with the statutes. But the insistence is that the proceeding in this case was one for legitimation, and not one for adoption, while the decree was for adoption alone. It will be noted from recitals heretofore made that the petition and prayer was for both legitimation and adoption, and this was proper in the case of a natural born child. But the

decree did not go to the extent of legitimating, but only adopting; and we are constrained to hold that this was the extent of the relief granted, and the child was adopted, and not legitimated, by the terms of the decree. This was, we think, altogether proper, under the petition, which asked for both legitimation and adoption; the court reciting that it was satisfied with the reasons assigned for the desire to adopt, but making no utterance as to the matter of legitimation. The differences between adoption and legitimation are marked, and in some contingencies far-reaching. By legitimation the child acquires such a legal status as will enable it to inherit from its father, and through him from the father's next of kin, direct and collateral. Mill. & V. Code, § 4887; *McKamsie v. Baskerville*, 86 Tenn. 459. Whereas by adoption he only acquires such legal status as enables him to succeed to the real and personal estate of the adopting parent, and beyond this gives him no inheritable right. He cannot inherit from the father's next of kin, nor can the father or his next of kin inherit from such child. *Helms v. Elliott*, 89 Tenn. 446, 10 L. R. A. 535; *McKamsie v. Baskerville*, *supra*. We think that the fact that the petitioner prayed for more extended relief than the court saw proper to grant will not render void the decree granting relief prayed for, and proper under the facts, even though not as full and complete as desired. The decree, as rendered, gives the child, by its terms, the capacity to succeed to and inherit the real and personal estate of the adopting father, and this would have been the effect of the decree of adoption under Mill. & V. Code, § 4890, without such recitals. And by the same section it is provided that the adoption shall give to the person seeking it no right of inheritance or succession, nor any interest whatever in the estate of the person adopted.

The child being adopted, and the father dying, the property descended to and vested in the child, and it necessarily follows that in no event could the next of kin of the father inherit from the adopted child, as it had no inheritable blood as to them, and they none as to the adopted child. To whom, then, does the property go upon the death of the adopted child? We answer that under section 3273, Mill. & V. Code, it must go to the mother. That section is as follows: "When an illegitimate child dies intestate without child or children, husband or wife, his real and personal estate shall go to his mother if living, then equally to his brothers and sisters by his mother, or descendants of such brothers and sisters." See also *Webb v. Webb*, 8 Head, 69; *Woodward v. Duncan*, 1 Coldw. 568; *Scroggins v. Barnes*, 1 Leg. Rep. 58. A very learned and elaborate argument is made upon the theory that the child could not inherit the property derived from the father in such cases, but only such as was acquired by the illegitimate child by his own labor, or in some way other than inheritance, else the effect will be to divert the property from the inheritable blood of the father to the illegitimate blood of the mother.

This is a matter which if true addresses itself to the lawmaking power, and not to the courts. Much argument is also made upon what the effect would be if the decree had been for legitimation instead of adoption, but this we need not consider under this rec-

ord, as the child was adopted, but was not legitimated.

There is no error in the decrees of the chancellor or Court of Chancery Appeals, and they are affirmed, with costs.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

Isaac L. HEWITT, *Appt.*,

v.

Warren STORY *et al.*

(64 Fed. Rep. 510.)

1. Mere declarations of parties who have acquired rights to the use of water in an irrigating ditch are insufficient to preserve those rights without any act or deed in vindication or maintenance of them, when for a period prescribed by the statute of limitations they take no water from the ditch except what is distributed to them as shareholders in an older ditch owned by an unincorporated association which has assumed entire control and use of the later ditch as a part of the older system.

2. The rights of the locators of a ditch for irrigation to the use of waste water after supplying prior appropriators are lost by permitting the exclusive possession, management, and beneficial use of the waste-water ditch to be enjoyed during the season of irrigation for more than the statutory period of limitation as part of an older system, without any use of water therefrom by such locators except what is distributed to them by virtue of their ownership of shares in the older ditch.

3. Rights in a ditch location lost by nonuser cannot be reasserted so as to acquire any right therein, except by continued and adverse use for the statutory period of prescription or by a new and valid appropriation.

(Knowles, District Judge, dissents.)

NOTE.—Abandonment or loss of rights of prior appropriators of water.

An abandonment of the rights of one who has appropriated water upon the public domain will not be decreed for trivial matters.

So long as he in good faith intends to retain his claim, and manifests that intention by use of the water or preparations to use it, his right will remain intact. But he will not be permitted to retain a claim which he neither uses nor intends to use, merely for the purpose of preventing others from using it.

The law will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time. *Partridge v. McKinney*, 10 Cal. 151.

Rights thus acquired may be abandoned or lost by the same means as a right of the same character issuing out of lands to which a private title exists. The rights of the first appropriator may be lost by the adverse possession of another. *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145 (1894).

To abandon a water right acquired by the use of water by appropriation there must be a concurrence of the act of leaving it so that it can be appropriated by the next comer and the intention not to repossess it. The mere intention to abandon it, not coupled with a giving up of possession and cessation of user, is not sufficient, nor will nonuser alone without intention to abandon be held to amount to abandonment. *Utt v. Frey*, 108 Cal. 303.

Relinquishment of possession by an appropriator subjects the water to reappropriation. *Smith v. Green* (Cal.) 41 Pac. Rep. 1022.

Thus, after the water has been allowed to return into a natural channel the appropriator cannot claim it as against a subsequent appropriator. *Eddy v. Simpson*, 3 Cal. 249, 68 Am. Dec. 408.

If water is turned into a stream without the intention of recapturing it, it is *publici juris* and belongs to the one having the prior right of appropriation to it. *Davis v. Gale*, 88 Cal. 23, 91 Am. Dec. 554.

Water which has been appropriated for a mill, 80 L. R. A.

and after use is allowed to flow down in its accustomed channel, is abandoned so as to be subject to appropriation by others. *Ortman v. Dixon*, 18 Cal. 83.

But turning artificial water into a natural water-course for the purpose of conducting it to the place of use is not an abandonment of it, but it may be taken out of the stream at that point if the quantity of natural water of the stream is not thereby diminished to the injury of prior appropriators of it. *Butte Canal & D. Co. v. Vaughn*, 11 Cal. 143, 70 Am. Dec. 789.

So, one who puts water into a stream may take it out again if he can do so without injury to a prior appropriator. *Burnett v. Whitesides*, 15 Cal. 85.

And merely using the bed of a dry gulch as part of the system of ditches to conduct the water to the place where it is to be used does not constitute an abandonment of it. *Hoffman v. Stone*, 7 Cal. 44.

So, the right of an appropriator to take out of the stream the amount of water originally appropriated by him cannot be defeated by his letting a portion of it go back into the stream after use, which is appropriated by a subsequent locator, although the latter may not be able to get at all times the full amount which he obtained at the time of his first appropriation. *Brown v. Mullin*, 65 Cal. 89.

Abandonment is a matter of intention, and there is no such thing as abandonment to a particular person or for a consideration. A conveyance, by an instrument in writing sufficient for that purpose, of the usufruct of the water for a valuable consideration, is clearly not an abandonment. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558.

The mere fact that several persons joined in a ditch have not accurately defined their rights therein or in the water flowing in it, and have selected a person to distribute the water among them, does not operate as a dedication of the ditch to the public. *Cate v. Sanford*, 54 Cal. 24.

Effect of nonuser.

In one case it was held that the water rights secured by the United States statutes are rights be-

(November 1, 1894.)

A PPEAL by complainant from a judgment of the Circuit Court of the United States for the Southern District of California in favor of defendants in an action brought to establish the rights of complainant to a portion of the water flowing in an irrigation ditch. *Affirmed.*

Before McKenna, Circuit Judge, and Knowles and Hawley, District Judges.

Statement by **Hawley**, District Judge:

This is a suit in equity. The bill of complaint alleges the wrongful and unlawful diversion of certain waters by the appellees, sixty-seven in number, including certain corporations, companies, associations, and individuals, using and claiming water by appropriation from the Santa Ana river, in San Bernardino county, Cal. It prays for a decree entitling appellant to a specific quantity of water, and for an injunction, etc. The bill was filed in January, 1887. Appellant claims to be the owner in possession, and entitled to the possession and use, of 883½ inches, under a 4-inch pressure, of the waters of the Santa Ana river, which he alleges were appropriated by his predecessors in interest through and by means of a certain ditch

known as the "Berry Roberts Waste-Water Ditch." The Santa Ana river is an unnavigable stream of running water, flowing through sundry wild cañons and ravines in the San Bernardino mountains, and emerging therefrom into the San Bernardino valley through the mouth of a steep ravine near the eastern boundary of the valley; and the waters thereof have been and are held and owned, for many miles above and below the entrance to the Berry Roberts ditch, exclusively by right of appropriation, and used generally for the purpose of irrigation. Long prior to the location of the Berry Roberts ditch, two appropriations had been made of the waters of the Santa Ana river,—one by means of the North Fork ditch, owned by the North Fork Water Company, a corporation, which taps the river near the point where it debouches from the mountains into the valley; the other by means of the South Fork ditch, owned by an association of individuals designated in the bill of complaint as the South Fork & Sunnyside Division of the Santa Ana river, which takes water from the river some distance lower down. The owners of these ditches have, at all times since acquiring their water rights, kept these ditches in repair. Prior to 1860 there were but few people using the water from the ditches, but, before the Berry Roberts ditch

longing to real estate and are not lost by mere non-user short of the necessary time to acquire rights by adverse possession, but the right may be lost by an act showing an intention to surrender and forsake the right. *Dodge v. Marden*, 7 Or. 456.

But it has been held that a failure to use water is evidence of an intention to abandon; and if continued for an unreasonable period it creates a presumption of an intention to abandon; but this presumption is not conclusive but may be overcome by other sufficient proof. *Sieber v. Frink*, 7 Colo. 148.

So, after a ditch by which water was diverted for mining purposes has fallen into disuse and has been abandoned, the water right is destroyed, and after it has remained in this condition for many years no person claiming under the original appropriators can divert the water through it beyond the water shed of the creek to the injury of a riparian owner. *Kirman v. Hunnewell*, 98 Cal. 519.

That after the purposes for which the water is appropriated has been accomplished and the appropriators have dispersed and the water has been allowed to go to waste for a long time, after which it is sold for a nominal price, may be received as evidence of abandonment. *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.

In *Hewitt v. Story*, 51 Fed. Rep. 101, the court says that the mere assertion of title to water embraced by an appropriation is not sufficient to prevent an abandonment if it is unaccompanied by acts in vindication and maintenance of it.

A ditch constructed by running a furrow and cleaning it out with a shovel will be abandoned if it is not used for many years and becomes so obliterated as not to be perceptible by persons driving over or plowing the land across which it was run, while the owners permit another person to construct a ditch and take water from the stream without notifying him of the prior appropriation. *Dorr v. Hammond*, 7 Colo. 79.

That the rights of an appropriator have been settled by a judicial decree will not entitle him to use the whole of the water as against subsequent appropriators when for more than eighteen years

after his original appropriation, and for more than nine years after the decree, he used only part of the water allotted to him, and the subsequent appropriators made use of the excess. *Mew Mercer Ditch Co. v. Armstrong* (Colo.) 40 Pac. Rep. 308.

The mere fact that miners abandoned the water and tailings from their flumes for a particular length of time, on the faith of which other persons constructed flumes to utilize the water and tailings, does not render it obligatory upon them to continue to do so, but they may decide to sell them to a third person and divert them in another direction so that the persons who have been accustomed to use them will be deprived of them. *Dougherty v. Creary*, 30 Cal. 280, 99 Am. Dec. 116.

The owner of a mining claim whose flume discharges the refuse water into a ravine on his land may extend his flume so as to prevent the appropriation of the water by a third person who has attempted to construct a ditch over his land to the mouth of the flume to take the abandoned water. *Correa v. Frietas*, 42 Cal. 390. This is put on the ground that the owner of a claim has a right to every part of it, and may prevent others from coming onto it.

Attempt to change use.

The question of the right to change the place and manner of use is treated in a note to *McGuire v. Brown* (Cal.) post, —.

But so far as such attempted change has been held to be or not to be an abandonment, the cases are inserted here.

Surveying a line for a new ditch will not constitute an abandonment of a right to appropriate at a point where the water is actually taken out and applied to purposes of irrigation. *Cole v. Logan*, 24 Or. 304.

Where an appropriation of water rights has been properly made, the change of the head of the ditch to a point higher up on the stream, or the building of a new ditch to carry the water, will not work a forfeiture of the right. *Greer v. Heiser*, 18 Colo. 303.

Appropriation under the California statute will

was located, the number had been largely increased. The ditches have since been enlarged, and many thousands of dollars have been expended thereon. The actual extent of the appropriation by the North Fork and South Fork ditches, prior to the location of the Berry Roberts ditch, is not clearly defined, and, under the views hereinafter expressed, the precise amount of water which each ditch is entitled to need not be determined. Subsequent to the location of the Berry Roberts ditch, two appropriations of water from the Santa Ana river nearer its head have been made: One, the Brown and Judson ditch, owned by the Redlands Water Company, a corporation, which was located in the spring of 1881, and conveys water to the town of Redlands for irrigation and domestic purposes. Every year since its construction, extensions and improvements, involving large expenditures of money, have been made. The other, the Bear Valley dam and reservoir, owned by the Bear Valley Land & Water Company, a corporation, was located in June, 1883. This corporation, in the spring of 1883, bought 3,000 or 4,000 acres of land situated in the lower portion of Bear valley, and constructed a dam at the

point where the lower edge of the valley adjoins the head of Bear cañon, for the purpose of obtaining, above that dam, the water that would otherwise have run to waste in the winter and spring months. This dam is of granite masonry, 20 feet thick at its base, about 60 feet high, and 800 feet long, forming a lake about 5 miles long and over $\frac{1}{4}$ of a mile wide, of an average depth of about 18 feet. Bear creek is fed by small tributaries which come into it, at different points, all of the way from where it leaves Bear valley down to its junction with the Santa Ana river. The construction of the dam does not appear to have affected the flow of water down Bear creek during the irrigating season. The Berry Roberts ditch was located in 1869, by Berry Roberts, Henry Suverkrup, and George A. Crow, as a waste-water ditch appropriating "the waste water of the Santa Ana river" remaining therein after the North Fork and South Fork ditches should be fully supplied. The locators of the Berry Roberts ditch, at the time of its location, occupied, possessed, and claimed separate and distinct portions of land situated in section 16, township 1 S., range 3 W. of the San Bernardino meridian. Roberts claimed 160 acres, and Suverkrup

not defeat or extinguish any prior right. *Alta Land & W. Co. v. Hancock*, 55 Cal. 212.

The posting of a second notice of appropriation while diligently prosecuting work to complete the appropriation under the first notice does not abandon the first claim. *Osgood v. El Dorado Water & D. G. Min. Co.*, 56 Cal. 371.

If the appropriation is for mining purposes generally, to be used at various points, an abandonment cannot be claimed when the mine to which it is first applied is exhausted. *Lowden v. Frey*, 67 Cal. 474.

If the appropriator constantly uses the water which he has appropriated for irrigation purposes, the mere fact that from time to time he changes the ditches from which it is taken will not constitute an abandonment of his right. *Kleinschmidt v. Greiner*, 14 Mont. 484.

The sale by a mill owner to the owner of a ditch higher up on the stream does not abandon his right as against an appropriator below his mill, but if the upper ditch owner permits the water to flow down past the mill, the mill owner is entitled to use it. *McDonald v. Askew*, 29 Cal. 200.

The attempt to convey a water right by an imperfect deed operates as an abandonment of the title obtained by appropriation thereof. *Barkley v. Teleka*, 2 Mont. 59.

Abandonment prevented by use.

The facts that but little water was used from a ditch, and that the ditch became so obstructed that but little water would flow in it, do not establish an abandonment where it appears that the ditch was used continuously to convey water for domestic purposes and to some extent for irrigation, and that the intention of the owner to retain a right was made manifest to the one claiming the abandonment. *Utt v. Frey*, 160 Cal. 392.

Where a person gains a right in one appropriation of water for irrigation purposes as a tenant in common, and then proceeds with reasonable diligence to get his land under cultivation, the mere fact that for the land tilled he utilizes water from another stream which is more convenient and continues to do so for seven years until all the land near the other stream is under cultivation, when

he immediately proceeds to utilize the water of the first appropriation for the remainder of the land, will not constitute abandonment of the rights to that water. *Moss v. Rose* (Or.) 41 Pac. Rep. 666.

A person may abandon an irrigating ditch without abandoning his water rights. Such rights may be abandoned by nonuser, but so long as the appropriator continues to use such rights without any unreasonable voluntary cessation, an abandonment will not be presumed against him. *Nichols v. McIntosh*, 19 Colo. 23.

Abandonment will not be shown by the fact that a ditch was permitted to be filled up under the agreement that the one filling it should clean it out which he was never compelled to do, nor from the fact that the portion of the ditch beyond the fill was allowed to remain unused, if the water was put to a beneficial use elsewhere. *Wimer v. Simmons* (Or.) 39 Pac. Rep. 6.

Failure for thirteen years to enlarge the acreage first put under cultivation will work an abandonment of the water appropriated for the portion of the land which has not been reduced to cultivation. *Low v. Rizer*, 25 Or. 551 (1894).

But failure to use the water for the purpose for which it was appropriated will not constitute an abandonment if during the years in which it was not used there was not a sufficient quantity to supply the requisite amount for that purpose. *McCauley v. McKelg*, 3 Mont. 389.

Decisions under statutes.

Under the California statutes mere nonuser of the appropriator's right for a period of five years will constitute a forfeiture of it as against persons who have acquired the government title since the appropriation. *Smith v. Hawkins* (Cal.) 43 Pac. Rep. 463.

If the end of a ditch is filled up by a landslide and not opened or used again for nine or ten years there will be an abandonment of the right under the Oregon statute, providing that if a ditch is abandoned and thereafter for one year the claimant shall cease to exercise acts of ownership over the same he shall be deemed to have lost all claim thereto. *Ison v. Nelson* Min. Co. 47 Fed. Rep. 199.

H. F. F.

and Craw, in the aggregate, 240 acres. The ditch constructed by them, and through which they appropriated the waste water, tapped the river on the south side between the head of the North Fork and the South Fork ditches. At the time the Berry Roberts ditch was located, and for many years thereafter, there existed in San Bernardino county a board of water commissioners, created by an act of the legislature of the state of California, whose duties were to regulate the distribution of water in accordance with the rights of the parties in interest, and they were invested with authority to appoint water overseers, etc. In the records kept by this board appears the following entry:

"By request of Henry Suverkrup, Berry Roberts, and G. A. Craw, W. T. Morris and E. Kerfoot, water commissioners for San Bernardino county, California, located a water ditch to be known as the 'Berry Roberts Ditch.' The water claimed by the aforesaid parties for this ditch is the waste water of the Santa Ana river, taken out in the southeast bank of said river about 4 miles northeast from section 16, township No. 1 south, range No. 8 west, San Bernardino meridian, running thence nearly a southwest direction to the said 16th section, and to be used for irrigating, and to be equally apportioned among said parties on the land of the said 16th section owned by said parties; and also Berry Roberts was appointed overseer for the aforesaid ditch for the present year.

"Done on the 19th day of February, A. D. 1870.

"W. T. Morris.

"E. Kerfoot."

Roberts thereupon took charge of the Berry Roberts ditch, and with Suverkrup and Craw conducted the waste water running therein to their respective lands, in section 16, for irrigation and domestic purposes. The lands which they then had under cultivation amounted, in the aggregate, to not exceeding over 100 acres, about 50 acres thereof being in grain, and the balance in fruit trees and vegetables. They permitted one or more of their neighbors to participate in the use of the water on condition that they should contribute to the necessary repairs of the ditch. In 1870, Roberts conveyed his interest in the 160 acres of land claimed by him, together with his interest in the Berry Roberts ditch and the waste water, to one Ball, who thereupon succeeded Roberts as water overseer. In 1872, Craw conveyed his interest in 160 acres of land claimed by him to Suverkrup, and also his interest in the Berry Roberts ditch and in the waste water. During the years 1870, 1871, and 1872, the then owners of the Berry Roberts ditch used the waste water running therein, at all times when they could get any water, for the irrigation of the lands which they then had under cultivation; but the waste water running in said ditch was wholly insufficient to supply their needs.

There is more or less confusion in the testimony as to the name of the South Fork ditch. It is sometimes called "South Fork," sometimes "Sunnyside Division of South Fork," but more frequently, in relation to its connection with the Berry Roberts ditch, it is

designated as the "Timber Ditch," by which name it will hereafter be called. Upon ascertaining the fact that no reliance could be placed in the supply of waste water from the Berry Roberts ditch during the irrigating season, Ball purchased 40 shares in the Timber ditch and in the water appropriated therein, and Suverkrup purchased 80 shares in the Timber ditch and in the water flowing therein. The quantity of water thus acquired by them was diverted through the Berry Roberts ditch to their respective tracts of land in section 16. Subsequently, by the consent of Ball and Suverkrup, various other owners of shares in the Timber ditch appropriation diverted and conducted the quantity of water to which they were respectively entitled, by virtue of their interests in the Timber ditch, through and by means of the Berry Roberts ditch. The Berry Roberts ditch continued in charge of the water overseers appointed by the board of water commissioners. In June, 1874, Suverkrup conveyed his interest in the 240 acres of land then claimed and possessed by him, together with his interest in the Berry Roberts ditch and in the waste water, and also the 80 shares in the Timber ditch, to one Borron, the immediate predecessor of appellant. During the year 1874, while Ball and Borron were diverting and using the water belonging to them as share owners in the Timber ditch through the Berry Roberts ditch, some of the other owners of shares in the Timber ditch applied to them for permission to divert and conduct the water belonging to their shares in the Timber ditch through the Berry Roberts ditch. Permission was given upon the condition that the parties should contribute and aid in enlarging and repairing the Berry Roberts ditch, which condition they complied with. After the year 1874, no water was taken from the river through the Timber ditch; but all of the water theretofore diverted through and by means of the Timber ditch was thereafter diverted through and by means of the Berry Roberts ditch, and the owners of shares in the Timber ditch appropriation (with but few, if any, exceptions) continued to use the water, to which they were entitled by virtue of that appropriation, through the Berry Roberts ditch. It is not shown that permission to make this change was granted to any considerable number of the shareholders in the Timber ditch appropriation; but it does affirmatively appear that the shareholders in the Timber ditch took actual possession and control of the Berry Roberts ditch, and through it diverted and conducted the water that had theretofore been diverted and conducted by means of the Timber ditch. As early as 1877, if not before, all of the water diverted through the Berry Roberts ditch was distributed by the water overseer in charge, and was used by the respective claimants of it, including Ball and Borron, in proportion to the number of shares held by them in the Timber ditch appropriation. The Berry Roberts ditch was enlarged and kept in repair by the parties so using it, and during the year 1877, upon application to the board of water commissioners, a change was made in its route,

and in the place of its diversion of the water from the river, in order to avoid a sand wash which caused a loss of water. The board of water commissioners then directed that the ditch should thereafter be known as the "South Fork of Santa Ana." In 1878 another change was made, by the construction of what is designated by some of the witnesses as the "Stone Ditch," and referred to by others as the "South Fork Sunnyside Division Ditch." After this change was made, the water running in the Santa Ana river during the irrigating season was all absorbed and taken in nearly equal quantities by the North Fork and South Fork ditches. The Sunnyside Division of the South Fork ran into the old Berry Roberts waste-water ditch about one mile from where the water was taken out of the river. The water diverted and conveyed by means of the South Fork or Timber ditch, with its divisions and systems of conducting the water, continued to be allotted to the respective claimants therein in the proportion of the number of shares held by them. It was so allotted, diverted, and used for more than five years during Borron's ownership, and during all that time Borron in person, or by his authorized agent, Col. Tolles, acquiesced in and accepted such allotment of the waters flowing in the ditch. In October, 1881, Borron contracted to sell his land and water rights to appellant, and the sale was perfected, and the deed therefor was executed and delivered in the spring of 1882; and the water was continuously thereafter allotted, diverted, and used the same as before the sale. It appears from the testimony that an inch of water is sufficient to irrigate from 5 to 6 acres of land, and is considered to be of the value of \$1,000 for the purposes of irrigation.

The circuit court, upon a review of the facts, found, as a conclusion of law, "that there was an abandonment by the immediate grantor of the complainant, as well as by the complainant himself, of the water embraced by the appropriation upon which the suit is based," and upon this ground, without any consideration of the other points involved in the case, dismissed the bill of complaint, and rendered judgment in favor of appellees for their costs. *Hewitt v. Story*, 51 Fed. Rep. 101.

Messrs. W. F. Herrin and H. L. Gear for appellant.

Mr. R. E. Houghton for appellees.

Hawley, District Judge, delivered the opinion of the court:

The argument of this case extended over a very wide range, embodying within its scope nearly every principle that has ever been enunciated by the courts, touching in any manner upon the question of the rights of appropriation of water from the public streams or upon private lands,—the incipieny of such rights, the manner of their acquisition, how they may be kept up and maintained, and in what manner and under what circumstances such rights may be lost. We consider the law to be well settled that the right to water flowing in the public

streams may be acquired by an actual appropriation of the water for a beneficial use; that, if it is used for irrigation, the appropriator is only entitled to the amount of water that is necessary to irrigate his land by making a reasonable use of the water; that the object had in view at the time of the appropriation and diversion of the water is to be considered in connection with the extent and right of appropriation; that if the capacity of the flume, ditch, canal, or other aqueduct, by means of which the water is conducted, is of greater capacity than is necessary to irrigate the lands of the appropriator, he will be restricted to the quantity of water needed for the purposes of irrigation, for watering his stock, and for domestic use; that the same rule applies to an appropriation made for any other use or purpose; that no person can, by virtue of his appropriation, acquire a right to any more water than is necessary for the purpose of his appropriation; that, if the water is used for the purpose of irrigating lands owned by the appropriator, the right is not confined to the amount of water used at the time the appropriation is made. He would be entitled, not only to his needs and necessities at that time, but to such other and further amount of water, within the capacity of his ditch, as would be required for the future improvement and extended cultivation of his lands, if the right is otherwise kept up; that the intention of the appropriator, his object and purpose in making the appropriation, his acts and conduct in regard thereto, the quantity and character of land owned by him, his necessities, ability, and surroundings, must be considered by the courts, in connection with the extent of his actual appropriation and use, in determining and defining his rights; that the mere act of commencing the construction of a ditch with the avowed intention of appropriating a given quantity of water from a stream gives no right to the water unless this purpose and intention are carried out by the reasonable, diligent, and effectual prosecution of the work to the final completion of the ditch, and diversion of the water to some beneficial use; that the rights acquired by the appropriator must be exercised with reference to the general condition of the country and the necessities of the community, and measured in its extent by the actual needs of the particular purpose for which the appropriation is made, and not for the purpose of obtaining a monopoly of the water, so as to prevent its use for a beneficial purpose by other persons; that the diversion of the water ripens into a valid appropriation only where it is utilized by the appropriator for a beneficial use; that the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that, in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purposes to which the water is applied by the prior appropriator have been in any manner impaired by the acts of the subsequent appropriator. These gen-

eral principles are of universal application throughout the states and territories of the Pacific coast. They have, in one form or another, been declared, upheld, and maintained by the courts by a uniform current of decisions in California ever since the decision in *Eddy v. Simpson*, 8 Cal. 249, 58 Am. Dec. 408. We cite a few of the many cases upon this subject: *Kelly v. Natoma Water Co.* 6 Cal. 106; *Kimball v. Gearhart*, 12 Cal. 28; *Ortman v. Dixon*, 18 Cal. 84; *Weaver v. Bureka Lake Co.* 15 Cal. 274; *McKinney v. Smith*, 21 Cal. 874; *Hill v. Smith*, 27 Cal. 476; *Nevada Water Co. v. Powell*, 84 Cal. 109, 91 Am. Dec. 685; *Nevada County & S. Canal Co. v. Kidd*, 87 Cal. 283; *Mitchell v. Amador Canal & Min. Co.* 75 Cal. 482; *Perego v. McKisick*, 79 Cal. 572; Cal. Civ. Code, §§ 1410 *et seq.* The same rules prevail in Nevada: *Loddell v. Simpson*, 2 Nev. 274, 90 Am. Dec. 587; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 594, 97 Am. Dec. 550; *Proctor v. Jennings*, 6 Nev. 88, 8 Am. Rep. 240; *Barnes v. Sabron*, 10 Nev. 218; *Simpson v. Williams*, 18 Nev. 432. In Colorado: *Wheeler v. Northern Colorado Irrigation Co.* 10 Colo. 588; *Platte Water Co. v. Northern Colorado Irrigation Co.* 12 Colo. 525; *Combs v. Agricultural Ditch Co.* 17 Colo. 146; *Fort Morgan Land & C. Co. v. South Platte Ditch Co.* 18 Colo. 1. In Idaho: *Conant v. Jones* (Idaho) 82 Pac. Rep. 250. See also *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414; *Basey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452; *Broder v. Natoma Water & Min. Co.* 101 U. S. 276, 25 L. ed. 791; *Gould, Waters*, §§ 228 *et seq.*; *Kinne, Irrigation*, §§ 160 *et seq.* In the light of these principles and authorities, it is evident that neither appellant nor his predecessors in interest ever acquired any right by appropriation to the extent of water now claimed by him.

But the contention of appellees is that appellant is not entitled to any amount whatever, under or by virtue of any appropriation that was made of the waste water flowing in the Berry Roberts ditch upon which this suit was brought; that such rights as were ever acquired by such appropriation were either abandoned or lost by nonuser, by the statute of limitations, which is specially pleaded, and by the prescriptive rights acquired by a portion of the appellees, and that appellant is estopped, by the line of conduct and action of himself and his predecessor in interest from asserting any right or claim to such waters for the purpose of irrigating his lands. Grouping these questions together for the brevity of discussion, it may be said that, if any of them are well founded in fact, the judgment of the circuit court in dismissing the bill should be sustained. The legal principles in regard thereto are well settled. The general principles pertaining to an abandonment of water rights, which are applicable to this case, are clearly summed up in *Black's Pom. Water Rights*, § 96, where it is stated that the previous sections "recognize the fact that there may be an abandonment of the exclusive right to divert and use water acquired by or resulting from a prior appropriation; that such an abandonment may

be made either after the prior appropriation has become perfect and complete, and the right under it vested, or while it is yet imperfect and incomplete, and the right under it remains inchoate; and, finally, that an abandonment may be express and immediate, by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, nonuser of them after completion, and the like. The general doctrine concerning the effect of such an abandonment, at whatever time or in whatever manner made, is well settled. The prior appropriator thereby loses all of his exclusive rights to take or use the water which he had acquired, or might have acquired, by his appropriation; and he cannot, after an abandonment, reassert his original right to the same, or the same amount of water, as against a second or other subsequent claimant who has taken proper steps to effect an appropriation thereof."

In *Yankee Jim's Union Water Co. v. Orary*, 25 Cal. 509, 85 Am. Dec. 145, the court said: "The right of the first appropriator may be lost in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the watercourse, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him."

In *Davis v. Gale*, 32 Cal. 84, 91 Am. Dec. 554, the court said: "A party acquires a right to a given quantity of water by appropriation and use, and he loses that right by nonuse or abandonment. Appropriation, use, and nonuse are the tests of his right."

In *Smith v. Logan*, 18 Nev. 154, the court said: "The findings show that from the year 1861 until 1867, inclusive, Logan irrigated from 10 to 85 acres of land. During the years 1868, 1869, and 1870 he made no use of the waters, and in 1871 and 1872 he irrigated but 5 acres. During these five years plaintiff and his predecessors in interest used the waters of the creek under their appropriations adversely to Logan. They therefore acquired the right to so much of the waters appropriated by Logan as he failed to use during the period limited by the statute of limitations."

Section 1007 of the Civil Code of California provides that "occupancy for the period prescribed by the Code of Civil Procedure is sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all."

Section 1411, under the title of "Water Rights," declares that "the appropriation must be for some useful or beneficial purpose, and when the appropriator and his successor in interest cease to use it for such a purpose, the right ceases."

The acts and conduct of appellant and of his predecessors in interest, relative to the use of the Berry Roberts ditch by the owners of the South Fork Company as part of their system for conveying the water which

belonged to the South Fork ditch by right of prior appropriation, are inconsistent with the claim made in the bill of complaint. In order to avoid the force and effect of this evidence, appellant contends that the original right of appropriation, as acquired by the locators of the Berry Roberts ditch, has been preserved and maintained by the assertions of Borron and appellant at various times during their respective ownership of the land, and during the time they were exclusively using the 30 inches of water from the South Fork or Timber ditch, "that they were entitled to the water embraced by the waste-water appropriation." Such declarations by word of mouth, unaccompanied by any act or deed in vindication and maintenance of them within the period prescribed by the statute of limitations, are wholly insufficient to keep alive the rights they had previously acquired by the appropriation and use of the waste water in the Berry Roberts ditch for the purpose of irrigation during the irrigating season. In *Cox v. Clough*, 70 Cal. 347, the court said: "If the defendants used and held the water adversely for five years next before suit was brought, the mere disputing their right to such possession by the plaintiffs would not prevent the bar of the statute. . . . The seventh finding might be literally true,—that is, defendants and their grantors might have 'claimed the right to the exclusive use of all the waters,'—and yet they may never have been for a moment in possession of any such waters."

No heed was ever given—no attention ever paid—to the asserted claim of ownership made by Borron or appellant. The asserted claim was never recognized or in any manner respected by any of the appellees, nor by any of the parties using the Berry Roberts ditch for the purpose of conveying the water of the South Fork ditch therein. The contention of appellant that the use of the Berry Roberts ditch was consented to by appellant and his grantor, and only amounted to a temporary license, which was revocable at their will and pleasure, is not sustained by the facts. The suit is without merit, and devoid of any equity whatever. Appellant's rights to water for the purpose of irrigation have not been impaired. Whatever rights he or his grantor ever had to the waste water during the irrigating season have been lost by their conduct and by their nonuse of the water, and appellant is not in a position to complain of the use of the waters of the Santa Ana river by other parties.

To recapitulate: The locators of the Berry Roberts ditch claimed the waste water of the river to irrigate their lands situate in section 18. After a few years they discovered that such waters were wholly insufficient for such purpose, that said ditch and the water rights acquired by its construction could not be relied upon to furnish water during the dry or irrigating season; that, to quote the language of one of the witnesses, the water was so scarce that the land was liable to "dry up and blow away." The locators then, for the purpose of obtaining the necessary quantity of water to irrigate their lands which were fit for cultivation, procured, by agreement

and purchase, certain interests in the waters flowing in the South Fork or Timber ditch, which, with the North Fork ditch, had a prior right to the waters of the Santa Ana river, as against the Berry Roberts ditch. After acquiring the waters of this ditch, they and their grantees stopped using any of the water they had formerly appropriated. They succeeded in making an agreement with some other owners of the South Fork to convey the waters from said ditch over into the channel of the Berry Roberts ditch, and prior to 1877 all the owners consented to this change of the waters, and united in its use. The owners of the South Fork ditch took absolute, complete, and exclusive possession, use, and control of the Berry Roberts waste-water ditch,—whether rightfully or wrongfully, by consent or otherwise, need not be here determined. They appointed overseers, or "water masters," as they are sometimes called, who issued time cards to the shareholders, and upon such cards allotted and distributed to the owners in the South Fork or Timber ditch all of the water which was taken and conveyed through the Berry Roberts waste-water ditch, to the entire exclusion of any and all other waters and water rights. After a few years' use of the water in this way, it was discovered, that a great saving of water could be made by changing the course of the ditch, and taking the water out at a point further up the river, so as to avoid sandy places in the river bed. This change did not give the full relief anticipated, and another change was made. From the year 1874 up to the time of the commencement of this suit, in 1887, all of the water used upon the 240 acres of land now owned by appellant, for the purpose of irrigating the same, was water represented by the 30 shares in the Timber ditch owned by appellant and his predecessors in interest, and this amount of water is sufficient to irrigate said lands. The diversion and use of this water in the way and manner stated were with the knowledge, consent, and acquiescence of Borron, the immediate predecessor of appellant, and were claimed by the other owners of the South Fork ditch to be adverse to any right or claim under the original location and appropriation of the waste water in the Berry Roberts ditch. The testimony shows that the use of the waste water in the Berry Roberts ditch was abandoned, in so far as it had, prior to 1878, been used as a source of water supply during the irrigating season; that in 1874 the Berry Roberts ditch was taken possession of and used by the South Fork Ditch Company; that ever since that time the South Fork Company has had the sole and exclusive possession, use, management, and control of it; that all the water which has run through it has been the water actually appropriated by the South Fork Company; that during the full time of Borron's occupancy of the land, from June, 1874, to the fall of 1881, he never questioned the right of the South Fork Company to the waters flowing in the Berry Roberts ditch, or to any part or portion thereof; that during all this time he only received water to irrigate his land through the Berry Roberts ditch on his 30 shares from

the South Fork Ditch Company. Substantially the same state of facts continued to exist after appellant purchased the land, in 1883. One witness, the son of appellant, testified that he protested, on behalf of appellant, against the use of the Berry Roberts waste-water ditch being taken by the South Fork Company, and that appellant occasionally used such water for irrigating his lands; but this use of the waters, it is admitted, was confined to the nonirrigating season in the early spring or late fall of the year. Col. Tolles testified that the expense of constructing what was called the "South Fork" of the Santa Ana ditch in 1877 was laid upon the basis of the shares in the waters of the South Fork ditch; that the original Berry Roberts ditch was thereafter used to convey the waters of the claimants in the South Fork of the Santa Ana continuously, so far as he knew, until the injunction which was issued in this proceeding; that the South Fork or Timber ditch water filled the Berry Roberts ditch to its full capacity; that repairs were subsequently made upon the Berry Roberts or South Fork ditch *pro rata*, according to the ownership of the respective parties; that Mr. Borron and appellant paid their proportionate share; that the water was apportioned *pro rata* on the basis of ownership of the South Fork shares; that there was no distribution of waste water, to his knowledge, to either Borron or Ball, other than during the rainy season, at which time it was not the custom to confine distribution to the water tickets, but each party was then allowed to continuously use the water; that during the irrigating season no waste water was used or distributed in the Berry Roberts ditch. All the testimony of the several water overseers or water masters and time-keepers and others was substantially to the same effect. The waste-water rights of the Berry Roberts ditch location, having been lost by nonuser upon the part of Borron prior to the time when appellant acquired the land, could not be reasserted so as to acquire thereafter any right therein, except by the continued and adverse use of such rights for the period of five years, or by a new and valid appropriation of the water. In *Cannon v. Stockmon*, 36 Cal. 540, 95 Am. Dec. 205, the court, in relation to this subject, said: "A party who has been in the continued, exclusive, adverse possession for five years is entitled to the benefit of the statute of limitations, although the five years are not next preceding the commencement of the action."

As against the appellees who have acquired rights to the waters of Bear creek and the Santa Ana river subsequent to the location of the Berry Roberts ditch, the question here is, as stated in *Hill v. Smith*, 27 Cal. 476: "Have the plaintiff's use and enjoyment of the water for the purpose for which he claims its use been impaired by the acts of defendant?"

This suit, it must continuously be borne in mind, is exclusively founded upon the alleged rights of appellant for water for irrigating purposes during the irrigating season, and not for any deprivation of water during the rainy season, or the waste waters

then flowing in the Santa Ana river, or through any of the many ditches or canals that have been mentioned. It is therefore necessary for appellant, in order to sustain this action as against the subsequent appropriators, to affirmatively show that his right to the waste waters of the Berry Roberts ditch for use during the irrigating season has been impaired by the wrongful and unlawful acts of the appellees to his injury. This he has not done. No injury has been shown. The absorption of the right to flow water into the Berry Roberts ditch by the South Fork Company, and the use of said ditch for the conveyance of the water were really beneficial, instead of detrimental, to appellant. Instead of the uncertain and insufficient quantity of water which then flowed in the Berry Roberts ditch, he has, under the agreements and changes in the condition, as before stated, obtained a valuable right amply sufficient to supply his wants, and to enable him to cultivate, irrigate, and improve his land. It cannot, in the light of all the facts and circumstances set forth in the voluminous record on file herein, be consistently claimed that his rights have in any manner been injured or impaired by the acts of appellees. In *Sharp v. Hoffman*, 79 Cal. 406, the court said: "The gravamen of plaintiff's action being the deprivation of water for irrigation during the irrigation seasons in the years 1883, 1884, and 1885, whereby he suffered loss, it is incumbent upon him to show by satisfactory evidence (Code Civ. Proc. § 1835) a right to use of the waters of the creek during each of such seasons, an interference with such right, and a consequent injury."

The same general principles are announced by the Supreme Court in *Atchison v. Peterson*, 87 U. S. 20 Wall. 514, 23 L. ed. 416. Mr. Justice Field, in delivering the opinion of the court, after citing and reviewing certain cases in the courts of California and Nevada, said: "What diminution of quantity, or deterioration in quality, will constitute an invasion of the rights of the first appropriator, will depend upon the special circumstances of each case considered with reference to the uses to which the water is applied. . . . In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant."

Upon a review of the evidence, and of the principles of law applicable thereto, we are of opinion that the conclusion reached by the circuit court is correct.

The judgment of the Circuit Court is affirmed, with costs.

Knowles, District Judge, dissenting:

The first question presented for consideration is as to the jurisdiction of the court in which the suit was instituted. The suit was commenced in the circuit court of the United States for the southern district of California. The first bill was filed on January 10, 1887. To this bill, answers were filed, and issue

joined. Subsequently, considerable evidence was taken in the case. On the 5th day of November, 1888, complainant came into court, and asked to be allowed to withdraw his original bill of complaint, and to file an amended bill, which request was granted. On March 7, 1889, it was stipulated that the respondents in the suit might amend their answers to the amended bill of complaint on or before the 18th of that month. Other matters were also provided for in said stipulation. On the said 18th day of March, one of the respondents, named Brown, filed, instead of an amended answer, a plea in abatement to the jurisdiction of the court. The matters alleged were, (1) that the complainant was a citizen of the state of California, and not of New York, as alleged in the bill, and that respondents were all citizens of the first-named state; (2) that other persons claiming, under the same title with complainant, interest in the property which is the subject of this suit, are citizens of the state of California, but are not made parties complainant or defendant to said bill, and it is not in said bill made to appear that such other persons, or any of them, were requested to and refused to join with said complainant in bringing his said bill of complaint; (3) that such suit or bill does not really and substantially involve a dispute or controversy properly within the jurisdiction of said honorable court, in this, that parties have been improperly or collusively made and joined as defendants for the purpose of creating a case cognizable by said court. Complainant moved to strike out this plea as improperly filed, subsequent to the filing of an answer by said Brown to the merits in the cause, and as a pleading not authorized by the stipulation in the case. The court sustained this motion, and the plea was stricken out. The cause was tried, and judgment entered for respondents. Complainant alone has appealed the cause to this court. This ruling of the court is not assigned as error; there was no hearing as to the facts presented in this plea. Had the motion to strike out been overruled, complainant would have had the right to have joined issue upon the facts set forth in the same. This court cannot consider any alleged error in this ruling of the court in striking out said plea. It is now urged that this court must consider the allegations set forth in said plea on account of the provisions of the act of March 3, 1875 (18 Stat. at L. 472); that by virtue of that act, the practice as to pleas in abatement involving jurisdiction have been changed. The practice which has heretofore prevailed in the Federal courts is that any plea in abatement should be filed and heard before any answer is made to the merits of the bill. It seems to be urged that this plea can be made at any time during the progress of the suit. The provisions of said act which it is urged have this effect are as follows: "That if in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve

a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no farther therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

There is nothing in this statute which would show that there was any intention of changing the order in which a defendant or respondent may make his pleadings. It does seem, however, that this statute has changed the mode in which the objection to the jurisdiction of the court may be made. Formerly the practice was to make it by plea; now it may be made in different ways. In the case of *Morris v. Gilmer*, 129 U. S. 815, 33 L. ed. 690, the Supreme Court says: "The statute does not prescribe any particular mode in which such fact may be brought to the attention of the court. It may be done by affidavit, or the depositions taken in the cause may be used for that purpose. However done, it should be upon due notice to the parties to be affected by the dismissal."

In the case of *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 34 L. ed. 863, it was held that the rule requiring the question of jurisdiction to be raised by demurrer or plea had been changed by said act of March 3, 1875. In the case of *Anderson v. Watt*, 138 U. S. 701, 34 L. ed. 1080, the Supreme Court again considered this point, and said: "Under the act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. at L. 470, 472) the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer; and the time at which it may be raised is not restricted."

I think, upon a review of these decisions, it will be seen that the mode in which the objection to the jurisdiction may be made is changed by the statute, but not the order in which a plea in abatement to the jurisdiction may be filed. Except so far as the matters were presented in the discussion of this plea in abatement, the jurisdiction of the circuit court was not raised. There cannot be much doubt as to the ruling of that court as the case was presented. There does not seem to be any doubt but that the very questions sought to be presented by the said plea in abatement may be raised in this court without such plea. In the case of *Morris v. Gilmer*, *supra*, the Supreme Court said: "At the present term it was held that whether the circuit court has or has not jurisdiction is a question which this court must examine and determine, even if the parties forbear to make it or consent that the case be considered upon its merits." *Metcalf v. Watertown*, 128 U. S. 586, 33 L. ed. 543.

To the same effect is the case of *Nashua & L. R. Corp. v. Boston & L. R. Corp.* *supra*.

About the same questions as were presented in the plea in abatement were presented in the answers of respondents. It is proper that

they should be considered. It is urged that the evidence shows that complainant was not a citizen of New York, but of the state of California, when suit was commenced. This is the evidence adduced to establish this fact: Harvy Hewitt, son of complainant, said, in giving in his evidence: "Q. Where has your father resided since he returned to the state? A. A greater portion of the time he has resided on the ranch in section 16. Q. Is he a married man? A. My father? Q. Yes, sir. A. Yes, sir. Q. Has he had a family with him? A. Why, I should say he had."

There is some other evidence bearing upon this point. In speaking of a deed desired to be introduced in evidence, the complainant, in giving in his evidence, said: "Q. Mr. Hewitt, since the taking of the testimony last fall, have you made any search for that deed? A. Yes, sir. Q. Where did you make that search for that deed? A. I have made it during—I made it among my home papers at New York."

The evidence shows that the complainant had been engaged in the mercantile business in Cleveland, Ohio, for twenty-five years, and that for the eighteen years previous to his coming to California he had been in business in New York city. In speaking about his taxes he said he paid taxes on a house and lot in New York and on a house and lot in Cleveland. He made a contract to purchase the ranch, irrigated, from time to time, by the water in dispute, in 1881. At that time complainant was in California for a short time, from two weeks to a month. In the spring of 1882 he was again in California for a time. In the fall of 1881 he placed a son, Harvy Hewitt, upon the said ranch, and entered into a partnership agreement with him for the cultivation of the same, and for a sale of one half thereof. This was to continue for five years. In October, 1885, he came to California, and seems to have remained there most of the time until the bringing of this suit. At times, it would appear from the evidence, before and after the bringing of the suit, he went to New York for some purpose. The partnership agreement with his son was terminated in the month of July, 1886. On the 10th day of January, 1887, this suit was commenced. It should be observed that there was no evidence introduced which seems to have been intended for this issue of citizenship. The evidence came out casually when examining the witnesses upon other points. The evidence bears only upon the point of residence, and not upon that of citizenship. "Residence" and "citizenship" are not synonymous terms. *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057. In the case of *Grace v. American O. Ins. Co.* 109 U. S. 278, 27 L. ed. 982, the Supreme Court said of the plaintiffs: "They may be doing a business in and have a residence in New York without necessarily being citizens of that state." There are numerous cases which show that a man may reside with a family in a place, and not be a citizen of the place. Citizenship rests very much in intention coupled with acts. There is perhaps a serious question arising in considering this point, owing to the fact that citizenship in

New York is alleged in the bill and denied in the answer, and an allegation that complainant "was and is a citizen of the state of California." Upon whom does this cast the burden of proof as to citizenship,—the complainant or respondents? Before the act of March 3, 1875, above referred to, the rule in the Federal courts was well established, that, whenever the jurisdictional facts were averred in the bill or declaration, it should be taken as *prima facie* true upon this point, and the objection thereto should be taken by plea in abatement, and the burden of proof was upon the party making the plea. *Sheppard v. Graves*, 55 U. S. 14 How. 505, 512, 14 L. ed. 518, 521; *De Sobry v. Nicholson*, 70 U. S. 3 Wall. 420, 18 L. ed. 263. I see no objection to continue this rule. As the matter now stands I apprehend it would not be sufficient to simply deny that complainant was a citizen of New York. That would not show a want of jurisdiction. Complainant might be a resident of some other state, where none of the respondents reside. The allegation that he was a citizen of California at the date of the suit is an affirmative allegation, and material. If the denial of the averment in the bill of citizenship casts the burden of proof on complainant, then all the former rules upon this point have been reversed, and it cannot be told whether or not a court has any jurisdiction of a cause until that question is established. Really, in an action at law, the question would be left to a jury. It could not be considered that a court had, *prima facie*, any jurisdiction to make any order in a case until this question of jurisdiction was settled. Holding, as I do, that the burden of proof is cast upon the respondents to establish, under the circumstances, want of jurisdiction in the circuit court, it must be held that they have failed upon this issue.

It is urged that the bill should be dismissed for the further reason that one Story, who, it appears, owns one third of the Berry Roberts ditch, and the waste-water right used through the same, should have been made a party complainant in the suit. If he was a necessary party complainant in the bill, then this point may be well taken. It appears that Story was a citizen of the state of California, and was not only interested in the Berry Roberts ditch, but claimed some interest in the South Fork ditch of the Santa Ana river, Sunnyside Division. In the bill it is charged that the parties owning in this ditch had diverted, with others, water to which complainant was entitled. If the respondent Story was associated with the owners in that South Fork ditch, and had co-operated with them and others in diverting the water to which complainant was entitled, he was a proper party respondent. It seems to be urged, however, that, because Story was a one-third owner in the Berry Roberts ditch, complainant could not proceed without making him a party complainant, or showing some reason for not doing so. This presents the question, Could the rights of Hewitt be determined, as far as the Berry Roberts ditch is concerned, without making Story a party, so that his rights would also

be determined therein? This point was presented in the *Mining Debris Case*, 8 Sawy. 628, 638, 16 Fed. Rep. 25. In rendering a decision upon demurrer to the bill in that case, Judge Sawyer said: "I am satisfied, also, that the complainant is entitled to maintain the suit without joining his cotenant, or making him a defendant. His interest—his estate—is several. There is but a unity of possession. His interest, or estate, is capable of being injured, and he is entitled to have it protected from irreparable injury, whatever course his cotenant may see fit to pursue. He claims nothing against his cotenant. The cotenant is not an indispensable party to a determination of his rights. In this state, both before the Code, under the common-law rules, and after the adoption of the Code, by express provision carrying the former rule into it, it was settled that tenants in common could sue alone."

When a tenant in common is given the privilege, by a state statute, to sue alone to protect his rights, I do not see but this comes within the rule recognized by the Federal courts,—that, where a right is given by a state statute, a Federal court may be called upon to enforce it. The following cases maintain that one tenant in common can sue for an injury to his estate or interest: *Good-enough v. Warren*, 5 Sawy. 494, Fed. Cas. No. 5,534; *Himes v. Johnson*, 61 Cal. 259; *Little Creek Water Co. v. Perdue*, 65 Cal. 447. The diversion of water from one entitled thereto is in the nature of a private nuisance. *Parke v. Kilham*, 8 Cal. 79, 68 Am. Dec. 310; *Tuolumne Water Co. v. Chapman*, 8 Cal. 392. All the rights of Hewitt in the Berry Roberts ditch can be adjudicated without joining with him his cotenant Story. It does not seem to me necessary that he should have been made a party complainant.

But it is also urged that certain parties who were owners in the South Fork and Sunnyside Division ditch, and whose names were suggested by the answers of respondents, were not made parties respondent; that these parties were necessary parties, and therefore the bill should be dismissed. The claim is that the cause cannot proceed to judgment without these parties. This action is one in the nature of a suit to abate a nuisance. The nuisance is one that has existed, and is threatened to be continued. It is for the diversion of water from complainant's ditch and land, to which he is entitled, and the threatened continuation of this diversion. Complainant asks for an injunction to restrain and prevent this diversion. This being the nature of the suit, then the rule is that only those persons can be made parties respondent against whom an action at law can be maintained for damages for creating such a nuisance. Wood, Nuisances, § 795. If we turn to the law, we find that, in an action for damages for the creation and maintenance of a nuisance, the persons who create and maintain the same are jointly and severally liable, and an action can be maintained against one or any number of the offending parties. Pom. Rem. & Rem. Rights, § 261. The creating of a nuisance is in the nature of a tort. It is difficult to see upon

what ground an injunction could be asked against any one who it did not appear was engaged in the diversion of the water, although he might be an owner in the ditch into which the water was diverted. In the *Mining Debris Case*, *supra*, Judge Sawyer said: "I can perceive no sound reason, in the established principles of equity jurisprudence and practice, why two or more of the parties injured by the common nuisance should not be permitted to unite, and two or more of those co-operating to commit it should not be joined in one suit, to redress the injury, and enjoin a continuance or increase of the nuisance thus in common inflicted."

The respondents, in their several answers to the bill, made certain denials of having diverted the waters of the Santa Ana river so as to prevent any of them from flowing down to the Berry Roberts ditch and to complainant's land; but these denials involve what is termed a "negative pregnant," and, as a fact, they admit such diversion. They are to the effect that they have not diverted, appropriated, or used any quantities of the water of the Santa Ana river in excess of the quantities lawfully belonging to any prior or subsequent appropriators, or any other waters than such as said respondents are entitled to as appropriators. They deny that they threaten to divert, appropriate, or use any waters of said Santa Ana river, except such as they are legally entitled to divert. They deny that the said respondents prevent any water flowing to the complainant's land to which he is legally entitled, or in any manner entitled. Now, as to all these parties, there can be no doubt they were made respondents properly, as they admit, as I have said, the diversion complained of. Whether in doing so they have interfered with any of the rights of complainant is the matter to be determined in this action. I do not see how any statement in the answers as to the other parties shows that they are necessary parties in this action, but that without them the case cannot proceed to judgment. Considering all these matters, I do not think the respondents have shown any lack of jurisdiction in the circuit court or in this court.

We come now to the merits of the case. It appears that the first appropriators of any of the waters of the Santa Ana river constructed a ditch commencing at a point about 8 miles below the ditch of complainant. This ditch was called the "Timber Ditch," and was divided into two forks,—one called the "North Fork," and the other the "South Fork." The persons taking out water in what was known as the "North Fork" changed their point of appropriation to a point near the mouth of the cañon at which the Santa Ana river comes into the San Bernardino valley. They enlarged a ditch, which had the name of the "Cram and Van Leuven Ditch," or the "Van Leuven Ditch." This was done some years before the Berry Roberts ditch, in which complainant claims a two-thirds interest, was dug. In about 1869, Berry Roberts, George A. Crow, and Henry Suverkrup constructed the Berry Roberts ditch. In 1870 they had

a record made by what are termed "water commissioners" of their location of a water right. This record shows that the appropriation was of the waste waters of the Santa Ana river. The evidence tends to prove the same fact,—that it was the waters that were not then appropriated by those who had constructed the Timber ditch, and the North Fork ditch that were thereby secured. These parties used these waste waters through this ditch for some time. Their grantees used them at times, certainly up to 1874. Prior to 1874, parties who owned in the South Fork of the Timber ditch began to sell out their interest in the waters appropriated thereby. The sale was of so many shares in the waters of the South Fork of that ditch. A Mr. Borron, who had become the owner of some 240 acres of the land for the irrigation of which this Berry Roberts ditch was constructed, with one Ball, who also owned an interest in this ditch, and some land irrigated therewith, obtained some of the shares of this Timber ditch water, and began to divert in the dry season, in the summer, their share of the Timber ditch water through this ditch. In 1874 certain other parties, owners in the Timber ditch water, desiring to do the same thing, but not owners in the Berry Roberts ditch, made an agreement with the Berry Roberts ditch that upon certain conditions, to be hereafter stated, they were to be allowed to run their shares of water in the Timber ditch through this Berry Roberts ditch. In 1877 or 1878 the owners of the Timber ditch constructed a new ditch, commencing about 8 miles above the Berry Roberts ditch on the said Santa Ana river, called the "South Fork Ditch." Most of those who owned Timber ditch water, and who had been using the same through the Berry Roberts ditch, had their water interests turned into this new ditch. Since that time other ditches have been dug, which take out more or less of the waters of the said river.

It is, I think, well established that up to 1874, when the owners of the Timber ditch water began to divert their water through the Berry Roberts ditch, there was a waste-water right used through that ditch; that is the water left in the stream after the South Fork and the North Fork or Van Leuven ditches were filled. Unless abandoned, two thirds of that right has been vested in complainant through proper conveyances. The right of complainant in this waste water and the Berry Roberts ditch is now denied, and the use thereof prevented, by some of the respondents at least. It is contended that this right was lost by abandonment. The decision and judgment in the circuit court were based upon this finding. Abandonment takes place of a water right when one having the right to use the same, and who is the owner thereof, gives the same up without any intention of using the same or exercising any ownership over or concerning it. *St. John v. Kidd*, 26 Cal. 264; *Bell v. Red Rock Tunnel & Min. Co.* 86 Cal. 214; *Judson v. Malloy*, 40 Cal. 299. The law does not presume abandonment; it must be established by the party alleging it. There has not been shown in evidence a declaration on the part of any

owner in the Berry Roberts ditch showing an intention of abandoning the same. While it was held by Justice Field, in the case of *Keane v. Cannovan*, 21 Cal. 291, 303, 83 Am. Dec. 738, that an abandonment might be inferred from lapse of time, and the delay of the first occupant in asserting his claim to the possession against parties subsequently entering upon the premises, he qualified this rule by the following: "But in such cases the leaving of the premises must have been voluntary, and without any express intention of resuming the possession."

In that case the claimant of the premises left an agent in charge; and in regard to the effect of this he said: "This circumstance is of itself sufficient to rebut the presumption of abandonment arising from the fact that he ceased to occupy them."

In this case, Borron, the grantor of claimant, left Col. Tolles as his agent in charge of his property, including his water rights. The facts of the owners of Timber creek water getting into possession of the Berry Roberts ditch appear to be about these: According to the evidence of Col. Tolles, a respondent in this case, an agreement was made between the parties, which he says was as follows: "The agreement, in substance, was that, if (they having first forbid our use of water in that ditch by putting in a dam to shut it off from our use) we would contribute to the enlargement and the repair of the ditch, we could then divert our interest, and receive our water *pro rata* from the Timber ditch."

He stated also that it was in contemplation, at the time this agreement was made, that a new ditch should be constructed to convey the water of the South Fork or Timber ditch to the different owners. Witness Glover, called as a witness for complainant, said of this agreement: "Mr. Ball was acting as water master, and he asked a question,—the parties were all together,—if this was a permanent thing. The answer given was that, as soon as the new ditch was built, they would have no more use for this Berry Roberts ditch. Well, under that understanding, the water went in, and no objection was made."

The evidence shows that the ditch was enlarged to double its former capacity, and the Timber ditch water owned by certain parties put into it. For the first year there seems to have been no regular apportionment of the water to different claimants. The next year (1875) there was, and the water tickets took notice of this waste-water right. Mr. Borron was there that year, and looked after the matter, it is presumed, himself. In 1877 or 1878 the new ditch was built, called the "South Fork Ditch," and most of those who had owned water in the Timber ditch took their water out of the Berry Roberts ditch, and into this new ditch. Borron left his place, in 1875, in the hands of his agent, Tolles, one of the respondents. Borron writes to him to look after his waste-water right. In 1880, or before that time, there is a talk, it would appear from letters in evidence in the case, of bringing a suit to determine his rights in regard to this waste water. Tolles, his agent, and one of the re-

spondents, writes him his waste-water right is in about the same condition as when he left. We find from the evidence of Glover that after the new ditch was built, in 1878, and the Timber ditch water turned into the same, there arose some dispute about this waste-water right, and that it was then used on the Hewitt place. The evidence is that at all times Borron was a great stickler for his waste-water right. Col. Tolles, a witness for respondents, said: "He was particular to advise me to maintain intact all his water rights and interests, referring also to his claim in the waste-water right."

Again, Col. Tolles, in regard to certain language in a letter he wrote to Borron in 1880, said, when a witness: "Q. In your letter to Borron, dated November 22, 1880, which you have identified as being your handwriting, you speak of the waste-water right of Borron being retained the same as when he was there? A. Yes, sir. Q. Now, what right did that have reference to, and right in what ditch? A. Well, the right was one which he always maintained after his purchase of the Suverkrup property, and the use of it through the Berry Roberts ditch."

On redirect examination he again testified: "Q. You have just stated, in answer to the gentleman, that the waste-water right referred to there was one that had been maintained, as I understood you, by Mr. Borron. Maintained in what way, do you mean? What do you mean by the word 'maintained'? A. I meant to convey the idea that he had claimed such a right and interest, not strictly as maintaining it by its use, but by setting up that claim."

Again, Col. Tolles, upon cross-examination, after having testified that Borron had employed him as his agent, said, in response to the following questions: "Q. You accepted that employment, and he left you as his agent in charge of the property, did he not? A. Yes, sir. Q. To protect his rights? A. Yes, sir. Q. In this matter that you are testifying to, as the privilege of putting in the water which you claim from the Timber ditch, Mr. Borron didn't propose to release you any rights which he may have had, did he? He did not intend to give you any of his rights, did he, as you understood it? I mean to water. A. Not to water. Q. He did not intend to create in you any ownership of water, did he? A. No, sir. Q. It was simply as to whatever water you might have the right to bring from Timber ditch? A. Yes, sir. Q. So that substantially it was this: Whatever water you have a right to of the Timber ditch water you may put into our canal or our ditch? A. Yes, sir. Q. That, and nothing more, was it? A. That was all. Q. Provided you keep up the repairs as stated? A. Yes, sir. Q. That was the substance of it? A. Yes, sir."

This sort of questions and answers might be referred to for some time.

When Borron conveyed his property to Hewitt, he conveyed this waste-water right. The agreement for a conveyance was made in 1881, but the deed does not appear to have been signed until 1882. In 1881, Hewitt

went into the possession of the property. The evidence of Harvy Hewitt is that he used this waste-water right on claimant's place in 1881, 1882, 1883, and 1884. Valdez, a witness for respondent, states that, in 1884 and 1885, Hewitt used the waste water in the Berry Roberts ditch whenever he wished to, and it was not used on time tickets. Water in South Fork ditch was generally used on time tickets. The witness said that Harvy Hewitt, who was acting for his father, the complainant, always claimed that waste water, and used it whenever he wanted it. The evidence of both Borron and Hewitt is that they never at any time did anything looking to the abandonment of that water right. Tolles, as the agent of Borron, certainly had no authority to abandon that water right. I do not see how it can be maintained that either Borron or Hewitt ever intended to abandon that water right. But it is claimed that they lost it because they allowed the owners of the Timber ditch to use the Berry Roberts ditch for more than five years for running their water through the same. If I understand the claim, it is that these parties obtained the right to the Berry Roberts ditch by adverse possession. Mr. Borron, as has been stated, owned a two-thirds interest in that ditch in 1874 by purchase from one Suverkrup. Ball owned one third by purchase coming from one of the locators and constructors of the Berry Roberts ditch. They had segregated the interest they had in the Timber ditch water, and diverted it through this Berry Roberts ditch. They were the legal owners of that ditch and that water. Tolles and other parties owning other interests in the same Timber ditch water were allowed, as has been sufficiently detailed, to put their water also into that ditch. But I do not see how it can be maintained, under the evidence stated, that they acquired any interest in the Berry Roberts ditch by virtue of that agreement. That ditch was to be used until New South Fork ditch was constructed, when the use of it was to be relinquished. Certainly, under the evidence, Borron used that ditch to carry his Timber ditch water up, until 1878. It should be borne in mind that the South Fork Water Company was not a corporation, but an association. Whatever titles or rights they acquired was as individuals in their individual capacity, and not in an associated capacity. As to this Timber ditch water they were tenants in common. They acquired their rights generally by purchase, and in their several names, as appears in evidence. The respondents have been particular to prove that, whenever required, Borron paid his share of all improvements and repairs on the Berry Roberts ditch, that through Tolles he paid his *pro rata* share of the building and maintaining the New South Fork ditch, and keeping that in repair. Under these circumstances, no adverse possession could arise in any of the South Fork ditch claimants, for certainly, with the others, Borron must have had possession of the Berry Roberts ditch and the New South Fork ditch all the time.

Under the statute of limitations it was held

by the Supreme Court, in the case of *Dowell v. De la Lanza*, 61 U. S. 20 How. 29, 15 L. ed. 834, that the possession "must be, in the language of the authorities, actual, continued, adverse, and exclusive for the space required by the statute." Could this possession be said to be exclusive when Borron and Ball were holding possession with the other claimants of water in the timber ditch? "To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title, and exclusive of every other right." *McCracken v. San Francisco*, 16 Cal. 594, 636, 637. At what time the respondents made a claim of title to the Berry Roberts ditch, I think it will be difficult to determine, and at no time was Borron or Hewitt denied the right to use it for Timber ditch water. It is said that the water was used under the supervision of a water master. He was no more than an agent of the parties holding these water rights. His possession of these ditches was their possession, if he ever had what is called "possession" of them. He was as much an agent of Borron as of the other parties. His duties, I think, only pertained to the apportioning of water by virtue of an agreement between the parties. There were certain parties—Tolles, Bates, and Dr. Barton—who went into the possession of the Berry Roberts ditch under an agreement with the owners. Their possession was that of the owners until they commenced to hold adversely. When did they commence to hold adversely? I am unable to tell from the evidence. But under the circumstances under which they went into the possession, before they could claim to be holding adversely, they would have to give Borron some notice that they were holding adversely. It is said that this notice was given to Col. Tolles, his agent. But Col. Tolles is one of the parties claiming adversely, according to the contention of respondents. I hardly think a court ought to consider a notice to him a notice to Borron. He was a man trusted and employed, according to his own evidence, to look after and preserve Borron's property, and yet he joined in with others to take away from him, according to the claims of respondents, without compensation, a valuable property interest Borron intrusted to his keeping. He was always a prominent member of the South Fork Ditch Company. I do not think that a court ought to hold that notice to him was notice to Borron. There is no other kind of notice claimed. "A silent possession accompanied with no act which can amount to an ouster, or give notice to his cotenant that his possession is adverse, ought not, we think, to be construed into an adverse possession." *McClung v. Ross*, 18 U. S. 5 Wheat. 116, 124, 5 L. ed. 46, 49.

Taking into consideration that Borron must have been in possession of the Berry Roberts ditch to the extent that he used it for Timber ditch water, and we reach another point in the case that I think is conclusive, as far as the adverse possession of this ditch is concerned. "The rule is that, where there is a mixed possession,—that is, where there are two or more persons in possession, each un-

der a separate conveyance or color of title,—the possession will be treated as being in him who has the better title, upon the ground that the seisin is in him who has the best title, and, as all cannot be seised, the possession follows the title." Wood, Lim. Act. § 261; *Langdon v. Potter*, 3 Mass. 215; *Bellis v. Bellis*, 123 Mass. 414. I think the case of *Hunnicutt v. Peyton*, 102 U. S. 333, 368-369, 26 L. ed. 118, 119-121, supports this doctrine. I do not see how it can be held that the respondents held any distinct and definite part of that ditch as against Borron. As tenants in common of the Timber ditch water, they had a unity of possession, perhaps, of the Berry Roberts ditch. If there was any possession with Ball and Borron by the other parties using water in the Berry Roberts ditch, it was a mixed one, and hence the above rule must prevail. As I said before, one of the main issues in this case is as to the waste water. When did any of the respondents set up any claim to the waste water? Undoubtedly, that waste-water right was preserved up to 1875. The evidence seems to be conclusive that from that time up to 1878 the ditch was always filled, during the irrigating season, with Timber ditch water. In 1878 most all of those owning Timber ditch water transferred it to the New South Fork ditch. Then we hear again of this waste-water right. Glover, in his evidence, says that in 1878 most of the parties turned their water into this New South Fork ditch, and the question was asked him: "Q. And did they cease, then, from taking any water through the Berry Roberts ditch? A. Well no, sir; there was a claim set up then to that water as waste water. Q. Well, what was done about it? A. Well, there were parties, who owned their water in what was called the 'New Ditch,' claimed they had a right in the other ditch, and this was disputed by representatives of the Berry Roberts ditch, and it worked along that way for quite a number of years. Q. Well, what did the owners or claimers of the Berry Roberts ditch do in regard to the water in that ditch, or through that ditch? A. They undertook to use it. Q. Well, did they use it? A. Yes, sir. Q. Now, where was that water used, and who by? A. Well, it was used principally on what is now known as the 'Hewitt Ranch,' and what was known as the 'Berry Roberts Ranch,' or on this section 16."

The Berry Roberts ranch is the same as the Ball ranch. On the 1st day of January, 1882, Borron conveyed his rights to Hewitt. It seems Hewitt had gone into possession of all Borron's ranch, and property connected with his ranch, in San Bernardino county, in the fall of 1881. This was less than four years after we hear of any claim to this waste-water right. This is what Harry Hewitt says as to his use of this right: "Q. Now, state what use has been made, if any, of the waters of the Santa Ana river during the years from 1881 down to the present time by your father, if you know, and where has the water been used? A. The water has been used by my father in his place in section sixteen, township one south. Q. Well, how? A. Used for the purpose of irrigation. Q.

For the last few years? A. In 1881 it was not used continuously because the ditch did not run the entire year through, but all the time that the water was in the ditch it was used. Q. You mean that the ditch did not run, or that the river didn't run, or that the water didn't run? A. The water didn't run. Q. Well, how in 1882, 1883, and 1884? Go right along. A. In 1882 we used the water with some exceptions. At some times the water was taken. We turned it back, and used it. Q. Well, how about the other years right along? Oh, state generally whether you used it. A. Well, generally in 1883. In the spring of 1884 the ditch— There was considerable water, and the Sunnyside water master took possession of it. Q. With your consent or without? A. Without our consent and under my protest."

The witness Valdez, called by respondents, said, in answer to questions of counsel for them: "Q. How did you get your water? A. From Mr. Rob Roberts. Q. What is the name of the ditch.—Berry Roberts? A. Berry Roberts ditch and Sunnyside ditch. Q. Were you working there on time cards? A. I don't understand you. Q. Were you working there, having water issued to you then, or delivered to you on time, which was represented by a card? A. Well, not Berry Roberts ditch. I don't recollect we ever used it in that way. He always claimed that as his water, and we always used it whenever we wanted to."

On cross-examination he testified: "Q. You said, in your direct examination about this Berry Robert ditch, he used that water whenever he had a mind to, didn't he? A. Yes, sir. Q. And irrespective of any time tickets, as far as you know? A. Not that I knew that there was any tickets of that water. Q. That was your understanding, was it? A. Yes, sir; that is the way I understood. Q. That there were no tickets? A. Yes, sir. He always claimed that water, and we used it whenever— He seemed to send the water whenever he wanted it."

This evidence pertained to the years 1884 and 1885. His evidence and that of Hewitt is corroborated by that of Glover upon this point.

I cannot find that as to this waste-water right it was definitely contradicted by any other evidence. There was never any location of a waste-water right by the South Fork Ditch Company. The action that was done in 1877 by the water commissioners cannot affect any title to the Berry Roberts ditch or the waste-water right. The recitation that they acted upon a petition of the owners of the Berry Roberts ditch does not prove the fact. This was a location of another ditch to be constructed from another point, and was used to convey these peregrinating water rights of the Timber ditch evidently as understood when they were put into the Berry Roberts ditch. The record says "E. A. Crow and William Curtis met at the mouth of the Santa Ana cañon, and did change the location of the Berry Roberts ditch in the following manner," etc. This is not a location of the Berry Roberts ditch. Its head is near 3 miles above that of the Berry Roberts ditch, and it covered and ran through different

ground for most of its course. It seems, however, these parties claiming to own the Berry Roberts ditch, after they had changed its location, did not seem to want to give up the former location thereof. They now claim both. There is shown no right, as far as Borron is concerned, in these commissioners, to change the location of that ditch. At all events, it cannot be held to be a location of the waste-water right of Borron and Ball.

A contention of some kind seems to be made to the effect that the appropriation of the waste-water right was not valid because an appropriation of water must be for some beneficial purpose, and that it appears that more water was appropriated than would irrigate the land sought to be irrigated thereby. There is evidence that in that locality 1 inch of water will irrigate 7 acres of land, and one witness gave evidence that, in cultivating some fruits, 1 inch would irrigate 10 acres of land. If this would make the Berry Roberts waste-water right void, at the date of its appropriation, for the reason assigned, then the appropriation of water in the Timber ditch was also void. The claim that 1 inch of water suffices generally to irrigate 7 acres or 10 acres of land in the San Bernardino valley, where the soil is a sandy loam, and the atmosphere dry, does seem to me to tax even the credulity of one accustomed to irrigation in other sections of country to a considerable extent. When acquired, I do not think there is any doubt but that the Berry Roberts waste-water right was a valid one. The change of notions concerning irrigation and the quantity of water needed for irrigation cannot affect it. It should be observed that the facts constituting an adverse possession are not pleaded. It should be observed that no facts showing adverse possession of either the ditch or water right in dispute are pleaded. The general rule is that the facts constituting the adverse possession should be stated. *McCloskey v. Barr*, 38 Fed. Rep. 165. There is no difference between a plea and an answer in this particular. The allegation that the action did not accrue within five years presents the question as to whether the action for the diversion of the water accrued within that time. There is no doubt but that respondents had diverted the water complainant claims within five years. The contention that the ceasing to use any parcel of property in its nature real estate, or an appurtenance thereto, for five years, would constitute abandonment thereof, cannot be sustained. No such arbitrary rule is applied in the consideration of this question. Time may be an element in determining intention, but not alone absolute proof of abandonment. *Partridge v. McKinney*, 10 Cal. 181; *Moon v. Rollins*, 86 Cal. 883, 95 Am. Dec. 181; *Judson v. Malloy*, 40 Cal. 300. It devolved upon the respondents to show abandonment, and the rule is that it should be clearly established. Neither for this assigned reason do I find abandonment, and then the evidence does not show a ceasing to use the waste water for any one five years.

There is one further clause in the evidence of Col. Tolles I will recite as bearing upon this question: "Q. What consideration, if

any, has he had in this distribution as to the matter of waste water? A. There was no distribution of waste water, to my knowledge, to the parties mentioned,—Mr. Borron or Ball,—during that time, other than was during the rainy season, when all parties shared alike in the surplus water.”

This is followed up by several answers.

Now, if the waste water was used at any time during the year by Ball and Borron, or either, that right was preserved. But, as I think I have shown before, there were no five years when this waste water was not used by some of the owners thereof in the irrigating season. It would seem to me that the act of allowing the owners of Timber ditch water to put their water into the Berry Roberts ditch by Ball and Borron was an act of neighborly kindness and accommodation, and the attempt of those thus favored to use this act to show that the owners thereof had thereby abandoned their right to the same, with the water right connected therewith, and that the respondents herein so accommodated had acquired all of the same, should not appeal with much force to a court of equity and conscience. Considering this case as best I could, I have been unable to reach the conclusion that either the ditch or waste-water right to which complainant asserts title has been abandoned by his predecessor in interest or himself. I will say that the record is an unsatisfactory one. Maps used on the hearing were left out by stipulation. They were needed to explain evidence. The evidence is so mixed up with objections and motions and immaterial evidence as to be confusing.

Complainant also makes claim to certain other water originally used in the Timber ditch. This is urged upon the ground, as I understand, that this water was abandoned by the owners thereof. The Timber ditch was undoubtedly abandoned, and all water used in the same, and not transferred, may be considered perhaps as abandoned. If the equitable title in the same had been conveyed in any manner, undoubtedly this would not occur. But, allowing that it was abandoned, there is no showing that complainant ever appropriated the same. From 1875 to 1878 the Berry Roberts ditch was filled, most of the time, with Timber ditch water. There was no chance, up to that time, to appropriate the same by the user; but, if there was, it would not suffice.

In 1878 the Civil Code of California went into effect. Section 1415 of said Code, upon the subject of irrigation, provides: “A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion stating therein, (1) that he claims the water there flowing to the extent of (giving the number) inches measured under a 4-inch pressure; (2) the purpose for which he claims it, and the place of intended use; (3) the means by which he intended to divert it, and the size of the flume ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must within ten days after it is posted be recorded in the office of the recorder of the county in which it is posted.”

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There are other provisions of the statute not necessary to be here referred to. Then follows this provision: “Sec. 1419. A failure to comply with such rules deprives the claimants of the right to use the water as against a subsequent claimant who complies therewith.”

There were notices of the location of all such water by other parties. Neither complainant nor his grantors complied with this statute in making any appropriation to any of the abandoned waters of the Timber ditch. This claim is therefore not maintained.

The locators of the Berry Roberts ditch claimed a waste-water right. The water commissioner noted this claim. The evidence shows what was meant by this term, “waste water.” It was the water that was left after the North Fork and the Timber ditch or South Fork ditches were supplied from the waters of the Santa Ana river. It is not an easy matter to determine from the evidence how much water was in fact appropriated as this waste water through the Berry Roberts ditch. Berry Roberts was of the opinion his ditch would carry about 175 inches of water, miners’ measurement. Glover claimed that at one time it would carry about 300 inches, and at another time 200 inches, of water under miners’ measurement. Tolles said that, at times Timber ditch water was put into it, it would not carry more than 100 or 150 inches of water, miners’ measurement, but that the ditch was then out of repair. The evidence shows that, about the time the Timber ditch water was put in, the ditch was enlarged to double its capacity. There were measurements of the ditch after it was enlarged, that would appear to be reliable, that made the capacity of the ditch about 480 inches, measured as above stated. There is one thing to be noticed concerning the evidence estimating the number of inches of water in any ditch from 1860 to 1878. The early estimates of water were much less than the later, and the actual measurements seem to have shown at all times a much larger amount of water than the estimates. Hence I think it would be safe to find that the Berry Roberts ditch appropriated 200 inches of water. There is no dispute but that during certain months the Timber ditch and the South Fork ditch took all the water in the Santa Ana river. What was the exact time this occurred cannot be easily determined from the evidence. Some seasons this period was much shorter than others. I find that from about the 15th of June to the 1st of September of each year, as a rule, these ditches took all the water in the river. As I said before, it seems to be admitted by the answers of all the defendants that they did divert this waste water. If the respondents had each set out the amount of water he or it claims, there might have been a determination of the case to show who are the exact parties who diverted the water owned by claimant. As the case stands, the only decree that can be entered is an injunction enjoining all of the defendants from diverting this waste-water right from the 1st of September to the 15th of June of each year. My opinion is that the judgment of the circuit

court should be reversed, and the cause remanded, and the circuit court directed to enter a decree according to this view.

This opinion was written with the thought that it might be adopted as the opinion of

the court in the case. Finding that the majority of the court do not agree with the conclusions I have reached, I present the same as my individual views and as a dissenting opinion.

MINNESOTA SUPREME COURT.

Anthony KELLY *et al.*, *Appts.*,

v.

City of MINNEAPOLIS *et al.*, *Repts.*

(.....Minn.....)

- *1. Held, that certain certificates calling for the payment of money, issued by the park board of the city of Minneapolis, are not an indebtedness of the city, within the meaning of section 2, chapter 204, Laws 1893, limiting the indebtedness of cities; and, further, that the amount of the bonds and money in the sinking fund of the city is to be deducted from the total amount of the outstanding bonds of the city, for the purpose of determining its actual indebtedness under the provisions of this statute.
2. Held, that the commissioners of such sinking fund have no authority to purchase from the city its bonds, for the fund, at the time they are offered for sale by it.

(December 9, 1893.)

A PPEAL by plaintiffs from an order of the District Court for Hennepin County denying a motion for a temporary injunction to restrain defendants from disposing of certain municipal bonds. *Reversed.*

The facts are stated in the opinion.

Messrs. J. B. Atwater and P. M. Babcock, for appellants:

There are two kinds of sinking funds—a real sinking fund and a pseudo sinking fund. The object of the first is to ultimately extinguish a certain indebtedness (*Sinking Fund Cases*, 99 U. S. 725, 25 L. ed. 508); the object of the second is to allure prospective purchasers of bonds by holding out to them the existence of a security which is such in appearance only, and not in reality.

It is apparent that, given a general power to issue bonds up to a certain limit, with the right to deduct the sinking fund in calculating this limit, nothing whatever is effected towards actually reducing indebtedness. The limit always rises *pari passu* with the increase of the sinking fund.

From every consideration of wise and prudent municipal economics it would be better to wipe out such a sham fund, and leave the city simply with the 5 per cent limit and the power of issuing new bonds to retire those maturing from time to time.

In enacting chap. 204, Gen. Laws 1893,

*Headnotes by START, Ch. J.

which kind of sinking fund did the legislature have in mind?

Section 2 starts out with a prohibition against the creation of any kind of indebtedness in excess of the 5 per cent limit, which is as sweeping and comprehensive as it was possible to make it. Then follow two exceptions to this prohibition.

If these exceptions had not been made, it might be argued that the legislature had left to the courts the matter of determining, according to general rules of law, whether or not a sinking fund should be deducted in estimating a city's total indebtedness. But the express specification of the one kind of deduction necessarily excludes the other.

McRoberts v. Washburne, 10 Minn. 23; *Sutherland, Stat. Constr.* §§ 825-829; *United States v. Macon County Ct.* 99 U. S. 583, 25 L. ed. 381.

Only such powers and rights can be exercised under grants by the legislature to corporations as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant.

Minturn v. Larue, 64 U. S. 23 How. 436, 16 L. ed. 575.

The board of sinking fund commissioners is a part of the city, and the city cannot issue its own bonds to itself.

Hoag v. Greenwich, 133 N. Y. 152; *Coddington v. Gilbert*, 17 N. Y. 439; *Sickles v. Richardson*, 23 Hun, 559; *Neel v. Beach*, 92 Pa. 231.

Nor does the fact that the certificates are to be paid out of a particular fund constitute them any less an indebtedness within the meaning of the statutory prohibition.

Sackett v. New Albany, 88 Ind. 478, 45 Am. Rep. 487; *Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *People v. May*, 9 Colo. 404; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 133; *Scott v. Davenport*, 34 Iowa, 208.

There is no similarity between the park certificates and a warrant or order drawn by the proper city officers for the payment of a specific amount of money out of the city treasury belonging to a particular fund. And the cases holding that such warrants do not create an additional indebtedness are clearly distinguishable from the case at bar.

Davis v. Des Moines, 71 Iowa, 500; *Law v. People*, *People v. May*, *Springfield v. Edwards*, *Scott v. Davenport*, and *Litchfield v. Ballou*, *supra*.

NOTE.—What constitutes an indebtedness within the meaning of restrictions upon municipal debts is considered in an extensive note to *Beard v. Hopkinsville* (Ky.) 23 L. R. A. 402. See also *Carter v.* 30 L. R. A.

Thorson (S. D.) 24 L. R. A. 734; *Linn v. Chambersburg* (Pa.) 26 L. R. A. 217; *Saleno v. Neosho* (Mo.) 27 L. R. A. 769.

So long as a contingency exists, however remote it may be, by which the city may become liable for something, in some way, such liability is within the letter and spirit of the prohibition.

Prince v. Quincy, 128 Ill. 443; *Doon Dist. Twp. v. Cummins*, 143 U. S. 866, 85 L. ed. 1044; *Law v. People*, *supra*; *Fuller v. Chicago*, 89 Ill. 282; *Springfield v. Edwards*, *Litchfield v. Ballou*, and *People v. May*, *supra*.

The fact that the holder of the certificate is to look only to a particular fund or property for the payment of the debt evidenced by the certificate, does not take the matter out of the prohibition imposed by the language of the statute.

Law v. People, *supra*; *Baltimore v. Gill*, 81 Md. 889; *Morrison v. Bernards*, 36 N. J. L. 219.

The making of a contract for municipal supplies extending over several years is the creation of an indebtedness for the whole amount to become due under it.

Kitchi v. Minnesota Brush Electric Co. 58 Minn. 418.

The statute of 1893 was passed for the purpose of prohibiting absolutely any kind of debt or liability for any purpose beyond the 5 per cent debt limit.

Prickett v. Marceline, 65 Fed. Rep. 469; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 182; *Law v. People*, *supra*.

The act of 1893 prohibits the incurring of "any debt or liability of any kind, for any purpose," and its inhibition is aimed alike against certificates, as well as all other forms of indebtedness.

Sackett v. New Albany, 88 Ind. 478, 45 Am. Rep. 467, applies alike to generations of all kinds, including present as well as future.

Brie's App. 91 Pa. 398; *Elsar v. Fort Worth* (Tex.) 27 S. W. Rep. 789.

The language of the act creating the sinking fund, and providing for its investment and disposition, is such as to leave no doubt that the board of sinking fund commissioners is but a department of the executive branch of the city government, and that the commissioners in executing the powers conferred upon them are but the agents of the city, and as to the sinking fund itself, the city or the commissioners are but trustees.

Elsar v. Ft. Worth, *supra*.

The fund to be created is not so much for the security of the creditors as the ultimate protection of the public and the corporations.

Sinking Fund Cases, 99 U. S. 725, 25 L. ed. 508; *Council Bluffs v. Stewart*, 51 Iowa, 385; *Wazahachie v. Brown*, 87 Tex. 519.

Mr. David F. Simpson, for respondents: The city of Minneapolis being by law duly authorized to sell a bond or bonds, and the board of sinking fund commissioners being by law authorized to invest the sinking fund in such a bond, there can be no reason assigned why the sinking fund commissioners should not bid for these bonds at a public sale, and purchase them, if they are the successful bidders.

The park board certificates are not an indebtedness of the city of Minneapolis within the meaning of the law of 1893, or in any sense whatever.

Tiedeman, Mun. Corp. § 189; *Fuller v.* 80 L. R. A.

Heath, 89 Ill. 296; *Law v. People*, 87 Ill. 385; *People v. May*, 9 Colo. 404; *Davis v. Des Moines*, 71 Iowa, 500; *Hopper v. Union Twp.* 54 N. J. L. 248; *Kingsberry v. Pettis County*, 48 Mo. 207; *Baltimore v. Gill*, 81 Md. 889.

The bonds and cash in the sinking fund should be deducted from the total outstanding bonds to arrive at the indebtedness of the city under the provisions of the law fixing a limit of indebtedness for the city of Minneapolis.

Bank for Savings in New York v. Grace, 102 N. Y. 313.

Contracts providing for annual payments for a term of years, which payments may be made by the current revenues levied and collected during those years, are not an indebtedness of the city within the meaning of the acts imposing a percentage limitation on the city's indebtedness.

Grant v. Davenport, 86 Iowa, 396; *Valparaiso v. Gardner*, 97 Ind. 1; *Corpus Christi v. Woessner*, 58 Tex. 463; *Smith v. Dedham*, 144 Mass. 177; *Brie's Appeal*, 91 Pa. 398; *State v. McCauley*, 15 Cal. 430; *Capital City Water Co. v. Montgomery*, 92 Ala. 366; *Crowder v. Sullivan*, 128 Ind. 486, 18 L. R. A. 647.

Interest on bonds is not to be included in estimating the total indebtedness.

Durant v. Iowa County, 1 Woolw. C. C. 69; *Powell v. Madison*, 107 Ind. 106; *Poughkeepsie v. Quintard*, 136 N. Y. 275.

Uncollected taxes and special assessments may be regarded as available for current expenses, so that contracts for such expenses are not included within the indebtedness of the city.

French v. Burlington, 42 Iowa, 614; *Council Bluffs v. Stewart*, 51 Iowa, 385.

Start, Ch. J., delivered the opinion of the court:

This action was brought to have a certain issue of the bonds of the city of Minneapolis, of the par value of \$200,000, known as "Reservoir Bonds," adjudged void, and to restrain the treasurer of the city from paying out of the sinking fund of the city any money for the purchase of such bonds for the sinking fund, pursuant to an agreement to that effect between the city council and the board of sinking fund commissioners. The plaintiffs are taxpayers of the city, and from an order of the trial court denying their motion for a temporary injunction so restraining the treasurer this appeal was taken. The bonds were issued under the provisions of chapter 204, Laws 1893, which forbids any city in this state to issue bonds or to incur any debt or liability of any kind for any purpose except for the purchase, refunding, or payment of outstanding bonds, in excess of 5 per cent of the assessed valuation of the taxable property of such city according to the last preceding assessment. The plaintiffs claim that this 5 per cent debt limit has already been exceeded by the city, exclusive of these reservoir bonds; and, further, that the board of sinking fund commissioners have no authority to purchase from the city its bonds at the time they are offered for sale by it.

1. The first question is, Had the city, if the amount of the reservoir bonds be added

to its debt, exceeded its debt limit at the time of the proposed sale of the bonds and the commencement of this action? In deciding this question the claim of the plaintiffs that the sum of \$206,567—an alleged indebtedness of the city to the court-house and city hall commission—should be added to the indebtedness of the city, must be rejected, for it does not affirmatively appear from the record that, if there ever was any such indebtedness, it existed at the time stated in the question. Eliminating this claim, it is sufficient to say, without going into mathematical details, that it appears from the admitted facts that, if the amount of certain park board certificates hereinafter to be noticed is not a part of the indebtedness of the city, and if the amount of the money and bonds in the sinking fund of the city is to be deducted from the total amount of the outstanding bonds of the city, the entire debt of the city, including these reservoir bonds, will not exceed its debt limit. The answer, then, to this first question involves a consideration of two subordinate ones: (a) Are the park board certificates an indebtedness of the city, within the meaning of the statute imposing the debt limit? (b) Is the amount of the money and bonds in the sinking fund to be deducted from the total amount of the city's outstanding and uncanceled bonds, for the purpose of determining its actual indebtedness? We are of the opinion that this first question must be answered no, and the second one yes, and we therefore answer the original question in the negative.

2. The park board certificates to which we have referred were issued under the provisions of chapter 80, Special Laws 1889, as amended, which provide for a board of park commissioners, and constitute such board a department of the government of the city of Minneapolis. This board is authorized to designate and acquire land in and adjacent to the city for public parks, and its here material powers are as follows: "The said board of commissioners, and their successors, shall have power, and it is hereby authorized, to obtain title for and in the name of the city of Minneapolis, to any lands so designated by it for the purpose of this act, by gift, devise, purchase, or lease. And said board may enter into any contract in the name of said city, for the purchase of any lands to be paid for in such time, or times, and in such manner, as the board may agree to; and said board may accept title to lands and give back a mortgage or mortgages in the name of said city, with or without bonds to secure the unpaid purchase price, provided, that no personal or general liability on the part of said city shall be created by any such contract, or mortgage, or bond beyond the means at the time available therefor, except the liability to pay such amounts as may be realized from benefits assessed on benefited property on account of the lands included in such contract or mortgage. And it is hereby made the duty of said board to pay on each such contract or mortgage an amount equal to the sum or sums so realized from such assessments; and said board shall have power to accept and receive donations of money, prop-

erty, or lands, for the use of the said city for the purposes contemplated in this act." Special Laws 1889, chap. 80, § 2, as amended by Id. chap. 108, § 1. The certificates in question were given for the purchase price of land for park purposes, and their payment secured by a mortgage on the land purchased. Each certificate states that the city of Minneapolis is indebted to the payee in the sum therein named, and recites that the consideration therefor is the conveyance to the city by the payee of land for park purposes, and that the certificate is secured by a mortgage on the land sold, and that it is payable out of the funds arising from assessments made upon real estate specially benefited by the park established on the land, and concludes with these words: "It being expressly understood and agreed that there is no liability on the part of said city to pay the amount evidenced by this certificate, secured by the above-described mortgage, out of any other fund than the fund above specified." No certificates issued or contracts made by the park board can be given any legal effect contrary to or in excess of the powers conferred upon the board by the statute we have quoted, and they are, in fact, substantially in accordance with its provisions. The board has no power to make these certificates a lien generally upon all the parks of the city, and the record shows that no attempt has been made to secure their payment by the creation of such a lien. The provisions of the statute relied upon by plaintiffs to support their proposition to the contrary (Special Laws 1889, § 5, chap. 80) refer only to park bonds issued for the purpose of obtaining money with which to acquire land for park purposes. It is admitted that such bonds are a part of the indebtedness of the city. Neither are these certificates secured by a mortgage on any portion of the property of the city previously owned by it, nor by a pledge of its revenues, as claimed by the plaintiffs. If such was the case, then their contention that the certificates are a part of the indebtedness of the city would be correct, for the statute providing a debt limit for cities cannot be evaded by the makeshift of issuing the bonds or other obligations of the city, and make them payable only from the general revenues of the city to be derived from a particular source, or by securing them upon its public buildings or other property, which, if sold to pay the obligations, must be replaced by taxation, to enable the city to discharge its governmental functions. The authorities cited by counsel for the plaintiffs fully support this proposition. But such is not the case we are considering, for each certificate is a lien merely upon the particular land for the agreed purchase price of which it was given, not upon any property which the city previously owned. The deed certificate, and mortgage are all one transaction, and after the mortgage is given the city has just as much interest in the land mortgaged as it had before. When the land is paid for, it will be the property of the city. If not, the certificate holder takes it on his mortgage. The debt of the city is neither increased nor diminished by the transaction. No

revenues of the city which must be raised or replaced by taxation are pledged for the payment of the certificates. The statute expressly provides that the park board cannot create any personal or general liability on the part of the city by any certificates they may issue, except to pay such amounts as may be realized from assessments on property benefited on account of the acquisition of the land purchased for park purposes. In no event, nor under any circumstances, is the city liable, except as a trustee, to pay over to the certificate holder the amount actually realized from the assessments. The debt limit is measured by the assessed valuation of the taxable property of the city. How, then, can it be said that these certificates, for the payment of which the city is not liable, and for which no tax can be levied, are an indebtedness of the city, within the meaning of the statute fixing the debt limit?

8. Is the amount of the bonds and cash in the sinking fund of the city to be deducted from the total amount of its outstanding bonds for the purpose of determining whether or not it has exceeded its debt limit? The view which we take of the purpose and nature of this sinking fund renders unnecessary a decision of the question raised and discussed by counsel as to the repeal, by chapter 204, Laws 1898, of the provisions of the charter of the city authorizing such deduction to be made. If this statute does not prohibit such deduction, we are of the opinion that it must be made. It is claimed by plaintiffs that the proviso of section 2, chap. 204, Laws 1898, under the rule, *expressio unius est exclusio alterius*, forbids the deduction of the amount of the sinking fund. This maxim is not of universal application in the construction of statutes, but whether or not it applies in a given case depends upon the intention of the legislature as indicated upon the face of the statute. Broom, Legal Maxims, 668; Sutherland, Stat. Constr. § 329. The proviso in question is in these words: "Provided that when bonds are issued for the purchase, refunding, or payment of other bonds of such city, the bonds to be so purchased or paid shall not be considered a part of the bonds on which any city may be liable for the purpose of determining whether the bonds so issued will increase the bonded indebtedness of any city above the limit prescribed in this act." The purpose of this proviso is obvious upon its face. It was intended to set at rest any possible question which might be raised by would-be purchasers of bonds issued for the purpose of purchasing, paying, or refunding previous bonds of the city, as to their validity, which would impair their market value, and embarrass their negotiation. When this proviso is read in connection with the other provisions of the chapter of which it is a part, especially the first section thereof, which declares that the rights and powers previously granted to the cities of the state shall not be abridged or affected by the act, it is manifest that the proviso was not intended either to prohibit or to authorize the taking into account the sinking fund of a city in determining its actual indebtedness. We are,

80 L. R. A.

then, to inquire as to the essential character of this sinking fund, and determine therefrom, according to general principles of law and the suggestions of common sense, whether or not the amount thereof should be deducted from the total amount of the outstanding funds of the city in order to ascertain its actual indebtedness. Section 18, chap. 5, Charter of Minneapolis, requires the city council to make an annual levy of taxes sufficient to pay interest to become due during the next fiscal year on all bonds and debts of the city, and also to levy a further tax of one mill to pay the principal of the bonds when they become due, and forbids the application of the fund created by such tax to any other purpose. Section 14, Id., declares that, in order to provide for the certain payment of the bonds and debts of the city, the council are authorized to maintain this sinking fund, and provide for its investment and security, but have no authority to abolish it until all the debts of the city are paid, nor to divert it or any increase thereof to any other purpose, and are required to appoint a board of sinking-fund commissioners to take charge of the fund. This board, with the consent of the council, may invest the fund in the bonds of the city or in certain other designated bonds. If it is invested in the bonds of the city, they are not to be canceled, but the interest thereon is to be collected, and added to the fund; and when the principal of any city bonds becomes due, such of the bonds in the sinking fund as may be necessary are to be sold, with the consent of the council, and the matured bonds paid. In case the board or council neglect or violate any of these provisions, any taxpayer or bondholder is given the right to enforce compliance therewith by suit. The substantial maintenance of this fund, in accordance with these provisions, to secure payment of the principal and interest of the bonds and debts of the city, is declared to be a part of the contract with the bondholders. Section 22, Id., declares, in effect, that no warrant or further appropriation on the part of the city council is required for the application of the money in the sinking fund to the payment of the bonds. It is clear from these provisions that the money in the sinking fund which has already been raised by taxation is irrevocably appropriated to the payment of the outstanding bonds and debts of the city. If any part of the fund is invested in city bonds, they can never be disposed of, except to extinguish by payment prior maturing city bonds. When any bonds held by the sinking fund become due, they are at once a charge against the fund, and they are extinguished by crediting the amount thereof to the fund. It is true, as counsel for plaintiffs claim, that there is no express provision in the charter providing that city bonds in the sinking fund, when they mature, shall be so extinguished; but such bonds can only be sold to pay other bonds as they become due, and the provision of the charter authorizing such sale surely cannot mean that city bonds in the sinking fund already due are to be sold to pay other bonds also due, or that city bonds purchased for the fund are

to remain uncanceled indefinitely after their maturity, and a tax equal to the interest thereon levied annually, and paid into the fund. The fair inference from the law relating to this sinking fund is that, when bonds become due, they are to be paid and canceled, whether held by the sinking fund or other parties. It appears from the record in this case that all of the bonds held by the sinking fund are the bonds of the city, hence the amount of the bonds and the money in the fund necessarily represent an equal amount of the outstanding and uncanceled bonds and indebtedness of the city, which has already been realized from taxation to pay the bonds; and to ascertain the further amount to be raised by taxation in order to extinguish the entire indebtedness of the city it necessarily follows that the amount of the sinking fund is to be deducted from the entire amount of the apparent indebtedness of the city. The balance is its actual debt. The debt limit of the statute has reference to an actual indebtedness for the payment of which a tax must be levied, not to an uncanceled apparent liability. *Bank for Savings v. Grace*, 103 N. Y. 818. As we have suggested, this debt limit of the statute is measured by the rate per cent of taxation necessary to pay the entire debt of the city. This is the test. Now, it is apparent from the admitted facts in this case, that a 5 per centum tax on the assessed valuation of the city would produce a sum which, if added to the amount of the sinking fund, would exceed the amount of all of its bonds and debts, including these reservoir bonds. It follows, then, that the amount of the sinking fund must be deducted from the total apparent debt of the city to ascertain whether its actual debt exceeds the debt limit.

4. Can the board of sinking fund commissioners purchase from the city its bonds at the time they are offered for sale? We answer this question in the negative. We agree with the city attorney that there is no statute forbidding in express words such purchase, but we are of the opinion that such a purchase is so radically inconsistent with the essential character of the sinking fund, and so destructive of the purposes to be conserved by its maintenance, that it must be held that the prohibition is necessarily implied. The city can only issue and sell its bonds by the action of its council, and the board of sinking fund commissioners can only buy its bonds by the action and consent of the council. The intention of the statute is that the council and the board shall be a check upon each other in the purchase of bonds with money in the sinking fund. The unbiased judgment and independent action of each body are essential to the safe guarding of a fund which is intended to secure the certain payment of the existing bonds and debts of the city, and which the council are forbidden to divert to any other purpose. The council cannot act for the city in selling its bonds, and at the same time consent that the trustees of the bondholders and creditors of the city, the board, may invest the trust fund in the bonds which the council desire to sell, because in such a case

there can be no exercise of an unbiased and independent judgment by the council as to the propriety of such purchase by the board. To construe the law so as to authorize such a sale would make the sinking fund a debt-creating instead of a debt-paying scheme. Section 4, chap. 204, Laws 1898, provides that the bonds to be issued under the act shall not bear interest at a greater rate than 5 per cent per annum, and that they shall not be sold for less than par and accrued interest to the highest bidder, after publication of notice of the sale thereof. This implies that, if the credit of a municipality or the money market is such that its bonds will not bring in the open market par and accrued interest, they shall not be sold. Now, if a city having a sinking fund set apart for the payment of its outstanding bonds can be a bidder and purchaser of its own bonds at the original sale thereof, using the sinking fund for such purpose, it follows that, when the credit of the city or the money market is such that a 5 per cent bond will not sell in the market for par and accrued interest, the city may sell its bonds to itself by the action of its council and its sinking fund board, in violation of the spirit, if not the letter, of the law. Or, in other words, the city council, when it cannot sell bonds of the city in the manner required by law, may consent that the board may turn over to the city the money in the sinking fund, and receive in lieu thereof a new issue of city bonds that cannot be sold in the market, whereby the sinking fund is diverted, to the prejudice of bondholders and the impairment of the credit of the city. One of the primary objects of the law in providing for and jealously guarding the sinking fund is to maintain the credit of the city, and enable it to borrow money, when necessary, on its bonds, at a low rate of interest, and thereby lessen the burden of the taxpayers. But if the city, by the consent of its council and the action of its board of sinking-fund commissioners, can help itself to the money in the fund when its bonds are unsalable, and substitute for the money such bonds, the object of the law will be defeated, and the sinking fund become the means of facilitating an increase of the debt of the city. True, there is no claim made in this case of any want of good faith on the part of the council and the board, and it may also be true that in this particular case it would be for the advantage of the sinking fund to purchase of the city its bonds direct, before they have been negotiated; but the evils which might result from a construction of the statute permitting this to be done are serious. The purpose of the statute is to guard against the possibility of such evils. When the provision of the charter relating to the sinking fund and the statute regulating the sale of municipal bonds are considered together, it is obvious that a sale by the city of its bonds to itself for its sinking fund would be a violation of the spirit, if not the letter, of the law.

Order reversed, and case remanded with direction to the district court to grant the plaintiffs' motion for a temporary injunction.

GERMANIA BANK, *Respt.*,
v.
Achille MICHAUD *et al.*, *Appts.*

(.....Minn.....)

- *1. An executor or administrator cannot bind the estate or make it liable on any promissory note he may make, and the only effect of any such note is to bind himself personally.
2. Under the law merchant, a negotiable promissory note made by an administrator in his official capacity imports sufficient consideration to bind him personally.
3. There is a sufficient consideration for such a note (1) when the maker has assets in his hands which he might have applied in fulfillment of his obligation; and (2) where a consideration for his promise has been received by the personal representative himself.
4. But such a promissory note given for the debt of the testator without any new consideration, and when the time to file claims has expired, and when the probate court has never allowed the claim or ordered it paid, is without consideration.
5. An agreement to extend the time of payment of the debt of a third party is a sufficient consideration for the promise of the defendant to pay that debt.
6. But such a consideration is not sufficiently adequate to make the defendant, who is an administrator, and who signed a note in his official capacity, personally liable thereon. Such a consideration would not warrant the court in invoking the fiction of law that makes a promise for him which he never intended to make, and by which he is held personally liable on the note.

(November 20, 1896.)

APPEAL by defendants from an order of the District Court for Ramsey County sustaining demurrers to their answers in an action brought to enforce payment of a promissory note. *Reversed in part.*

The facts are stated in the opinion.

Messrs. J. L. Macdonald and Henry J. Horn for appellants.

Mr. O. E. Holman, for respondent:

The defendant, Achille Michaud, is personally liable on the note set out in the complaint.

The administrator had no authority whatever, either in law or in fact, to bind the estate by the issuance of its promissory note.

Frankland v. Johnson, 147 Ill. 525.

An administrator cannot create a debt against the estate of the deceased, and it is immaterial how clearly the intent to do so may be expressed. The law conclusively presumes a personal obligation from the fact of the execution of the note by the administrator.

Ness v. Wood, 42 Minn. 439; *Brown v. Farnham*, 55 Minn. 84; *Hayes v. Crane*, 48 Minn. 45; *Sumner v. Williams*, 8 Mass. 163, 5 Am. Dec. 89; *Whiting v. Devey*, 15 Pick. 428; *Austin v. Munro*, 47 N. Y. 866; *Schmittler v. Simon*, 101 N. Y. 557, 54 Am. Rep. 787; *For-*

ster v. Fuller, 6 Mass. 58, 4 Am. Dec. 87; 2 Woerner, American Law of Administration, p. 795; *Cornthwaite v. First Nat. Bank*, 57 Ind. 269; *Stirling v. Winter*, 80 Mo. 141; *Davis v. French*, 20 Me. 28, 37 Am. Dec. 86; *White v. Thompson*, 79 Me. 207; *McCalley v. Wilburn*, 77 Ala. 549; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 118, 38 Am. Rep. 661; *M'Eldevy v. M'Kenzie*, 2 Port. (Ala.) 87, 27 Am. Dec. 648; *Sims v. Stilwell*, 8 How. (Miss.) 181; *Steele v. Steele*, 64 Ala. 451, 38 Am. Rep. 15; *Brown v. Lang*, 4 Ala. 50; *Kingman v. Soule*, 132 Mass. 285; *Wilson v. Fridenberg*, 23 Fla. 186; Schouler, Exrs. & Adms. 2d ed. § 397; *Long v. Rodman*, 58 Ind. 62; *Doolittle v. Willet* (N. J.) 31 Atl. Rep. 385.

The administrator having no authority to bind the estate, the law will strike out that part of the note and signature which he had no authority to put there, and which represents him as contracting for the estate, and if apt words remain to bind him individually he will be held personally responsible for the payment of the note.

Wears v. Gove, 44 N. H. 197; *Walker v. Bank of State of N. Y.* 9 N. Y. 585.

Where an administrator undertakes to bind the estate by a note, believing he has due authority, but in point of fact having no authority, he will be held personally liable, because, where one of two innocent persons must suffer a loss, he ought to bear it who has been the sole means of producing it, by expressly or impliedly inducing the other to place a false confidence in his acts, and because an administrator, who enters into a contract to bind the estate, impliedly warrants his own authority to so bind it.

Farmers' Co-Op. T. Co. v. Floyd, 47 Ohio St. 525, 12 L. R. A. 846; *White v. Madison*, 26 N. Y. 124; *Frankland v. Johnson*, 147 Ill. 525; *Jefts v. York*, 10 Cush. 395.

There are but two exceptions to the foregoing rules: (1) where the contract specifically provides that the administrator shall not be personally liable, or where the promise to pay is restricted to the assets of the estate and not otherwise; (2) where a public agent or officer, without authority, attempts to bind his principal on grounds of public policy, he is relieved from personal liability.

Shoe & L. Nat. Bank v. Dix, 128 Mass. 150, 25 Am. Rep. 49; 2 Woerner, American Law of Administration, p. 787; *Taylor v. Mayo*, 110 U. S. 830, 28 L. ed. 163; 7 Am. & Eng. Enc. Law, p. 299; *Patterson v. Orwig*, 1 Baxt. 293; *East Tennessee Iron Mfg. Co. v. Gaskell*, 2 Lea, 744; *Morehead Bkg. Co. v. Morehead*, 116 N. C. 418; *Beattie v. Latimer*, 42 S. C. 818.

The individual obligation of the three guarantians was a perfect consideration for the note set out in the complaint.

Dan. Neg. Inst. § 183.

The surrender of one negotiable instrument in consideration of receiving another in lieu of it is a sufficient consideration to support a new note or bill.

2 Am. & Eng. Enc. Law, p. 861; *Pratt v.*

*Headnotes by CANTY, J.

NOTE.—The above case is believed to be some what unusual so far as it involves the question of the lack of consideration in a note given for an estate by an administrator.

80 L. R. A.

As to the effect of the words "as administrator" in making contracts, see note to *Rich v. Sowles* (Vt.) 15 L. R. A. 850.

Coman, 87 N. Y. 443; *Lundberg v. Northwestern Elevator Co.* 42 Minn. 87; 3 Woerner, American Law of Administration, p. 795; *Forster v. Fuller*, 6 Mass. 58, 4 Am. Dec. 87; *Wilton v. Eaton*, 127 Mass. 174; *Childs v. Monina*, 2 Brod. & B. 460; *McGrath v. Barnes*, 18 S. C. 328, 36 Am. Rep. 687; *McLean v. McLean*, 88 N. C. 396; *Ellis v. Merriman*, 5 B. Mon. 297.

A note given by an administrator, although worded as the promise of the estate, binds the administrator only.

White v. Thompson, 79 Me. 307.

Canty, J., delivered the opinion of the court:

The plaintiff, as payee, brings this action against the defendants, as makers of the following note:

"\$36,000.00. St. Paul, Minn., May 6th, 1892.

"Sixty days, without grace, after date, the estate of E. Langevin, or either of us, promise to pay to the order of Germania Bank of St. Paul thirty-six thousand dollars, with interest thereon at the rate of 8 per cent per annum from date until paid, for value received. Payable at the Germania Bank of St. Paul.

"The Estate of E. Langevin,

"by Achille Michaud, Administrator."

It is alleged that the defendants Elenor Langevin, Emma Flannegan, and Mary E. Michaud indorsed said note before it was delivered to plaintiff, for the purpose of giving the same credit with plaintiff, and intending thereby to make themselves liable thereon as makers thereof. It is further alleged: "That the said defendant Achille Michaud had no authority whatever and was at no time empowered to make or deliver the said promissory note for or on behalf of the said estate of the said E. Langevin, deceased." Judgment is demanded against all of the defendants personally for the amount of the note.

The defendant Achille Michaud answers separately, and alleges: That on September 16, 1890, Edward Langevin died testate, and, at and before the time of his death was indebted to plaintiff in the sum of \$50,000, and "was mentally and physically incompetent to transact business, and under the guardianship of certain persons, duly appointed as such by the probate court of said county of Ramsey, who were then duly qualified and acting as such; and that said plaintiff at that time held several unpaid promissory notes given to it by said guardians, solely for said indebtedness of said Edward Langevin, and which had been previously made, executed, and delivered by said guardians, as such, to said plaintiff; and that said unpaid promissory notes of said guardians, so held by said plaintiff at the time of the death of said Edward Langevin, were for sums amounting in the aggregate to \$50,000 or \$51,000." That on the 14th day of March, 1891, the will of said deceased was duly probated and adjudged by the probate court of Ramsey county to be the last will of said deceased. That on the 21st day of July, 1891, he (Achille Michaud) was appointed administrator of the estate of

said deceased with the will annexed, and letters of such administration were then duly granted to him by the probate court of Ramsey county. That on the same day the probate court made its order limiting the time for creditors to file their claims against said estate to the 21st day of January, 1892. That said order was duly published, and the time for so presenting such claims expired on said 21st day of January, 1892. That, prior to his appointment as such administrator, the estate had been in charge of three special administrators, who paid a portion of said indebtedness, thereby reducing such indebtedness to the sum of \$36,000; but that the claim was never presented to the probate court, or approved or allowed by that court, and that said balance of said claim so remaining unpaid was barred as a claim against said estate when the time so to present the same to said probate court so expired as aforesaid. "That on the 6th day of May, 1892, the said plaintiff still held the said notes of said guardians, or a note given solely in renewal of the same, for said \$36,000." That, on said last-named day, this plaintiff represented to him, said Achille Michaud, "that said plaintiff was not allowed to hold or carry what appeared to be overdue notes or commercial paper in its bank, and then and there, and for that alleged reason only, requested this defendant, as said administrator, and not otherwise, to make and give to said plaintiff, in lieu and place of said overdue and unpaid notes for (and representing) said \$36,000, and not otherwise, the note of the said estate of said Edward Langevin for said \$36,000; and that thereupon said cashier made out all of said note set out in said complaint, except the signature of this defendant, using one of plaintiff's blanks with the words 'or either of us' printed therein, but not then noticed by this defendant or assented to by him; and this defendant, then believing that said \$36,000 was a legal and valid claim and demand against said estate, and not otherwise, as said administrator of said estate, and not otherwise, and without any consideration whatever therefor or moving to him, and solely at the request of and for the accommodation of the said plaintiff, and for the purpose of plaintiff aforesaid, affixed his name to said note set out in said complaint, and solely as the note of said estate, as requested by said plaintiff, as aforesaid, and not otherwise." That there was no other consideration for said note except said indebtedness of \$36,000, which had been so barred by the statute of limitations; and that, at the time he signed said note, he was not aware of the fact that plaintiff had failed to file a claim for such indebtedness in the probate court, or that it was so barred, but believed that such indebtedness was a valid claim against said estate. This is all of the answer that it is necessary here to consider. The other defendants interposed a somewhat similar answer. The plaintiff demurred to each of these answers, on the ground that it does not state facts sufficient to constitute a defense, and from the orders sustaining the demurrers defendants appeal.

Let us first consider the defense of the ad-

ministrator, Michaud. Although the note is executed by him in the name of the estate, it is well settled that an administrator or executor cannot bind the estate by any promissory note he may make. Even though the note is given for a valid debt or liability of the estate which he should pay, and even though he has a right to reimburse himself out of the assets of the estate when he does pay it, still the note, though made by him as administrator, is his personal obligation, and not the obligation of the estate. 1 Dan. Neg. Inst. 4th ed. § 262. The case is not at all analogous to one where the party signing the note is acting for a disclosed principal. An executor or administrator has no principal. "When a trustee contracts as such, unless he is bound, no one else is bound, for he has no principal. The trust estate cannot promise. The contract is therefore the personal undertaking of the trustee." *Taylor v. Mayo*, 110 U. S. 385, 28 L. ed. 165. Persons contracting in a representative capacity are liable personally when they represent no responsible principal. Story, Agency, §§ 280-286. But these are very general statements of well-established principles, which it might be easy to misapply. When a trustee executes an instrument as trustee, even though he has no principal, and does not bind the trust estate, there ought to be some good reason why the court will make for him a new contract by which he is bound personally. The doctrine that he is liable personally on such a contract is a fiction of law, which, like many other fictions of law, was invented to prevent injustice, not to promote it. This fiction of law has always been applied to cases where the executor or administrator had assets in his hands which he might have appropriated to the fulfillment of his obligation, and to cases where the other party, as a consideration for the obligation of the executor or administrator, parted with something more than a mere nominal or technical consideration. But this fiction of law should not be invoked to make a new contract for the parties where the executor or administrator had no assets with which to reimburse himself, and the other party had no good reason to suppose that he had or would have such assets, has not been misled, and has parted with nothing but a nominal or technical consideration on the faith of the administrator's promise. We can find no case which holds otherwise.

The defendant administrator attacks the complaint, and contends that it does not state a cause of action as against him. Under the rule of the law merchant, a negotiable promissory note made by an executor or administrator, as such, imports sufficient consideration to bind him personally. Story, Prom. Notes, § 68; 1 Dan. Neg. Inst. § 262. For this reason, we are of the opinion that the complaint states a cause of action against the administrator. But, as against any one but an innocent purchaser for value before maturity, the consideration for such a note may be inquired into.

At common law, except when suit was brought against him, the administrator or executor himself, and not the court, allowed

or adjusted the debts of the deceased with the creditors. He paid these debts without any order of the court out of the assets of the estate, or paid them out of his own funds, and reimbursed himself out of the assets. He had the right, among creditors of equal degree, to pay one in preference to another. 1 Wms. Exrs. (Rand. & T. Ann. Notes) 256. He might thus prefer and pay a creditor by giving his own obligation for the debt. *Hepworth v. Haslop*, 6 Haro, 561. When the executor or administrator, having assets of the estate applicable to the payment of the debt, gave his own note to the creditor for such debt, it amounted to an appropriation of the assets to the amount of the debt to the payment thereof; and this constituted a sufficient consideration for his promise, and he was personally liable, whether he made the note as administrator or in his own right. 1 Dan. Neg. Inst. § 263. If he failed to reimburse or indemnify himself, it was his own fault, and no concern of the creditor. But if, without any new consideration, he gave his note for the debt of the deceased when he had no assets, there was no consideration for the note, and his promise to pay was *nudum pactum*. 3 Wms. Exrs. 288-298; 1 Dan. Neg. Inst. § 270; *Bank of Troy v. Topping*, 18 Wend. 557; *Rucker v. Wadlington*, 5 J. J. Marsh. 238; *Byrd v. Holloway*, 6 Smedes & M. 199; *Rann v. Hughes*, 7 T. R. 850, note; *Ellis v. Merriman*, 5 B. Mon. 296; *Schoonmaker v. Roosa*, 17 Johns. 304; *Ten Eyck v. Vanderpool*, 8 Johns. 120.

In jurisdictions where the giving of a new note for a prior indebtedness, and the surrendering up of the old note which represented the prior indebtedness, is an absolute payment, it is held that when the executor or administrator gives his note for the debt of his testator or intestate, whose note is surrendered up to the executor or administrator, it constitutes an absolute payment of the debt and a sufficient consideration for the new note. But this is not the law in those states where, in such a transaction, the giving of the new note would not constitute absolute payment. In referring to the case of *Thacher v. Dinmore*, 5 Mass. 801, the court in *Bank of Troy v. Topping*, 9 Wend. 278, says: "That case is no authority here because the reasons are not applicable. A promissory note given in this state for a simple contract debt does not absolutely discharge such debt. The creditor may still prosecute upon the original consideration, and may recover upon producing and cancelling the note. In that case, also, it appears that the defendant had assets. In the case now under consideration, the plaintiffs lost nothing by taking the defendants' notes for the note of their intestate. They might at any time have prosecuted the defendants as administrators for the money lent to their intestate, and recovered judgment, and thus have obtained any preference which the law would then have given them." In this respect the law of this state is like that of New York, and the giving of the new note in such a transaction would not be an absolute payment. See *Combination Steel & I. Co. v. St. Paul City R. Co.* 47 Minn. 207.

The respondent's counsel has cited many cases which hold that the contracts of an executor or administrator are not binding on the estate, and, although made by him as such executor or administrator, are binding on him personally. Most of these are cases where the transaction originated with him, and not with the deceased, and the other party to the contract furnished the whole consideration therefor at the request of such executor or administrator. To cite from his own brief: "The rule must be regarded as well settled that the contracts of executors, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, . . . are the personal contracts of the executors, and do not bind the estate." *Austin v. Munro*, 47 N. Y. 866, 367. "The action here is exclusively upon the undertaking of the defendant, importing a promise to pay the sum of \$900 on the 1st day of July, 1879, to the payee of the draft or his order for a consideration received by the promisor. No facts are alleged or proved showing any liability on the part of the defendant's testator to the drawee of the draft, or any legal demand existing in his favor, against the estate represented by the defendant." *Schmittler v. Simon*, 101 N. Y. 558, 54 Am. Rep. 787. See also *Sumner v. Williams*, 8 Mass. 162, 5 Am. Dec. 83; *Merchants' Nat. Bank v. Weeks*, 53 Vt. 118; *M'Eldery v. M'Kenzie*, 2 Port. (Ala.) 37, 27 Am. Dec. 643; *Sims v. Stilwell*, 3 How. (Miss.) 181; *Steele v. Steele*, 64 Ala. 451, 38 Am. Rep. 15; *Kingman v. Soule*, 132 Mass. 285; *Long v. Rodman*, 58 Ind. 63; *Doolittle v. Willet* (N. J.) 31 Atl. Rep. 385. In *Davis v. French*, 20 Me. 28, 37 Am. Dec. 36, it is said: "The true doctrine on this subject appears to be that where the cause of action existed against the deceased, the executor or administrator may make himself personally liable by a written promise founded upon a sufficient consideration. . . . In this case the contract originated with the administrator, and there is no evidence that the debt also did not."

But the transaction set out in the answer of the administrator in the case at bar did not originate with him. He alleges that he gave the note in suit for the debt of the testator. An administrator, under the law of this state, has no assets of the estate which he can apply to the payment of a debt of the deceased, unless the claim has been allowed by the probate court. He does not allow such claims, and has no discretion as to the order or priority of payment of such claims. The probate court allows and orders the claims paid, and he is the mere depository of the funds for payment. Then the doctrine of the common law that assets of the estate in the hands of an administrator or executor are sufficient consideration for his promise to pay the debt of the intestate or testator can have no application here, and there can be no presumption that such executor or administrator has such assets. Then we cannot see that Michaud would be liable on his note, even if the debt in question had not been barred as a claim against the estate before he gave his note for it. The reasons by which

we reach this conclusion are in conflict with the reasons given for the decision of *Brown v. Farnham*, 55 Minn. 84, but we are of the opinion that the result arrived at in that case is correct. The question of the liability of the executor arose on a demurrer to the complaint. It appears from the complaint that Farnham and Lovejoy were partners, and, as such, owed the plaintiff \$12,000. After Lovejoy's death, his executors and the surviving partner, Farnham, continued and carried on the partnership business under the old firm name of Farnham & Lovejoy. The executors, acting with the surviving partner, presumably meddled with and diverted assets of the old firm, which the surviving partners should have applied in payment of the plaintiff's debt. But, instead of doing this, the executors joined with Farnham in executing to plaintiff their note for his debt, not in their official name as executors, but in the name of Farnham & Lovejoy. They subsequently joined with Farnham in executing a composition agreement with the creditors of the old firm of Farnham & Lovejoy, which agreement they failed to perform. Surely, under these circumstances, it should not be presumed that there was no consideration for the undertakings of these defendants in these matters, merely because they were executors of the estate of Lovejoy.

Both parties have argued the demurrer to this answer on the theory that the only question is whether or not the administrator has, by the note in suit, bound himself personally to pay the debt of his testator; while it seems to us that the answer clearly shows that this debt had ceased to be a debt of the testator or a liability against his estate long before the administrator signed the note in suit. If this is true, he could not (as could the original debtor) by his promise, without a new consideration, revive a debt barred by the statute of limitations. But the answer alleges that, at the time of his death, the testator was under guardianship, and plaintiff then held the notes of the guardians for this debt; that, when the note in suit was made, plaintiff "still held the notes of said guardians, or a note given solely in renewal of the same;" and that this was the debt for which the note in suit was given. The answer of the administrator can be considered only as a plea of want of consideration for the making of the note in suit, but it does not appear by his answer that the debt in question did not continue to be a valid debt against the guardians or the person or persons who made the note "given solely in renewal" of their note. The burden was on the defendant to show want of consideration for his note, but he has not shown that the debt did not continue to be the debt of some one else after it had ceased to be the debt of the estate of Langevin. Whether or not the guardians could, by their note, without a new consideration and without assets, bind themselves to pay the debt of their ward, we need not consider. The probate court may have provided for that purpose assets which they already had in their hands, or they may have received a new consideration for the making of the note, or the consideration for

it may have originally been received by them as guardians, and not by the ward before guardianship. The defendant has not shown that there was no consideration for any of those prior notes, and we must presume that there was a sufficient consideration for them. Then it must be held that the note in suit was not given for a debt of the estate or of the testator, but a debt of these guardians or of those who made a note in renewal of their notes. Then the question resolves itself into this: Has the defendant administrator, by the note in suit, become bound to pay the debt of these third parties? It does not appear by his answer whether or not, as a consideration for the note in suit, the time of payment of this debt has been extended. Such extension of the time of payment would be a sufficient consideration for the promise of a surety, if this can be considered such a promise. See *Nichols & S. Co. v. Dedrick* (Minn.) 68 N. W. Rep. 1110. It is not alleged in the answer that no such extension was given, and, if such extension would be a sufficient consideration for the note in suit, it must be presumed that it was given. But, while such consideration is sufficient to support the promise which the party intended to make, we are of the opinion that it is not a sufficiently adequate consideration to warrant the court in making a new contract for the parties, and, by a fiction of law, hold the administrator liable on a promise which he never intended to make. We cannot see that

the words "or either of us," in the note in suit, after the words, "the estate of E. Langevin," have any tendency to show that the defendant administrator intended to bind himself personally.

For these reasons, we are of the opinion that the answer of the administrator stated a good defense, and that the court below erred in sustaining the demurrer to the same.

But the other defendants promised in their own right, and, from what we have said, there may be sufficient consideration, by such an extension of the time of payment of the debt, to support their promise. These defendants allege nothing that is not alleged in the answer of the administrator, and, while they do not allege as much as is alleged in that answer, still they refer to that answer, and make it a part of their own. Whether this is an irregular mode of pleading we need not consider. No objection is taken to it, and we shall therefore regard both answers as substantially the same. We are therefore of the opinion that the answer of these other defendants states no defense.

This disposes of the case.

The order appealed from, so far as it sustains the demurrers to the answer of the defendant Achille Michaud, is reversed, and, so far as it sustains the demurrers to the answer of other defendants, is affirmed.

Rehearing denied.

ILLINOIS SUPREME COURT.

INDIANA, ILLINOIS, & IOWA RAILROAD COMPANY *Appl.*,

v.

Frederick O. SWANNELL *et al.*

(187 Ill. 618.)

1. A trustee for railroad bondholders to purchase at a foreclosure sale under a reorganization scheme, though entitled to abandon the sale because of the failure of a sufficient number of bondholders to pay assessments made, is bound by all the terms of his trust, where, notwithstanding such failure, he proceeds to complete the purchase made as such trustee, until he is released therefrom by the bondholders.
2. Property purchased under a scheme for reorganization of a railroad, by a trustee for bondholders, may be followed by the latter into the hands of a purchaser from such trustee with knowledge of the trust.
3. A railroad company is chargeable with the knowledge of its president and director that property purchased by it is impressed with a trust in favor of the holders of bonds issued by the former owner of such property.

NOTE.—On the general subject of following trust funds, see *Philadelphia Nat. Bank v. Dowd* (C. D. E. D. N. C.) 2 L. R. A. 480, and *note*; *Little v. Chadwick* (Mass.) 7 L. R. A. 570, and *note*; also *Leake v. Watson* (Conn.) 3 L. R. A. 666.
30 L. R. A.

4. A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchases, even though he is a purchaser for a valuable consideration.
5. A money judgment is properly rendered against a railroad company purchasing from a trustee for bondholders a railroad bought in by him under a reorganization scheme, with notice of the trust, by which the bondholders were entitled to new bonds secured by mortgage, where it refuses to comply with an interlocutory decree directing it to issue such bonds, although stock in a construction company was given in consideration of such purchase, which was at one time of great value, but has greatly depreciated.
6. The beneficiary in a trust is not bound to enforce an individual liability against a trustee who has disposed of the trust property in an improper manner, but has the alternative remedy of following the trust property.
7. A release by a bondholder of the trustee in a reorganization agreement from all further duty or liability, and a waiver of all rights attained through or by him, will not preclude such bondholder from following the railroad property purchased by such trustee in his official capacity and transferred by him to another company.
8. The return of bonds by a trustee

for bondholders under an arrangement for the reorganization of a railroad, to a bondholder upon an order receipting in full for the bonds and discharging the trustee from all liability, does not release the equities that such bondholder has in the property purchased by such trustee under the arrangement and transferred by him to another company.

9. **Property purchased by a trustee for bondholders under an arrangement for the reorganization of a railroad** is not discharged from the trust, where such trustee does not abandon his bid, but procures the confirmation of the sale to himself and the vesting in him of the title to the property, as to bondholders who fail to pay assessments, release the trustee from liability, and accept a return of their bonds or a portion of the assessments paid,—especially where the reorganization plan makes no provision for forfeiting the interest of bondholders, but provides that their shares of the purchase money may be borrowed or otherwise provided, and in default of payment within a specified time the interests of such bondholders may be sold.

10. **All the bondholders (who are parties to an agreement for the reorganization of a railroad, by which a trustee was appointed to purchase the road at foreclosure sale, have a beneficial interest in the property purchased by such trustee, and are in equity to be regarded as the real owners of it as tenants in common; and any of them are entitled to relief in a suit by one of them for himself and others similarly situated to enforce the trust against a purchaser from the trustee, where the only differences in their situation are such as do not release the property from the trust.**

(October 11, 1895.)

APP^EAL by defendant from a judgment of the Appellate Court, First District, modifying and affirming as modified a judgment of the Circuit Court for Cook County in favor of plaintiffs in an action brought to hold certain property in the hands of defendant subject to a trust in favor of plaintiffs. *Affirmed.*

Statement by **Baker, J. :**

The Kankakee & Pacific Railroad Company, being a corporation originally created by and under the laws of the state of Indiana, with power to locate and operate a road from Plymouth, in the state of Indiana, westerly to the boundary line of the state of Illinois, was consolidated with a company organized under the laws of the state of Illinois; the name of the consolidated company being the Plymouth, Kankakee, & Pacific Railroad Company, with a capital stock of \$2,500,000. Said railroad company proceeded to procure a right of way, and partially constructed its railroad, and made large outlays of money for the purchase of material and payment of labor. On the 1st day of June, 1871, the Plymouth, Kankakee, & Pacific Railroad Company executed 3,600 bonds, each for the sum of \$1,000, due in thirty years, and to secure the same executed a trust deed conveying all and singular its line of railroad and all its property in trust to J. Edgar Thompson and George W. Cass, of the state of Pennsylvania. Of said bonds 398 were negotiated and sold to various parties. Thereafter, default in the payment of

interest having been made, Samuel T. Hanna and several other bondholders filed a bill, on the 25th day of July, 1874, in the United States circuit court for the northern district of Illinois, for the purpose of foreclosing the said trust deed. On the 4th day of August, 1876, a decree was entered in said cause, which decree provided, among other things, that said railroad company should pay the amount found due on said bonds, and that, in default of such payment, the property described in the said trust deed should be sold by the master in chancery of said court, and the proceeds of such sale applied to the payment of the bonds and coupons described in said decree. Thereupon the property covered by said trust deed was, in pursuance of such decree, on the 12th day of June, 1877, offered for sale by Henry W. Bishop, a master in chancery of said court, the report of the sale of the master, filed June 10, 1878, containing the following statement: "At which sale Mr. John C. Cushman, trustee for bondholders, bid the sum of \$4,000, that sum being the highest sum bid for the same, and he being the highest bidder; and I further report that said bid has not yet been complied with, and respectfully ask of the court further directions herein." Prior to the property being offered for sale, a portion of the holders of said bonds had made an arrangement under which said John C. Cushman was to bid in the property for the use and benefit of such of the bondholders as might come in and become parties to such arrangement. Such arrangement contemplated a reorganization, the issuance of new bonds to the old bondholders, and the payment of a small sum upon each of the bonds to defray the necessary expenses attending upon such arrangement. No further proceedings were had in said cause until February, 1881, at which time the said Cushman and one Joel D. Harvey filed in said United States circuit court their petition asking that said Cushman be allowed to complete his bid and receive a deed for said property; and on the 8d day of May, 1881, the said circuit court confirmed said sale to said Cushman, and ordered the said master to execute and deliver a deed to him of said property, and a deed thereof was, on the same day, in pursuance of said order, executed and delivered to said Cushman. On the 11th of July, 1881, said Cushman conveyed said property to appellant, the Indiana, Illinois, & Iowa Railroad Company. He took from Harvey, who had become the owner of the greater portion of the bonds for which the foreclosure was had, an indemnifying bond which, among other things, provided that said Harvey should hold Cushman harmless against all loss, costs, damage, and expenses to which said bondholders or any other person might seek to subject him (Cushman) by reason of such conveyance, and to pay all judgments, costs, and expenses that might be awarded or rendered against him (Cushman) in any court of final or general jurisdiction, in any suit or proceeding growing out of such conveyance, or of his trusteeship for the holder of any bond of the Plymouth, Kankakee, & Pacific Railroad Company. In consideration of the convey-

ance to the Indiana, Illinois, & Iowa Railroad Company, Harvey received, according to his testimony, about \$150,000 of the stock of a company known as the "Western Air Line Construction Company." Under an order of reference made by the court in the case at bar, the master found that the new bonds which the respective bondholders were to receive by the terms of the reorganization contemplated by the arrangement under which said Cushman made his bid at the master's sale would, if they had been issued, be worth 88 cents on the dollar,—or, in other words, that if the plan of reorganization had been carried out, the bondholders of the Plymouth, Kankakee, & Pacific Railroad Company would have received for the bonds which they held other bonds of the same amount, and now actually worth 88 cents on the dollar.

The original bill in the case at bar was filed by William G. Swannell, since deceased. His executors, Frederick Swannell and Frederick O. Swannell, have been substituted, pending the litigation, in his place and stead. Said original bill charges that, subsequent to the decree of foreclosure in the United States circuit court, and to the bid of Cushman at the master's sale, and before the confirmation of such sale, said Harvey purchased a large number of said bonds for a nominal sum, and that Cushman and Harvey conspired together to obtain the property and to defraud Swannell, who filed the bill as a holder of some of the bonds secured by said trust deed, and also to defraud other holders of said bonds of their proportion in the said property, mortgaged as aforesaid. The bill charges that, at the time Cushman conveyed the property, as aforesaid, it was of sufficient value to pay the bonds of Swannell and the other bondholders in full, but that complainant never received anything from the proceeds of said sale. The suit was brought by Swannell on behalf of himself and other holders of the bonds similarly situated who might desire to become parties and share the benefits of the suit. The prayer of the bill is that the title acquired by Cushman shall be declared to be in trust for all the bondholders, and that the conveyance from Cushman to the Indiana, Illinois, & Iowa Railroad Company shall be charged with the same trusts, and be held in trust for Swannell and the said other bondholders, and that the said railroad company shall be decreed to deliver new bonds in equal amounts, according to the plan of reorganization. And the bill contains, also, a prayer for general relief. During the progress of the cause various intervening petitions were filed,—one by Patrick Dore, the owner of seven of the bonds; another by Samuel W. Strong, owner of three of the bonds; and still another by Henry M. Hooker, the owner of twenty-five of the bonds. The original bill and the intervening petitions were all referred to a master in chancery to take testimony and report the same, together with his findings and conclusions, to the court. The master reported in favor of granting relief upon the original bill, in favor of Frederick Swannell and Frederick O. Swannell, executors of the last will and testament of William G.

Swannell, deceased; but he recommended that relief be denied upon the intervening petitions of Dore, Strong, and Hooker, respectively. The circuit court of Cook county sustained the exceptions of Dore to the report of the master, and overruled those of Strong and Hooker, respectively, to said report. And thereupon said court entered a final decree that Frederick Swannell and Frederick O. Swannell, executors of William G. Swannell, deceased, recover of the Indiana, Illinois, & Iowa Railroad Company the principal sum of \$825, with interest thereon at 6 per cent per annum from October 25, 1891, such interest amounting to \$96.80, and the total of principal and interest amounting to \$921.80, and that they have execution therefor; that Patrick Dore recover of said Indiana, Illinois, & Iowa Railroad Company the principal sum of \$2,810, with interest thereon at 6 per cent per annum from October 26, 1891, such interest amounting to \$271, and the total of principal and interest amounting to \$3,081, and that he have execution therefor; and that the petitions of Samuel W. Strong and Henry M. Hooker, severally and respectively, be dismissed. From the decree thus rendered, the Indiana, Illinois, & Iowa Railroad Company, Samuel W. Strong, and Henry M. Hooker each appealed to the appellate court for the first district, and assigned errors, and such proceedings were had in the appellate court as that the decree of the circuit court was reversed, and the cause remanded to that court, with directions to enter a decree in favor of Samuel W. Strong against the Indiana, Illinois, & Iowa Railroad Company for 88 cents on the dollar of the par value of three bonds of \$1,000 each, less the sum of \$12, being for the sum of \$978, with interest thereon at 5 per cent per annum from the 21st day of October, 1891; and to enter a decree in favor of Henry M. Hooker against the Indiana, Illinois, & Iowa Railroad Company for 88 cents on the dollar of the par value of twenty-five bonds of \$1,000 each, less the sum of \$225, with interest at 5 per cent per annum, being for the sum of \$8,025, with interest thereon at 5 per cent per annum from the 21st day of October, 1891; and to render decrees in favor of the executors of Swannell and said Dore, respectively, for the principal amount severally found for said executors, and for the principal amount severally found for the said Dore, with interest thereon in each case at the rate of 5 per cent per annum from the 21st day of October, 1891, instead of the rate of 6 per cent per annum, as directed by the decree appealed from. And the appellate court also made an order in regard to the apportionment and taxing of the costs of that court. The Indiana, Illinois, & Iowa Railroad Company now prosecutes this appeal from the order and judgment of the appellate court.

Messrs. Walker & Eddy for appellant:

It cannot be fairly held that the inadequacy of price was, of itself, notice that this property was purchased by Cushman in trust for the bondholders.

Wade, Notice, § 24.

The foreclosure record was not sufficient notice to the appellant that Cushman's title in the property was that of mere trustee; nor was it by any means notice of the equities now attempted to be asserted by the appellees.

It cannot be said that appellees still regarded Cushman as their trustee, for notice had been given them of the plan of reorganization, and those who had not failed or refused to comply with the request of Cushman, as set forth in the circular letter long prior to the last order of the court, had withdrawn their bonds from Cushman and expressly released him from all trusts in the property.

The word "trustee" attached to a name is merely descriptive, and does not limit liability or authority, and is not notice of a trust.

Powers v. Briggs, 79 Ill. 493, 22 Am. Rep. 175; *Allen v. Woodruff*, 96 Ill. 24.

A purchaser is protected against secret trusts or equities of a former owner.

McDavid v. Call, 111 Ill. 804.

Where one purchases at a judicial sale he will be protected if the record shows jurisdiction of parties and subject-matter, a valid judgment or decree, and execution of the same, whatever errors may intervene in the proceedings.

Goudy v. Hall, 36 Ill. 313, 37 Am. Dec. 217; *Hobson v. Ewan*, 62 Ill. 146.

We are not required to search the court records, or affected with notice of what they contain; we may, if we choose, run the risk of there being jurisdictional defects; and if we do not in fact search the court records, we are not affected with notice of what they contain.

Choteau v. Jones, 11 Ill. 800, 50 Am. Dec. 460; *Anthony v. Wheeler*, 130 Ill. 128; *Bourland v. Peoria County*, 16 Ill. 538; *Bates v. Rankin*, 77 Ill. 289; *Wade*, Notice, 2 ed. § 95.

The rule requiring a purchaser of property held upon trust to see to the application of the purchase money among the *cestui que trust* does not apply where the trustee has express or implied power to receive the consideration for the sale on behalf of the *cestui que trust*.

Perry, Tr. §§ 791-793.

Messrs. Thomas P. Bonfield, G. Frank White, George W. Cass, and Dent & Whitman, for appellees:

The privity between the complainants, the community of interest in the subject-matter, the fact that Cushman was the trustee of each of them in one entire piece of property which, although they had separate and distinct interests in it, belonged to them as equitable tenants in common, and that in Cushman's administration of this property he had defrauded them,—meet the requirements as to community of interests.

Pom. Eq. Jur. § 269; New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592; *Black v. Shreve*, 7 N. J. Eq. 440; *Langdon v. Branch*, 37 Fed. Rep. 449, 3 L. R. A. 130; *Walker v. Matthews*, 58 Ill. 196.

If it were true that the claims of Strong and Hooker were objectionable on account of their being multifarious in joining them with Swannell's cause of action, that question should have been raised when the petitions were filed.

Story, Eq. Pl. § 271; *Henderson v. Cummings*, 44 Ill. 325; *Labadie v. Hewitt*, 85 Ill. 341; *Briggs v. Sperry*, 95 U. S. 405, 24 L. ed. 30 L. R. A.

891; 1 Dan. Ch. Pr. revised ed. 352; *Nelson v. Hill*, 46 U. S. 5 How. 132, 12 L. ed. 83; *Oliver v. Piatt*, 44 U. S. 8 How. 412, 11 L. ed. 658.

Baker, J., delivered the opinion of the court:

There being some differences in the particular circumstances of the case as made by the executors of Swannell, and those made by Dore, Strong, and Hooker, respectively, the merits of the case made by each may, to some extent, properly and conveniently be separately considered; and this may be done without repeating, in respect to each of the cases, facts and rules of law or equity that are stated in regard to one case, and that are equally applicable to the cases of some or all of the other appellees.

1. It seems to us that three questions only arise in regard to the decree in favor of the Swannells. They are these: Did John C. Cushman hold the title to the property, at the time he conveyed it to appellant, as trustee for William G. Swannell and other bondholders? Did appellant acquire such title from Cushman with notice of this trust, and therefore take the same subject to the equities of Swannell? Was it proper to render a money decree in favor of the executors and against appellant?

John C. Cushman, at the sale made by the master in chancery, under the foreclosure decree in the circuit court of the United States for the northern district of Illinois, bid in all the property of the Plymouth, Kankakee, & Pacific Railroad Company as trustee for the bondholders, and he made such purchase in pursuance of a trust agreement, made previous to the day of said master's sale, between him and the holders of 883 bonds out of 898 bonds of said railroad company. In this trust agreement there was embodied a plan of reorganization whereby the old bondholders were to receive bonds in a new company to be organized by the said Cushman, and to be secured on the same property, such bonds to be issued to the extent of \$23,000 per mile; the old bondholders simply obligating themselves to pay to said trustee, when called upon, their proportions of the expense and costs incurred in the foreclosure proceeding and in the organization of a new company, in the manner provided by the terms of said trust agreement. Nearly all the bondholders signed this trust agreement previous to the sale, and although Cushman bid off the property at the master's sale as trustee for the bondholders, it appears that a majority of the original holders of said bonds afterwards failed to pay the assessments made upon them for their respective proportions of the costs of the foreclosure sale and reorganization, and it is therefore claimed by appellant that the said Cushman was absolved from the obligation and burden assumed by him under the terms of said trust. Cushman had a right to abandon the sale, and to refuse to complete the same, because of the failure of a sufficient number of bondholders to respond to his call for their shares of the assessment. This would have left the mortgaged property still under the lien, and subject to the equities of Swannell and the

other bondholders. A resale could have been had under the decree, and the value of the property thereby applied in payment of their demands. But having, however, bid off the property as trustee for Swannell and others, and having proceeded to complete the purchase made by him as their trustee, he must be held to be absolutely bound by all the terms of said trust until released therefrom by the appellee, Swannell, and the other bondholders. Swannell entered into this trust agreement and delivered his bonds to Cushman. He paid all assessments made upon him by Cushman as such trustee, and the money so paid by Swannell to Cushman was actually and in fact retained and used by Cushman to make up the sum of money necessary to complete the purchase made by him at the master's sale; and Swannell never withdrew his bonds, or received back from Cushman any portion of the assessments paid to him as trustee to perfect such sale, and never in any manner released Cushman from any of the duties or obligations imposed upon him by the trust agreement entered into between them prior to the day of said master's sale. Cushman could not, therefore, divest himself of any of the obligations imposed by said trust agreement without Swannell's consent. The matter of the relation existing between John C. Cushman and Joel D. Harvey, respectively, and the bondholders who had placed their bonds in the hands of Cushman, was before this court in *Cushman v. Bonfield*, 139 Ill. 219. We there held that Cushman had bid off the property, rights, and franchises of the Plymouth, Kankakee, & Pacific Railroad Company as trustee of such bondholders, and that the trust created was impressed upon and followed the title, which was subsequently perfected in Cushman by the execution of the master's deed made in pursuance of such sale, and continued up to the time of the conveyances by which the railroad property became vested in the Indiana, Illinois, & Iowa Railroad Company; and also held that it was fairly to be inferred, from the terms of the indemnity bonds given by Harvey to Cushman at the time the latter conveyed the property to the Indiana, Illinois, & Iowa Railroad Company, as well as otherwise clearly shown by the evidence, that Harvey had full knowledge of the trust reposed in Cushman, and of the equitable interests of Bonfield and the other bondholders in the property, and that said Harvey having in his possession the proceeds of trust property, the law charges him also as trustee, and holds him accountable as such. And we may here add that the case appearing in this record in favor of Swannell is in all respects like the case made out for Bonfield in the former litigation, the only substantial difference being that there the relief was granted against Cushman and Harvey personally, while here the decree went against the appellant corporation.

This brings us to the question whether the Indiana, Illinois, & Iowa Railroad Company had notice of the trust and of the restrictions and limitations upon the title of Cushman, at the time that it received the conveyance of the property from him. The record shows

that said railroad company was organized on July 8, 1881; that it was organized by Harvey for the express purpose of receiving from Cushman title to the property, rights, and franchises of the Plymouth, Kankakee, & Pacific Railroad Company, and that on July 11, 1881,—three days after its organization,—Cushman made to it a quitclaim deed for the same, and on the day the deed was given Harvey executed to Cushman an indemnifying bond, in the sum of \$60,000, conditioned that he would hold Cushman harmless against all loss, cost, damage, or expense to which the bondholders of the Plymouth, Kankakee, & Pacific Railroad Company, or any of them, or any other person or persons, may seek to subject him by reason of the conveyance, and pay all judgments, costs, and expenses incurred, awarded, or rendered against him in any suit or proceeding growing out of the conveyance, or his trusteeship for the holders of any of the bonds of said Plymouth, Kankakee, & Pacific Railroad Company. From the date of the organization of appellant, and at the time Cushman executed to it the quitclaim deed for the trust property, and for many years thereafter, Harvey was a stockholder in and director of the company, and its president. That Harvey had full—even plenary—knowledge of the trust that was imposed upon Cushman, appears so clearly and in so many different ways in this record, that it is useless to waste time in mentioning them. The knowledge of a person who is a director of a corporation, and its chief executive officer, must be regarded as actual notice to the corporation itself. In no better way can notice be imputed to it. The company, then, must be considered to have taken the property covered by the trust with full knowledge of the trust imposed upon it. It had ample notice of the rights and equities of Swannell and the other bondholders, and it cannot now be heard to say that it is an innocent purchaser of the property for value. It took its title under the Cushman conveyance, charged with all the conditions and limitations imposed upon it by the trust agreement between Cushman and the bondholders for whom he undertook to act. The railroad company simply stepped into Cushman's shoes, and Swannell has the right to follow the property and hold the company as his trustee. The doctrine is that a purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased,—and this even though he is a purchaser for a valuable consideration. 2 Pom. Eq. Jur. § 688; 27 Am. & Eng. Enc. Law, pp. 251, 265; *School Trustees v. Kiroin*, 25 Ill. 73; *Fast v. McPherson*, 98 Ill. 496; *Cushman v. Bonfield*, 139 Ill. 219; *Union Mut. L. Ins. Co. v. Slee*, 128 Ill. 57; *Phillips v. South Park Comrs.* 119 Ill. 626.

The remaining question in regard to the Swannell claim has reference to the propriety of a money decree against appellant for the value of bonds such as should have been issued according to the terms of the trust agreement. The circuit court first entered an in-

terlocutory decree that appellant, within sixty days from the date of such decree, execute and deliver bonds such as called for by the original plan of reorganization, secured by mortgages as therein provided; but appellant failed and refused to comply with the requirements of such decree, and thereupon the court entered a final decree against appellant for the value of such bonds as shown by the report of the master and the evidence reported therewith, together with interest from the date of the report, and awarded execution therefor and for costs, as upon a judgment at law. Harvey received, as consideration for the transfer of the property, rights, and franchises of the Plymouth, Kankakee, & Pacific Railroad Company to the Indiana, Illinois, & Iowa Railroad Company, paid-up stock to the amount of \$150,000 in the Western Air Line Construction Company, a corporation formed under the laws of the state of Iowa for the purpose of completing the construction of the railroad in question. According to the testimony of Meckling, an experienced railroad builder, who went over the railroad in 1880 or 1881 at Harvey's request, he and said engineer agreed that the property in its then condition, as left by the Plymouth, Kankakee, & Pacific Railroad Company, was of the value of \$900,000. It appears from the testimony of Harvey that the original capital stock of the construction company was \$1,000,000; that he got \$150,000 of this stock, paid up, for the property of the old railroad company; and that the other parties in interest paid for the residue of the stock in cash; and that said stock was then worth its par value, but it has since so declined in value as that there have been some sales of it as low as 8 cents on the dollar. It would be inequitable and unjust, and a destruction of the contract rights of the bondholders, to now compel them to receive, in satisfaction of their claims, their respective proportionate shares of said \$150,000 construction company stock, that is now almost worthless, on the ground that, in the plan of reorganization, there was direct authority to the trustee to sell and transfer all the right, title, and interest in the property of every bondholder becoming a party to such plan of reorganization, and under that authority it was sold and transferred to appellant for \$150,000 in construction company stock. The power authorizing the trustee to sell and transfer, "providing he shall deem it for our interest to make such transfer," was coupled with the provision that he should "receive for us, in exchange therefor, such securities as are provided by the plan of reorganization hereto annexed for our respective interests in the property purchased." And the securities for which provision was made in the plan of reorganization were that the bondholders should receive new bonds for the principals of their old bonds, secured by a first mortgage on the railroad property, not exceeding \$23,000 per mile of the main track, and second-mortgage or income bonds for the coupons and accrued interest due on their existing first-mortgage bonds. It is suggested that in *Cushman v. Bonfield*, *supra*, it was in effect held that the purchase price received by Harvey, as the

value of the property at the time of the conversion, was a trust fund to be held for distribution among all the bondholders in accordance with their respective equities, and the intimation seems to be that that case is an authority that the particular relief granted in this case is improper. The *Bonfield Case* establishes that a personal decree against Harvey and Cushman was proper relief for a court of chancery to grant, but it was not there held that it was the only relief admissible under the circumstances of the transaction. The beneficiary in a trust is not bound to enforce an individual liability against the trustee, for he has the alternative remedy of following the trust property. *Bradley v. Luce*, 99 Ill. 234; *Long v. Fox*, 100 Ill. 48; *Breit v. Yeaton*, 101 Ill. 242, 27 Am. & Eng. Enc. Law, p. 261, and authorities cited in note 4. In the *Bonfield Case* the chancellor granted one mode of relief, while in this case he allowed appellees to follow the property into the hands of appellant.

2. In the matter of the intervening petition of Partick Dore, it appears that Dore, the owner of seven bonds, became a party to the trust agreement of November 21, 1876, and duly executed and delivered to Cushman a power of attorney authorizing him to act in respect to said bonds, in purchasing the property, and disposing of the same; that he delivered said bonds to Cushman, and paid to him the two assessments called for, to be used in perfecting title in Cushman for the benefit of the bondholders, said assessments amounting to \$35 and \$28, respectively, and Cushman testifies that this money, so received, "was used in the costs and expenses of the foreclosure proceedings in the United States court." The sole and only difference between the case of Dore and that of Swannell is that, on July 9, 1881, Cushman handed back to Dore his seven bonds, and took from him a receipt and discharge which reads as follows:

"Chicago, Ill. July 9, 1881.

"I have this day received from John C. Cushman seven first-mortgage bonds of the Plymouth, Kankakee, & Pacific Railroad Company, numbered 440, 441, 443, 444, 445, 448, and 449, with interest coupons thereto attached, numbered from 6 to 60, inclusive. And I hereby release said Cushman from all further duty or liability in connection therewith, as my attorney or representative, and agree to hold him harmless therein, and waive all rights that I may have attained through or by him."

It appears that Cushman tried to induce Dore to assign his interests to Harvey for \$418, but that Dore refused to accept the offer, saying he would rather lose it all. Cushman told him that he had nothing more to do with the road, that he could do nothing more for him, and for him to go and see Harvey, and gave him Harvey's address. Thereupon Dore demanded his bonds, and they were delivered to him upon his signing the receipt in question. It is manifest from the evidence that, when he received his bonds back from Cushman, on July 9, 1881, it was his intention and purpose to insist upon his rights, and claim his interest in the property covered by the decree of foreclosure. Even

If effect can be given to the release from further duty and from liability, and to the waiver of rights embodied in the receipt, yet such release and waiver do not affect the equitable rights enforced by the decree herein. The relief granted by the court is not a personal decree against Cushman, and is not an enforcement of his personal liability as trustee; and the rights which the decree enforces are not rights or equities which Dore obtained by or through Cushman, but rights and equities which were vested in Dore under and by virtue of the mortgage and decree of foreclosure. Wipe out the bid of Cushman, and the acts done by him, yet the equities of Dore in the property of the Plymouth, Kankakee, & Pacific Railroad Company still exist, and the fact still remains that appellant has converted that property to its own use, with full notice and knowledge of such equities.

The difference between the case of Samuel W. Strong and that of Dore is this: Both the assessments paid by the latter were used in perfecting the title in Cushman, while, of the two assessments paid by Strong, one, that for \$15, was so used, while the other, \$12, was returned to Pearre, the agent of Strong. The circumstances under which this was done may be stated. Strong gave to Pearre a written order as follows:

"You will please deliver to L. G. Pearre, Esq., on presentation of this order, which shall be your receipt in full and a complete discharge from all liability, three first-mortgage bonds of the Plymouth, Kankakee, & Pacific Railroad Company, being numbers 426, 427, and 366, for \$1,000 each, and coupons thereto attached, together with the power of attorney authorizing you to act as trustee to represent said bonds."

Cushman swears that he drafted this order, and that Strong had frequently talked with him, and knew that the plan of reorganization had completely failed. Of course, the discharge from liability in this order did not work the result of releasing the equities that Strong, as a bondholder, had in the property and under the decree. If it be urged that the Swannell suit was brought only on behalf of himself and such other holders of the bonds of the Plymouth, Kankakee, & Pacific Railroad Company as are similarly situated, and that said suit proceeds directly upon the theory of the trust agreement made between Cushman and the bondholders, and that, therefore, these general equities of Dore and of Strong in the railroad property, and under the decree of foreclosure, do not arise and are not involved in the original suit of Swannell, and consequently not here enforceable, we may say that we regard what is hereinafter said in respect to the intervening petition of Henry M. Hooker, and in respect to the cases made on the petitions of Dore and of Strong, as conclusive against any such suggestions or result.

It appears that the Third National Bank of Chicago formerly held the twenty-five bonds which its receiver afterwards sold to Hooker, and which Hooker now owns. The bank was a party to the trust agreement, and gave to Cushman a power of attorney authorizing

him to purchase the railroad property at the master's sale for its benefit, and to receive for it new bonds in a reorganized company, and delivered to him said twenty-five bonds. Cushman, on January 12, 1877, acting under the trust agreement, bid \$4,000 for the property at the master's sale, that being deemed sufficient to pay costs and expenses, and it was struck off to him as trustee of the bondholders. He bid in the property for the benefit of the bank, as well as for the benefit of other stockholders. Neither of the two assessments made on the bank was paid, either by the bank or the receiver. Quite a considerable time thereafter Cushman returned the bonds and the power of attorney to the receiver. There was no rescission of the trust agreement, either as to the assignor of Hooker, or Strong, or Dore. Neither the return of the bonds and the powers of attorney to the receiver for the bank, to Strong and to Dore, respectively, nor the restitution to Strong of the \$12 received for the last assessment, nor the failure of the bank and its receiver to respond to assessments, nor the release and discharge contained in the order signed by Strong, nor the release and the waiver of rights embodied in the receipt of Dore,—worked such a rescission as to the rights and interests of either of the interveners. It is a fundamental condition of the law governing the rescission of contracts that the parties must be restored to their original positions as nearly as possible. Cushman could not retain his bid, made in his capacity of trustee of Dore, Strong, the bank, and other creditors, and his claim upon the property of the railroad company, obtained by means of the powers of attorney and the trust agreement, and yet successfully maintain that the contract and agreement between him and said bondholders were rescinded and the trust relations existing between him and them at an end. He could not shake off the trust without abandoning his bid and all claim to the property. This he did not do, but procured a confirmation of the sale to himself, and a vesting in himself of the title to the property which was the subject of the trust. If he had thrown up his bid and abandoned all claim to the property, then these intervening bondholders, and the other bondholders in whose interest the mortgage was foreclosed, could readily have procured a resale of the property and the application of the proceeds of such sale in payment of their bonds. The plan of reorganization and the powers of attorney defined the relations between the holders of the bonds and Cushman, and gave Cushman whatever interest he had in the property, and whatever power he had in the event any of the bondholders failed in making payment of assessments for costs, expenses, and fees. This plan of reorganization, and these powers of attorney made no provision by virtue of which Cushman could forfeit the rights and interests of any of the bondholders who were parties to the trust agreement. The authority given to enforce payment of assessments is carefully and specifically pointed out in item 4 of the plan of reorganization. It is there provided that the trustee may borrow the *pro rata* shares of

bondholders who fail to pay their shares of the purchase money, "or any other person may provide the same, and any sum so borrowed or provided for such purpose shall be repaid, with interest at the rate of 10 per cent per annum by the bondholders for whose benefit it was borrowed or provided, before he shall be entitled to receive any bonds or other proceeds of such sale from said trustee; and should such sum, with interest, remain due and unpaid for one year from the date of its advancement, said trustee shall, upon demand by the party making such advance, sell the interest of said bondholders in the proceeds of said sale at public auction, giving ten days' notice thereof in some daily newspaper of the city of Chicago, of the time and place of sale, to the highest bidder thereof for cash, and after paying costs of such sale, and the money and interest thereon before advanced, said trustee shall pay the residue, if any, to said bondholder, or his legal representative, on demand." It is claimed that the equities of Dore, Strong, and Hooker are not the same as the equitable rights of Swannell, and that, therefore, they

cannot come in under his bill, and are not entitled to the same relief. We think that the gist of the original bill is the relation of trustee and *cestuis que trust* that existed between Cushman and the bondholders by virtue of the powers of attorney and the plan of reorganization, the violation of the trust, and the transfer of the property, with notice, to appellant. All the bondholders who were parties to the trust agreement had a beneficial interest in this property,—were in equity the real owners of it, and in equity to be regarded as tenants in common. The differences between the cases of Swannell, Dore, Strong, and Hooker we regard as simply differences in the immaterial circumstances of each particular case. There is such a community of right and interest among the appellees in the question at issue, and in the remedy, as makes it admissible that the intervening petitioners should come in under the original bill of Swannell. Pom. Eq. Jur. § 269; *Walker v. Matthews*, 58 Ill. 196; *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 590. *The judgment of the Appellate Court is affirmed.*

UTAH SUPREME COURT.

Joseph KRANTZ, *Appt.*,
v.

RIO GRANDE WESTERN RAILWAY
CO., *Resp't.*

(.....Utah.....)

1. A railroad company owes no duty to a passenger as such after he alights from the train at a station and proceeds towards a section house connected with the station, for the purpose of engaging in his regular business as a peddler.
2. A railroad company is liable for an injury to a person in one of its station houses in a sparsely settled country, although he was not an intending passenger, caused by one of the employees of such company aided by strangers, without any provocation, in the presence of the ticket agent, who represented the company and made no effort to prevent the injury.
3. A correct verdict will not be set aside because of errors occurring on the trial.

(August 31, 1895.)

APPEAL by plaintiff from a judgment of the District Court for the Third District in favor of defendant in an action brought to recover damages for an assault committed on plaintiff by defendant's servant. *Reversed.*

The facts are stated in the opinion.

NOTE.—The above case is believed to be a novel one on the subject of liability for injuries to person in depot. Another unusual case is *Dean v. St. Paul Union Depot Co.* (Minn.) 5 L. R. A. 442.

On the general subject of a carrier's liability for assault upon a passenger, see note to *Davis v. Houghtelin* (Neb.) 14 L. R. A. 737.

30 L. R. A.

Messrs. E. W. Taylor and C. S. Varian,
for appellant:

Appellant was a passenger when assaulted. In any event the question was for the jury.

It is not necessary that the contract for passage should be actually made or the fare actually paid, nor that a person should be on the train, to create the relation. If he is on the premises of the carrier, or in a vehicle under its control to the station, with the bona fide intent to become a passenger, the carrier owes to him a duty as such.

2 Wood, Railway Law, pp. 1087, 1045, 1046 *et seq.*; Thomp. Carr. 1st ed. p. 48; Hutchinson, Carr. §§ 557a, 565; Pierce, Railroads, 275; *Hamilton v. Texas & P. R. Co.* 64 Tex. 251, 58 Am. Rep. 756; *Gordon v. Grand Street & N. R. Co.* 40 Barb. 546; *Cleveland v. New Jersey S. B. Co.* 63 N. Y. 306; *Hurt v. Southern R. Co.* 40 Miss. 391; *Allender v. Chicago, R. I. & P. R. Co.* 37 Iowa, 270; *Harris v. Stebens*, 31 Vt. 79, 73 Am. Dec. 340; *Grimes v. Pennsylvania R. Co.* 36 Fed. Rep. 72; *Brien v. Bennett*, 8 Car. & P. 724; *Buffett v. Troy & B. R. Co.* 40 N. Y. 171; *Norfolk & W. R. Co. v. Galliher*, 59 Va. 639; *Rogers v. Kennebec S. B. Co.* 86 Me. 261, 25 L. R. A. 491; *Longmore v. Great Western R. Co.* 19 C. B. N. S. 188; *Waller v. Missouri, K. & T. R. Co.* 59 Mo. App. 411.

The respondent is liable to a passenger—or one intending in good faith to become such—absolutely for the acts of its own servants, and relatively for those of strangers.

2 Wood, Railway Law, p. 1194; Thomp. Carr. pp. 383, 364; *Craker v. Chicago & N. W. R. Co.* 86 Wis. 658, 17 Am. Rep. 504; *Wright v. Chicago, B. & Q. R. Co.* 4 Colo. App. 102; *Godard v. Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39; *Norfolk & W. R. Co. v. Galliher, supra*; *Evansville & I. R. Co. v. Darting*, 6 Ind. App.

375; *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 590, 48 Am. Rep. 185; *Hanson v. European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 469, 60 Am. Rep. 878; *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 26, 35 L. ed. 924.

The company had delegated its powers over the premises to the station agent, and is held to be present in his person.

Com. v. Power, 7 Met. 601, 41 Am. Dec. 465; 1 Wood, Railway Law, p. 450.

The duty of the agent was plain. He should have led the way in protecting appellant. At least he should have made an earnest endeavor to do so, bringing all the authority with which he was clothed into action.

Pittsburgh, Ft. W. & C. R. Co. v. Hinds, 53 Pa. 512, 91 Am. Dec. 224; *New Orleans, St. L. & O. R. Co. v. Burke*, 58 Miss. 227, 24 Am. Rep. 689.

When the liability of the master depends on the sole fact that the person inflicting the injury was in some business his servant, if on inquiry it is found that the act was not done while in the transaction of the master's business then the act is not that of the master but of the servant. But this rule cannot be applied when the master, either by contract or by reason of imperative duty imposed by law or public policy, is under obligations to protect the injured person from the servant's wrongful act as well as his own. In such case the master is liable—at least, to make actual compensation—as though the act was his own personal act.

Dillingham v. Russell, 73 Tex. 47, 3 L. R. A. 634; *New Orleans & N. E. R. Co. v. Jones*, 142 U. S. 27, 35 L. ed. 924.

The position of defendant is that, having permitted the servant of the company, acting with strangers, to force appellant into a situation whereby he lost his money, upon his return to renew his claim for protection and transportation respondent owed him no duty. We fail to see why the rule as to gratuitous passengers would not apply in all its force to this case, even upon the assumption that appellant had no money.

Hutchinson, Carr. § 566; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 14 L. ed. 502; *Rogers v. Kennedec S. B. Co.* 86 Me. 261, 25 L. R. A. 491.

Messrs. Bennett, Marshall, & Bradley, for respondent:

The duty of railway companies to persons who come to their stations as passengers is twofold:

(a) As the owners of fixed property to guard persons thereon at their invitation from pitfalls and concealed dangers. This duty is not peculiar to common carriers.

(b) To care for the safety of persons who as passengers have surrendered the control of their actions to the carrier.

2 Wood, Railway Law, 2d ed. § 299.

The relation of passenger and carrier ends when the journey contracted for is completed and the passenger has either left the railway-station premises or been afforded a sufficient time to so leave.

Patterson, Railway Accident Law, § 221; *Imhoff v. Chicago & M. R. Co.* 20 Wis. 344.

But if, instead of leaving or attempting to leave, the claimed passenger resumes control 30 L. R. A.

of his own person; stays on the premises of the railway for his own purposes; goes to a portion of the premises clearly not intended for him, and that not in an effort to leave the premises, but with the express intent to there vend his wares,—he has severed the relation that bound them and ceased to be a passenger.

Heintz v. Boston & P. R. Co. 147 Mass. 186; *June v. Boston & A. R. Co.* 158 Mass. 79; *Buckley v. Old Colony R. Co.* 161 Mass. 27; *Allerton v. Boston & M. R. Co.* 146 Mass. 241; *Pittsburgh, C. & St. L. R. Co. v. Krouse*, 80 Ohio St. 223; *Platt v. Forty-Second Street & G. Street Ferry R. Co.* 2 Hun, 124; *Central R. Co. v. Peacock*, 69 Md. 257.

If plaintiff was not then a passenger defendant is not liable for the act of the section foreman.

Cooley, Torts, pp. 625-627; *Patterson, Railway Accident Law*, 117 *et seq.*

A mere indefinite intention to leave by rail some time in the future would scarcely make plaintiff a passenger.

Patterson, Railway Accident Law, 219.

An intending passenger cannot insist on being accepted if he presents himself to the carrier under such circumstances of danger to the passenger as to throw unusual obligations on the carrier.

Pearson v. Duane, 71 U. S. 4 Wall. 605, 18 L. ed. 447; *Webster v. Fitchburg R. Co.* 161 Mass. 298, 24 L. R. A. 521; *Baltimore Traction Co. v. State*, 78 Md. 409.

The intending passenger must make known his intention. The contract must be formed. It is true the payment of fare need not be made. But there must be a promise to pay, with the present liability to comply therewith, and this must be known to the carrier.

Patterson, Railway Accident Law, §§ 214, 218; *Gardner v. New Haven & N. R. Co.* 51 Conn. 143, 50 Am. Rep. 12; *Gilmer v. Higley*, 110 U. S. 47, 28 L. ed. 62; *Atchison & N. R. Co. v. Finn*, 24 Kan. 629; *Hutchinson, Carr.* 2d ed. § 554; *Johnson v. Chicago, R. I. & P. R. Co.* 58 Iowa, 848.

The rule of absolute liability for misconduct of the servants in respect to a passenger only extends to such servants as are charged by the carrier with executing its contract with the passenger and such other servants as may be acting within the scope of their employment.

New Jersey S. B. Co. v. Brockett, 121 U. S. 637, 80 L. ed. 1049; *Mulligan v. New York & R. B. R. Co.* 129 N. Y. 506, 14 L. R. A. 791; *Stewart v. Brooklyn & C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185.

Smith, J., delivered the opinion of the court:

In this cause, appellant, the plaintiff below, brought suit to recover damages on account of alleged personal injuries inflicted by the respondent's servants. There are two counts in the complaint, and upon the trial a verdict was directed for the respondent, the defendant below, upon the first count, and a verdict returned in favor of the appellant, plaintiff below, in the sum of \$4,000 upon the second count. The record discloses the following facts: Upon the 19th of July, 1892, appellant boarded one of the passenger

trains of respondent at the station of Sunny-side, in this territory, and paid his fare to the next station, Lower Crossing, where he alighted from the train. Appellant was fifty-one years of age, and a traveling merchant by occupation, at the time engaged in traveling over the country, selling spectacles. Lower Crossing is simply a station on the line of railway, and its station house, together with the pump house and section house, were embraced, practically, within one inclosure. There was a platform extending from the station house to the section house, which was but a few yards distant. In alighting from the train, in pursuit of his business, plaintiff went towards the section house, for the purpose, as he says, to sell his wares. Before he reached the house, the section foreman, then in the employment of the company, who, it appears, was under the impression that the appellant was a spotter and spy of the respondent company, without provocation or words, assaulted him with a shovel, and drove him back to the station house, following him. The foreman pulled him out of the station house, and ordered him to leave, saying that he would give him five minutes to get away, and threatening him with death unless he obeyed. The ticket agent was present, and saw the foreman assaulting the appellant outside the station house, and saw them back into the waiting room. Plaintiff, fearing further bodily injury, or worse, started to walk on the track away from the station, and towards Grand Junction, some 30 miles away. He was followed by two unknown persons, designated in the testimony as "tramps," who assaulted and robbed him after he had proceeded about a quarter of a mile upon his journey, taking his satchel, containing his stock in trade, together with his pocketbook, containing a few dollars in money. Thereupon he returned to the station house. The persons who robbed him returned also, and, it appears, located themselves at or near the pump house, which was opposite and across the tracks from the station house. Upon his return he entered the station and made complaint to the ticket agent of what had happened, and was talking with him about sending telegrams to Green River station, giving information of the robbery. The section foreman interfered, and directed the ticket agent not to send the telegrams, and immediately after crossed the track to where the two tramps were standing, when all three came over to the station, the foreman in advance, and, entering the waiting room, the three assaulted the appellant, brutally beating him. Appellant appealed to the agent and the bystanders for assistance, which was finally rendered by a stranger, the ticket agent making no effort to protect him, other than, as he says, to order them all out of the waiting room. He testifies that he knew the section foreman, for some reason or other, was bent upon injuring the appellant, and that he did not interfere to protect him because he was sick; that he would have had to fight to protect him; that the foreman was subject to his orders in the station house, but would not mind him, because they were

at outs; that his authority as station agent would not have been sufficient to protect appellant. Appellant was driven from the station, and walked all night to Price station, a distance of forty miles, in his sick and disabled condition, where he received attention. The injuries he received were severe and permanent in their nature. The first count in the complaint charges the respondent company with damages for the first assault upon the appellant by the foreman outside of the station house. The second count charges the company for the assault and beating of the appellant by the foreman and the two tramps in the waiting room after he had been robbed. The district judge charged the jury that, in order to find for the plaintiff upon the second count, they must find "that this man was absolutely a passenger of the defendant company; that the relation of passenger and carrier existed between them at the time of the assault. There is a correlative duty existing on both the passenger and carrier: the passenger to pay, or offer to pay, his fare; if it is accepted, he then becomes a passenger; then the duty of the railroad company is to protect, by all means within its power, during his transportation, and while he remains in the station house in that character, awaiting the coming of a train, or the departure of a train, as the case may be. That relationship existing, it was the duty of the railroad company to protect him from assaults, not only from its own agents and servants, but from other persons, if within their power; more especially from their servants and agents. That correlative duty was imposed on the railroad company, if you find, I say gentlemen, that he was a passenger at that time; and, to become a passenger, he must have paid his fare, or have offered and tendered to pay his fare." A new trial was granted upon the second count, and the plaintiff appeals from the judgment against him on the first count, and from the order granting a new trial.

We are of the opinion that when the plaintiff alighted from the train at Lower Crossing, and made his way towards the section house, for the purpose of engaging in his regular business, his relation as passenger to the respondent company had ceased, and that it no longer owed to him any duty as a passenger; that the acts of the section foreman were not within the scope of his duties or employment, and, not being suffered or permitted by the respondent company, the appellant cannot recover from the company. We do not think that the general rule which permits a passenger a reasonable time in which to depart from the company's premises after alighting from his train has any application, and therefore affirm the judgment upon this appeal upon the first count.

In support of the order granting a new trial, it is urged by respondent's counsel that a motion for a new trial is addressed to the discretion of the trial court, and that, in some particulars, the evidence being conflicting, that court should not disturb the order. It is further claimed that, in order to entitle appellant to the protection of the respondent

company, he must not only have intended to become a passenger, but must also have announced such intention, and his proposition must have been accepted by or on behalf of the company. This view was adopted by the trial court, and the case submitted to the jury upon this theory, and this alone. It is quite evident from the entire record that the new trial was granted because, in the opinion of the trial judge, the appellant was not a passenger or intending passenger within the rule declared in its charge. In other words, the new trial was granted because, in the opinion of the court, the verdict was contrary to the law, and not because of any conflict in the evidence. In the view we take, we are of the opinion that it is unnecessary to determine here when or how the relation of passenger begins. We think the case turns upon another rule of law. It appears from the record that the section house was situated in a desert country, sparsely settled, and with habitations few and far between; that the only method of transportation to and from Lower Crossing was by rail, and the station house was kept open for the reception of the public at large, as well as passengers, ordinarily, during all hours of the day. It is a matter of common knowledge, of which the court may take notice, that these railroad station houses scattered along the line of railroads in a sparsely-settled country, such as the locality here is proved to be, are thrown open for the use of the public, which, by invitation of the company, is permitted to use them at all times, before and after the arrival and departure of trains; that there was and is an implied invitation to all persons intending to avail themselves of the railroad service to enter and occupy the premises, and at any time, in the absence of reasonable regulations to the contrary, made by the company. And the offer to pay fare, or the announcement of the intention to pay fare, and the acceptance by or on behalf of the company, is not necessary to be made, by a person entering the station with such or other legitimate purpose, to entitle him to protection against violence by the company's servants. This case does not even depend upon this question. When the appellant was assaulted and beaten in the waiting room of the station, the company itself was present, in the person of the ticket agent in charge, who was its vice-principal, and the injuries inflicted upon the appellant by one servant of a company, aided by strangers, in the presence of and under the very eye of the vice-

principal, who tamely acquiesced, and failed to exercise his authority for the protection of the appellant, were inflicted by the company itself. The agent should have protected appellant, or, at least, should have made an earnest effort to do so. *Pittsburgh, Ft. W. & C. R. Co. v. Hinds*, 58 Pa. 512, 91 Am. Dec. 224; *New Orleans, St. L. & O. R. Co. v. Burke*, 58 Miss. 227, 24 Am. Rep. 689. We are not prepared to sanction the proposition that a man in the situation of the appellant, driven by the unprovoked and brutal violence of the company's own servants to seek the protection of its station house and waiting room in charge of its agent, has no recourse against the company for the wilful and malicious acts of its employees, under circumstances which make them the acts of the company. We think such contention is not only against public policy, but the settled rules of law. Upon the evidence, then, the verdict was clearly right, and, in our judgment, the amount was not excessive. The district judge erred in his construction of the law, and the case was submitted to the jury upon a wrong theory.

We are of the opinion from this record that the appellant is entitled to recover from the railroad company, and are not disposed, and do not find it necessary, to put him to the expense and trouble of a new trial. "Why should a verdict be set aside which is correct, because erroneous principles of law have been announced by the court? The object of a jury trial being to do justice between the parties, the annulment of the verdict, where this has been accomplished, on account of mistakes and misdirections on the part of the court, would seem akin to the criticism which censured a celebrated commander because he persisted in winning victories in violation of the rule of strategy." *New Orleans, St. L. & O. R. Co. v. Burke*, 58 Miss. 227, 24 Am. Rep. 689.

The judgment upon the verdict as to the first count is affirmed, and the order granting a new trial as to the second count is reversed, and the original judgment upon the verdict reinstated as of April 28, 1894, the date of the original entry. As the two appeals were submitted upon practically one record, and briefed together, the costs of printing briefs and record will be taxed in the respective appeals as apportioned by the clerk.

Bartch and King, JJ., concur in the judgment.

GEORGIA SUPREME COURT.

H. M. COMER, Receiver, etc., of Central Railroad & Banking Co., *Plff. in Err.*

Julius H. DUFOUR,

(95 Ga. 376.)

***1. Where, after the indorsement of a**

***Headnotes by SIMMONS, Ch. J.**

NOTE.—See reference in opinion to *note to Anderson v. Gill* (Md.) 26 L. R. A. 200.

30 L. R. A.

check by an accommodation indorser, it was cashed by a bank and duly sent for collection to its correspondent in the city where the bank upon which the check was drawn was located, and there, together with a number of other checks, was duly presented to the drawee for payment, and the runner of the correspondent accepted in payment of all these checks a small sum of money and a check of the drawee upon another bank in the same city, which check, had it been promptly presented, would have been paid, but, having been held by the runner or the

bank be represented, for two or more hours, during which time the drawee failed, in consequence of which the check last mentioned was dishonored.—*Held*, that under these facts the bank which cashed the original check could not hold the accommodation indorser liable for the amount thereof; and this is true although after the drawee's check had been dishonored the original check was reclaimed and duly protested.

2. The facts as above stated having been agreed upon by the parties, direction is given that the superior court render a final judgment in favor of the defendant.

(February 5, 1895.)

ERROR to the Superior Court for Chatham County to review a judgment in favor of defendant in an action brought to enforce the liability of an indorser upon a check. *Affirmed*.

The facts are stated in the opinion.

Messrs. Lawton & Cunningham and **H. W. Johnson**, for plaintiff in error:

The Central Railroad Bank had until the day following its receipt of this check to forward it to its Baltimore correspondent for collection, and the Baltimore Bank had until the day following its receipt there to present it for payment.

Dan. Neg. Inst. § 1592; *Morse, Banks & Banking*, § 421.

According to this rule, therefore, the utmost diligence was used in that part of the transaction, for the Central Railroad Bank might have held the check for a day, and the Citizens' Bank of Baltimore might have also held it for a day, and yet no negligence could have been charged against either, although Nicholson & Sons, the drawees, had failed in the meantime.

Dan. Neg. Inst. § 1625; *Morse, Banks & Banking*, § 421.

Where the holder of negotiable paper takes a check in payment of it, he should take care to present the check with such diligence that if it is not paid he may return it to the drawer and reclaim the bill or note in time to make a proper demand and protest, so as to preserve the liability of the drawer and indorsers.

Morse, Banks & Banking, § 247; *Smith v. Miller*, 43 N. Y. 171, 8 Am. Rep. 690; *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320, 33 Am. Rep. 618, 89 N. Y. 418; *Randolph, Com. Paper*, § 1566; *Merchants' Nat. Bank v. Samuel*, 20 Fed. Rep. 664.

The runner of the Citizens' Bank of Baltimore, in accepting Nicholson & Sons' check on the Western Bank, acted in pursuance of "the custom of Nicholson & Sons to give their check for the even hundred and cash the amount (less than \$100) in excess of the hundreds, unless for any reason cash or certified check for the whole amount were demanded." Dufour was bound by this custom.

1 *Morse, Banks & Banking*, pp. 28, 29; *Mills v. Bank of United States*, 24 U. S. 11 *Wheat*, 428, 6 L. ed. 514.

Messrs. Giguilliat & Stubbs, for defendant in error:

Brosius had the money on deposit with the drawee bank to meet the check; the agent and correspondent of plaintiff presented the check; the drawee gave in satisfaction thereof that which was both given and received as a dis-

charge of Brosius's undertaking or obligation, in fact, part of what was given was legal tender or currency. This was a payment for if the agent took anything but money he did so at his own risk.

Randolph, Com. Paper, §§ 1398, 1454; *Morse, Banks & Banking*, 247, 247c; *Word v. Smith*, 74 U. S. 7 *Wall*, 447, 19 L. ed. 207.

No local usage, even though it was Nicholson & Sons' custom to give a check for the even hundred, could affect the law which determines what is legal tender.

Morse, Banks & Banking, § 9, p. 20, note 9.

The Central Railroad Bank is liable for the negligence of its correspondent.

Randolph, Com. Paper, § 1437.

This whole matter is settled beyond any doubt by *Anderson v. Gill*, 79 Md. 812, 25 L. R. A. 200, a parallel case in almost every particular.

Simmons, Ch. J., delivered the opinion of the court:

The receiver of the Central Railroad & Banking Company (of which the Central Railroad Bank is a part) brought suit in a justice's court against J. A. Dufour, upon a check for \$75, dated at Baltimore, January 9, 1893, upon J. J. Nicholson & Sons, bankers, by S. H. Brosius, payable to the order of A. M. Brosius, and indorsed by A. M. Brosius and by J. A. Dufour, which check had been protested for nonpayment. The case was submitted upon an agreement as to facts, and the justice rendered judgment in favor of the plaintiff. A writ of certiorari to this judgment was sustained by the superior court, and the case remanded to the justice's court for a new trial. To this ruling the plaintiff excepted. The facts agreed on were as follows: On January 11, 1893, defendant, accompanied by A. M. Brosius, went to the Central Railroad Bank and requested the assistant cashier, Ulmer, to cash the check in question. Brosius being a stranger to Ulmer, he told defendant he could not cash the check unless it was indorsed by him. Defendant thereupon indorsed it, and it was cashed. On the same day it was forwarded by mail by the Central Railroad Bank to its correspondent in Baltimore, the Citizens' National Bank, for collection. The Citizens' National Bank received it, and acknowledged the receipt on January 14, 1893, and on the same day, about 11 o'clock, by its regular runner, presented this check, with other checks and drafts on J. J. Nicholson & Sons, to said firm for payment, the aggregate of all the checks and drafts so presented being \$1,748. The runner accepted \$48 in cash and the uncertified check of J. J. Nicholson & Sons on the Western National Bank for \$1,700, in payment for the checks and drafts presented, the custom of Nicholson & Sons being to give their check for the hundreds, and cash for the balance, unless for any reason cash or certified check for the whole amount were demanded. The checks and drafts so presented to Nicholson & Sons, including the check in question, were canceled by them and charged up to the drawers thereof. The check book of Nicholson & Sons showed that three or four checks (including one for about \$1,900

and another for about \$2,200) drawn by them on the Western National Bank after the check for \$1,700 was delivered to the runner of the Citizens' National Bank were paid by the Western National Bank before the \$1,700 check was presented to it, said check not having been so presented at any time before half-past 1 o'clock. Banking hours in Baltimore were from 9 to 3 o'clock in the day. The Western National Bank was three squares from the bank of Nicholson & Sons, and nearly seven squares from the Citizens' National Bank. It was not over five minutes' walk from the first place and ten minutes from the latter. Nicholson & Sons failed about 1:45 o'clock of said day, and the Western National Bank refused payment of the check drawn by them for \$1,700. The Citizens' National Bank relieved the checks and drafts which its runner had delivered to Nicholson & Sons, after 2 o'clock, and during that afternoon protested all of them for nonpayment and on the next day returned to the Central Railroad Bank the check sued on here.

1. If the holder of a bank check neglects to present it for payment within a reasonable time, and the bank fails between the time of drawing and the presentation of the check, the drawer is discharged from liability to the extent of the injury he has sustained by such failure. An indorser is discharged absolutely. *Daniels v. Kyle*, 1 Ga. 304, 5 Ga. 245; 2 Morse, Banks & Banking, 3d ed. §§ 421, 422. What is a reasonable time will depend upon circumstances and the relation of the parties between whom the question arises. When the facts are undisputed, the question is one of law to be determined by the court. If the check is received at a place distant from the place where the bank upon which it is drawn is situated, and is forwarded by due course of mail to a person in the latter place for presentment, the person to whom it is thus forwarded has until the close of banking hours on the next secular day after he has received it to present it for payment unless there are special circumstances which require him to act more promptly. 2 Morse, Banks & Banking, 3d ed. § 421; Dan. Neg. Inst. 4th ed. § 1591. The holder cannot, however, after having once presented the check, derive any advantage from the fact that he could, without being chargeable with unreasonable delay, have held it longer before making presentment. The first presentment fixes the rights of the parties. If the drawee is then ready and willing to pay, and the holder allows the fund to remain longer in the hands of the drawee, or if he accepts in lieu of money a check of the drawee, he does so at his peril. 2 Morse, Banks & Banking, 3d ed. § 426; 2 Dan. Neg. Inst. 4th ed. § 1593; *Simpson v. Pacific Mut. L. Ins. Co.* 44 Cal. 189; *Anderson v. Gill*, 79 Md. 312, 25 L. R. A. 200. If his acceptance of the drawee's

check does not of itself discharge an indorser of the original check, the indorser should certainly be held discharged if the substituted check is not presented promptly and the collection is thereby defeated. Such presentment cannot be delayed at the risk of the indorser for any time beyond that within which, with reasonable diligence, the presentment can be made. In this case, it appears that presentment of the substituted check could have been made in about five minutes from the time it was received, the bank upon which it was drawn being only three squares distant from the bank of J. J. Nicholson & Sons, the drawees of the original check; but it was not presented for two hours and a half or more after it was received by the collecting bank, and by reason of this delay the collection was defeated. Under these circumstances, we think the collecting bank failed to exercise due diligence, and its principal, the plaintiff in this case, was not entitled to recover against the defendant, the indorser of the original check. In the case of *Anderson v. Gill*, *supra*, under circumstances almost identical with these, the drawer of the check sued upon was held discharged. In that case, as in the present case, the original check was drawn upon J. J. Nicholson & Sons and was presented to them on the day of their failure, about 11 o'clock A. M., and their check upon the Western National Bank received in lieu of it and not presented until after the failure, though presented within banking hours of the same day. In that case, also, the original check was recovered from Nicholson & Sons and protested on the same day; but it was held that this made no difference,—that, although the collecting bank was not bound to have made demand upon Nicholson & Sons when it was made, still, having made it, and, by its own choice, not having received the cash, it could not, if it had not used due diligence, claim the right to undo what it had done, and by a subsequent demand put itself in the position it would have occupied had it not made the first demand at the time it did make it, or done the act it then did. A full discussion of the subject, with numerous citations of authority, will be found in the opinion of the court in that case. See also *Smith v. Miller*, 48 N. Y. 171, 8 Am. Rep. 690, 53 N. Y. 545; *Merchants' Nat. Bank v. Samuel*, 20 Fed. Rep. 664; *People v. Cromwell*, 103 N. Y. 477; also cases cited in note to *Anderson v. Gill*, in 25 L. R. A. 200, 201.

2. The facts of this case, as above stated, having been agreed upon by the parties, direction is given that the superior court render a final judgment in favor of the defendant. See Code, § 218, ¶ 2, and § 4284; *Central R. & Bkg. R. Co. v. Kent*, 91 Ga. 693.

Judgment affirmed, with direction.

NEW HAMPSHIRE SUPREME COURT.

John H. BLY, Admr., etc.,

v.

NASHUA STREET RAILWAY COMPANY.

(.....N. H.....)

The provision of Gen. Laws, chap. 269, § 14, that "no person shall ride through any street" in the compact part of any town at a swifter pace than at the rate of 5 miles an hour, applies to a street-railway company whose charter provides that the road may be operated by such power as may be authorized by the mayor and aldermen, who shall have power to make such regulations as to the rate of speed as the public safety and convenience require, where no regulations have been made by them in regard to speed.

(July 23, 1893.)

EXCEPTIONS by defendant to rulings of the Hillsborough County Court, made during the trial of an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence, which resulted in plaintiff's favor. *Overruled.*

The facts sufficiently appear in the opinion. *Messrs. G. B. French and Burnham, Brown, & Warren* for defendant.

Messrs. E. S. Cutter, H. A. Cutter, R. M. Wallace, and C. H. Burns for plaintiff.

Chase, J., delivered the opinion of the court:

Does the statute providing that "no person shall ride through any street or lane, in the compact part of any town, on a gallop or at a swifter pace than at the rate of 5 miles an hour" (Gen. Laws, chap. 269, § 14), apply to the defendants, whose charter provides that their "railway may be operated by such horse or other motive power as may be authorized by the mayor and aldermen" of Nashua, and that the mayor and aldermen "shall have power to make all such regulations as to rate of speed and the mode of use of said railway as the public safety and convenience may require?" Laws 1885, chap. 192, § 5. The statute was enacted in 1792, and has been re-enacted in every general revision of the laws substantially in the same form. Laws 1792, p. 181; Laws 1880, p. 160, § 5; Rev. Stat. chap. 118, § 13; Comp. Stat. chap. 119, § 15; Gen. Stat. chap. 252, § 14; Gen. Laws, chap. 269, § 14. Street railways were unknown in 1792. The mode of conveyance for persons then in general use was on horseback. A gallop is a favorite gait for such riding. But the mode of conveyance was a mere incident of the mischief to be remedied. This consisted of the danger

to which the life and limbs of persons using a street or lane were exposed by the fast riding of others, whatever be the mode of conveyance. The object of the statute was to remedy the mischief; and it was to be accomplished by preventing fast riding generally, not fast riding on horseback in particular. The words used are general: "No person shall ride . . . at a swifter pace," etc. The means of riding may be any that is in use while the statute is in force. See *Taylor v. Goodwin*, L. R. 4 Q. B. Div. 228; *Williams v. Ellis*, L. R. 5 Q. B. Div. 175.

The defendants are restrained by this limitation, the same as persons using other modes of conveyance, unless their charter gives them a special privilege. The charter does not give the defendants the exclusive use of the portions of streets occupied by their tracks. If it did, there would be ground for claiming that the legislature intended to exempt them from the limitation, for, in such case, no one could lawfully occupy a position in which he would be exposed to the danger of collision with their cars. The public generally have a right to use those portions of the streets, but in a manner and to an extent modified by the use which the defendants make of them. People may pass across or along the tracks when cars are not passing. The rights of the public and the defendants are in a great measure common. *Middlesex R. Co. v. Wakefield*, 108 Mass. 261, 268; *Concord v. Concord Horse R. Co.* 65 N. H. 80, 86. By the charter, the legislature authorized a new use of streets, which is the source of a new and great danger to other travelers. The driving of cars over steel or iron rails is attended with greater danger to others using the streets than the driving of ordinary vehicles over their uneven surfaces. As cars are heavier than ordinary vehicles, and there is less resistance to their motion, their momentum is not so easily controlled, and causes more serious consequences when they come in collision with objects. Being confined to a fixed track, they cannot be turned aside to avoid collision. They have a tendency to frighten horses, especially when propelled by steam or electricity. The legislature was aware of these facts, and they are competent evidence upon the question of the legislative intent expressed by the charter. They show that there is greater necessity for limiting the speed of cars than for limiting that of ordinary vehicles. In view of them, it is highly improbable that the legislature intended to release the defendants from all restraint as to speed, even temporarily. If the general law does not apply to the defendants, they may drive their cars at any rate of speed, however great, until the mayor and aldermen establish regulations for their government, while a person riding upon horseback or in a carriage cannot drive across, along, or in the vicinity of their tracks at a swifter pace than 5 miles an hour, without subjecting himself to liability to be fined or imprisoned. Such inequality would be arbitrary and unreasonable.

NOTE.—The above case is thought to be the first one decided as to the application to street cars of a general provision as to the speed allowed for riding on a street.

As to speed of electric cars in general, see *Newark Pass. R. Co. v. Bloch* (N. J.) 22 L. R. A. 374.

30 L. R. A.

The speed at which the defendants may drive cars without endangering the safety of other travelers depends somewhat upon the width and character of the streets and the extent and nature of travel over them. Recognizing this fact, and the further fact that the mayor and aldermen, from their knowledge of the streets and travel, are well qualified to judge of the speed allowable within the limits of safety, the legislature delegated to them authority "to make all such regulations as to rate of speed and the mode of use of the railway as the public safety and convenience may require." *Com. v. Temple*, 14 Gray, 69, 74. This is in accordance with a policy adopted in this state when the first street-railway charter was granted, and which has been generally adhered to in the enactment of later charters. Laws 1864, chap. 3080, § 5; Laws 1878, chap. 118, § 4; Laws 1881, chap. 251, § 4; Laws 1889, chap. 178, § 8; *Id.* chap. 218, § 4; *Id.* chap. 241, § 8; Laws 1891, chap. 258, § 5; *Id.* chap. 298, § 5; Laws 1893, chap. 250, § 4. "This control is given to these municipal officers, not as representing a conflicting interest, but as independent bodies charged with the duty of protecting the rights and promoting the convenience of the whole public." *Union R. Co. v. Cambridge*, 11 Allen, 287, 292; *Cambridge R. Co.* 10 Allen, 50, 57. The legislature intended that the mayor and aldermen should take the subject up where they left it; that is, with the general law in force and applicable to the defendants. If the mayor and aldermen find that no additional or different regulations are required, they need not act; but if they find the public safety and convenience require that the defendants shall run their cars at a less rate of speed than 5 miles an hour, or that they shall take precautions of any kind to avoid injury to travelers, they are authorized to make regulations accordingly. After the adoption of regulations the defendants would be governed by the statute as modified by the regulations. *Cooley*, Const. Lim. 198; 1 Dill. Mun. Corp. § 368; *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 498; *State v. Welch*, 86 Conn. 215; *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. Hayes*, 61 N. H. 264; *School Dist. No. 1 v. Prentiss*, 66 N. H. 145, 146.

The suggestion that this law has no more application to the defendants than the law requiring travelers meeting in a highway to turn to the right (Gen. Laws, chap. 75, § 11) has not been overlooked. It is apparent that the latter law does not apply to street railways, for it would disable them from exercising the rights which the legislature has granted them. *Com. v. Temple*, 14 Gray, 69, 78. But the application of the speed law to them does not have that effect. On the other hand, it produces the result in respect to street railways that it was designed to produce in respect to other travelers. It protects, to some extent at least, the lives and limbs of those who have occasion to use the highways in common with the railway cor-

porations. While it cannot be supposed that the legislature intended to disable the defendants from exercising the rights granted to them by requiring them to do an impracticable thing, it is reasonable to suppose that they did intend to require the defendants to regulate the speed of their cars so as to avoid, as much as practicable, the great danger caused by them to other travelers.

It is also suggested that there is the same reason for applying the speed law to steam railroads when crossing highways at grade. The law may have had such application before the enactment of Laws 1850, chap. 965, § 1, which provided "that no railroad corporation shall run their engine, cars, or train across any public highway in or near the compact part of any town or city in this state at a greater speed than 6 miles per hour." If the Law of 1792 previously applied to steam railroads, this section excepted them from its operation. It imposed the same restraint upon them while crossing highways as the Act of 1792 did upon travelers who use highways in the ordinary manner, except that the maximum rate of speed was 6, instead of 5, miles an hour. It was re-enacted from time to time until 1889, when it was repealed and the matter was committed to the railroad commissioners for regulation. Laws 1889, chap. 90. In the meantime an act was passed requiring railroad corporations to maintain warning signs at every grade crossing over a highway at which there were no gates or flagmen, and to cause the locomotive whistle to be sounded and the bell to be rung when approaching crossings. Laws 1885, chap. 98, §§ 1-4. In the absence of regulations by the railroad commissioners, travelers upon highways have some protection from these warnings. The legislation on this subject shows a disposition to impose restraints upon other occupants of highways, as well as upon ordinary travelers, for the safety and convenience of all. It is far from being inconsistent with the view taken of the law under consideration.

It does not appear that the mayor and aldermen have made any regulations concerning the speed of the defendants' cars. They may have decided that the public safety and convenience do not require any regulation in addition to the general law. If so, there was no occasion for them to act. It was incumbent on the party alleging that they have made regulations to prove the allegation. Upon the facts disclosed in the case, the general law is applicable to the defendants the same as to other travelers. This law was competent evidence on the question of the defendants' negligence. *State v. Boston & M. R. Co.* 58 N. H. 408; *Nutter v. Boston & M. R. Co.* 60 N. H. 483; *Clark v. Boston & M. R. Co.* 64 N. H. 823; *Wright v. Malden & M. R. Co.* 4 Allen, 238; *Hanlon v. South Boston Horse R. Co.* 139 Mass. 310.

Exceptions overruled.

Carpenter, J., did not sit; the others concurred.

NEW YORK COURT OF APPEALS.

John E. HILES, *Respt.*,
v.

Maria J. FISHER, Impleaded, etc., *Appt.*

(144 N. Y. 806.)

1. The common-law right of the husband to the entire usufruct of an estate by the entirety during the joint lives of his wife and himself is not an incident of that estate, but is a part of his common-law marital rights.
2. The rents and profits of an estate by entirety during the joint lives of husband and wife do not follow the nature of the estate in respect to their disposal, but belong to them in separate moieties, the wife's share of which is within the general statutory provisions giving married women power to control and dispose of their own property.
3. A purchaser on foreclosure sale under a mortgage given by the husband alone on land held by the entirety, where the wife is alive at the time of the sale, obtains the husband's interest subject to her right of survivorship, with the right to use an undivided half of the land during the joint lives of husband and wife.

(January 15, 1886.)

APPEAL by defendant, Maria J. Fisher, from a judgment of the General Term of the Supreme Court, Fourth Department, rendered in favor of plaintiff upon a statement of facts submitted without action for the opinion of the court to determine the right to the possession of certain real estate. *Modified.*

Statement by Andrews, Ch. J. :

Appeal from judgment of the general term, fourth department, on submission of controversy without action under section 1279 of the Code, stating substantially the following facts: The defendants are, and for the past thirty years and upwards have been, husband and wife. On or about the 22d of March, 1866, the defendants, by a deed to them as husband and wife, took title to a farm of about 44 acres in the town of Dryden, Tompkins county, N. Y., which they have ever since occupied and possessed as their home under said deed with no other title. This deed runs to "William R. Fisher, of the town, county, and state aforesaid, and Maria J. Fisher, his wife," and the consideration therein stated is \$3,000. It was duly recorded on the 9th of May, 1866. The purchase price was wholly paid by the wife, who, however, consented to the form of the

NOTE.—Tenancy by entirety.

- I. Definition.
- II. Who can hold this estate.
- III. Nature of the interest of each spouse.
 - a. The interest of the husband during the joint lifetime at common law.
 - b. The interests of the spouses during the joint lifetime, since the married women's property acts.
 - c. Right of the spouses and their representatives to emblements at common law.
 - d. Husband's right to compensation for improvements.
 - e. Husband's right to commit waste.
 - f. Husband's right to estovers.
 - g. Right of either spouse to sue for wrongs to the entirety property.
- IV. Survivorship of one of the spouses after the death (actual or civil) of the other.
- V. Operation of technical rules on the entirety estate.
 - a. Rule in *Shelley's Case*.
 - b. Merger.
 - c. Equity to a settlement.
 - d. Vendor's lien.
 - e. Notice.
 - f. Homestead exemption.
 - g. Construction of statutes.
- VI. Where and to what extent entirety estates exist.
 - a. List of states, etc.
 - b. Construction of statutes affecting this question.
- VII. In what subjects, estates, and interests entirety may exist.
 - a. In what subjects.
 - b. In what tenures.
 - c. In what titles.
 - d. In what species of estate—legal or equitable.
 - e. In what estates.
 1. In what shares.

VIII. Creation of entirety estates.

- a. By act of law.
- b. By act of the party.
 1. Limitation to husband and wife without specifying how they are to take.
 2. Limitation expressly by entirety in a state where entirety does not exist.
 3. Limitation to husband and wife as joint tenants.
 4. Limitation to husband and wife as tenants in common.
 5. Limitation to husband and wife for their lives.
 6. Limitations in peculiar forms.
- c. Conveyance by entirety to spouses one of whom already has an estate in the land or other subject-matter.
- d. Invalidity on other grounds of a limitation.

IX. The share taken by husband and wife under a limitation to them and another or others.

X. Disposition or encumbrance of entirety property.

- a. By both spouses concurring.
- b. By one of the spouses alone.
 1. Neither can derogate from the survivorship right of the other.
 2. Each can in most states pass his or her own survivorship right.
 3. Whether a conveyance by the husband, made before the wife's death, was void for the period of the joint lifetime.

XI. The effect of divorce on the entirety property.

- a. Generally.
- b. Nullification.
- c. Dissolution.
- d. Separation without dissolution of marriage.

XII. Partition between tenants by entirety.

XIII. Adverse possession and the statute of limitations.

deed as taken by them. On or about March 31, 1885, the defendant William R. Fisher borrowed of the plaintiff \$1,400, for which he and his wife gave their promissory note. On or about February 20, 1886, William R. Fisher, to secure the payment of this debt to plaintiff, and other small amounts of borrowed money, amounting then altogether to \$1,550, executed and delivered to one Goodrich, for plaintiff, a mortgage in the usual form, granting and conveying the said 44 acres, and conditioned for the payment of \$1,550, one half in one year and balance in two years, with interest at 5 per cent annually. This mortgage was dated and acknowledged February 20, 1886, and was immediately assigned to plaintiff. It was recorded August 5, 1890. Fisher, of the money which he borrowed of plaintiff, used \$1,000 in part payment for 85 acres of land in the same town, the title to which he had taken in his own name. At the time the mortgage was given, the plaintiff knew that the wife's money paid for the 44 acres, and that she refused to sign the mortgage, but he supposed that William R. Fisher held the title, and the wife had only her dower right therein, and he therefore said that the mortgage was good enough without her signature, and so took it; and he told the defendants that he did not calculate that William R. Fisher should ever pay the mortgage; that he cal-

culated to give it to him by his will, and all he wanted was the interest while he lived. The description in the mortgage was copied from the deed, which was present when the mortgage was executed and delivered. On the 3d of September, 1890, William R. Fisher conveyed to Maria J. Fisher both of said parcels of land by quitclaim deed recorded that day. Default was made in the payment of interest on the mortgage, and it was duly foreclosed by statutory foreclosure, and on the sale thereunder, which occurred February 6, 1892, the premises were bid in by the plaintiff for the sum of \$500, the amount then unpaid on the mortgage being \$1,863.37, besides the expense of foreclosure, thereby vesting in plaintiff the entire fee so far as the mortgagor could lawfully have conveyed at the date of the mortgage under the same circumstances. Notice of the foreclosure was duly served on both defendants. Mrs. Fisher thereafter, and before the sale, commenced an action in the supreme court against the plaintiff and said Goodrich and her husband, asking that the mortgage be declared void as to her, and be set aside as a cloud upon her title, and that the foreclosure of the mortgage be restrained. A temporary injunction was obtained, but vacated by the court upon the papers upon which it was granted. On the foreclosure sale Mrs. Fisher gave notice of her claims. After the sale the plaintiff

I. Definition.

An estate by entireties is an estate held by husband and wife together so long as both live, and, after the death of either, by the survivor so long as the estate lasts.

In the old English reports tenancy by entireties is always called joint tenancy, and is regarded as a species of joint tenancy with peculiar incidents. So, enactments of a beneficial character respecting joint tenancy have been held to include tenancy by entireties (*Morris v. McCarthy*, 158 Mass. 11 (1898); *Marburg v. Cole*, 49 Md. 402, 38 Am. Rep. 206 (1878)); but the phrase "joint tenancy" in a statute has not generally been thus extended.

Although the wife's freehold was, prior to the married women's property acts, held by both spouses in right of the wife, the decisions by which its incidents are regulated have not generally been held precedents for estates by entireties.

By the common law, when land was conveyed to husband and wife they did not take as tenants in common, or as joint tenants, but each became seized of the entirety *per tout, en non per my*, and upon the death of either the whole survived to the other. The survivor took the estate, not by right of survivorship simply, but by virtue of the grant which vested the entire estate in each grantee. During the joint lives the husband could, for his own benefit, use, possess, and control the land, and take all the profits thereof, and he could mortgage and convey an estate to continue during the joint lives, but he could not make any disposition of the land that would prejudice the right of his wife in case she survived him. *Bertles v. Nunan*, 32 N. Y. 152, 44 Am. Rep. 361.

This estate, created by conveyance to husband and wife, is a peculiar one. The interest of the grantees is not joint, nor in common. The parties do not hold moieties, but take as one person, taking as a corporation would take; they have but one title; each is seized of the whole, and each owns the whole. If one dies, the estate continues in the survivor, the same as if one of several corporators

dies. It does not descend upon the death of either, but the longest liver, being already seized of the entire estate, is the owner of it. One tenant by entirety cannot sever the tenancy by deed, as a joint tenant can, for neither can alien so as to bind the other. *Corinth v. Emery*, 38 Vt. 505.

II. Who can hold this estate.

Husband and wife may hold by entireties. This is so in all cases even though their marriage is voidable on account of some invalidity in its inception—as appears from the cases cited on the subject of divorce. But see *infra*, as to void marriages.

And though they be not described in the conveyance at husband and wife. *Chandler v. Cheney*, 37 Ind. 391 (1871); *Hulett v. Inlow*, 37 Ind. 412, 25 Am. Rep. 64 (1877).

And though one or both of them be aliens. *Wright v. Saddler*, 20 N. Y. 320 (1859).

And this last point holds in New York notwithstanding the proviso in the Revised Statutes, 720, § 17; for that proviso merely restricts the operation of the previous sections, and, where they are inapplicable, leaves the common law in force. *Ibid*.

But this power of aliens to take remains subject to the right of the Crown or state to seize where that right still exists. *Ibid*.

But they cannot take by entireties when they take the estate at different times,—as, when a person who holds jointly with one of the spouses conveys his interest to the other. *Lane v. Pannell*, 1 Rolle, Rep. 317, 438 (1616).

Or when a person who holds in common with one of them conveys his share to the other. *Banzer v. Banzer*, 10 Misc. 24 (1894). In both these cases they are tenants in common with one another.

This rule against taking at different times does not extend to limitations of trust or use.

Persons who are not legally husband and wife cannot take by entireties, even though the conveyance was made to them in anticipation of their intermarrying. *Symond's Case*, F. Moore, 93 (1538); *Ward v. Matthew*, Noy, 123 (1496); *Brent's Case*, 3

duly demanded possession of each of the defendants, and they severally refused to deliver the same, and now withhold it. Upon these facts the plaintiff claimed the right to recover the premises, with the right to hold the same during the joint lives of the husband and wife, and in fee in case the husband survives the wife. The defendant Mrs. Fisher claims that the mortgage, not having been signed by her, was void, and that, Mr. Fisher's interest having been conveyed to her, she is the absolute owner; that by reason of her having paid for the property she is equitable owner of the whole; that, in any event, she is entitled to the possession during the joint lives of herself and husband, and to the fee in case she survives. The general term rendered judgment adjudging that by the sale under the mortgage the plaintiff acquired the right of possession of the whole property during the joint lives of Mr. and Mrs. Fisher, and to the fee in case the husband survived the wife.

Messrs. Smith & Dickinson, for appellant:

The precise question in this case has never been passed upon in this state on a full argument.

Bertles v. Nunan, 93 N. Y. 152, 44 Am. Rep. 361, came the nearest to the decision of these questions, and yet in that case the court of appeals declined to decide them.

Dyer, 340a (1536); Brabroke's Case, F. Moore, 95 (1523) (which last was compromised on error, and was a limitation to the use of A and of such woman as he might marry; McDermott v. French, 15 N. J. Eq. 73 (1862) (*dictum*).

And though they are described in the conveyance as husband and wife. *Chandler v. Cheney*, 37 Ind. 391 (1871) (*dictum*).

But the contrary was held in *Jacobs v. Miller*, 50 Mich. 119 (1883), under circumstances stated below.

So, though the limitation was merely equitable, being by way of use before the statute of uses. *Bedyl v. Holstoke*, 3 Dyer, 149b (1557); *Fulcambe v. Linacre*, 1 And. 303 (1522), cited in 3 Dyer, 149b (1557); *Morgan v. Wharton*, cited in 3 Dyer, 149b (1557).

Nor though they were living as husband and wife, and were believed by themselves and by the grantor to be so, and had gone through the marriage ceremony, which was invalid only because the former husband of the woman was still living. *Morris v. McCarty*, 158 Mass. 11 (1893).

Nor though the limitation was expressly to them as tenants by entireties and not as joint tenants, in which case they nevertheless take as joint tenants. *Ibid.*

And such a limitation will, under these circumstances, make them joint tenants notwithstanding an enactment that a conveyance shall be deemed to create a tenancy in common, unless it manifestly appears to have been intended to create a joint tenancy. *Ibid.*

Similar circumstances existed in *Jacobs v. Miller*, 50 Mich. 119 (1883), where the marriage was invalid because the supposed husband had a wife living. The only question was whether survivorship had taken place. The decision was grounded on the theory that a purchaser without notice of the defect in the title was safe because he could only be ousted by oral evidence of the fact that the parties were not husband and wife, they having been described as such in the deed. This theory seems untenable, for the defense of purchaser without notice

Justice Macomber, in *O'Connor v. McMahon*, 54 Hun, 69, said, under the common-law rule, while he receives with one hand the rents and profits of the real estate so held, he is by the same common-law rule required with the other to dispense the same, or so much thereof as is necessary to the support and maintenance of his wife and family, which was not done in this instance.

See also *Chandler v. Cheney*, 37 Ind. 391; *Stelts v. Schreck*, 60 Hun, 74.

Dicta have been acted upon and cited as authority in subsequent cases, and an apparent common law has been constructed without any real foundation.

Barber v. Harris, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Bennett v. Child*, 19 Wis. 362, 38 Am. Dec. 692.

That the husband alone cannot give a mortgage of such interest, has been held in other states on full consideration.

Chandler v. Cheney, *supra*; *Ketchum v. Wainworth*, 5 Wis. 95, 68 Am. Dec. 49.

In *Morrison v. Seybold*, 93 Ind. 398, it was held that where property is held by them by the entirety the property is not subject to a lien for taxes on his personal estate.

Hulett v. Inlow, 57 Ind. 412, 26 Am. Rep. 64, held that the property thus held cannot be sold for the husband's debts.

See also *Adams v. State*, 58 Ind. 66; *McConnell v. Martin*, 53 Ind. 486; *Bertles v. Nunan* and *Stelts v. Schreck*, *supra*.

It does not avail against a legal, but only against an equitable, title, and oral evidence is always admitted to correct a misdescription of person or property. (See *Chandler v. Cheney*, 37 Ind. 391 (1871), and *Dowling v. Salliotte*, 83 Mich. 184 (1890) on this point.) Still more is such evidence admissible when the object is, not to explain the intention, but to prevent it taking effect.

Nor does their subsequent intermarriage make them tenants by entireties; but they continued to be joint tenants or tenants in common, as they were before. *Symond's Case*, F. Moore, 92 (1536); *La Reigne v. Savage*, F. Moore, 715 (1591) (where they were joint tenants); *Ward v. Matthews*, Noy, 122 (1496); Co. Litt. 187b; *Ames v. Norman*, 4 Sneed, 686, 70 Am. Dec. 299 (1897) (*dictum*); admitted, *Stuckey v. Keefe*, 26 Pa. 397 (1856).

Even though the limitation was made in contemplation of the marriage which immediately afterward took effect. *Moody v. Moody*, Ambli. 649 (1707).

Nor even as regards a legal estate transferred to them by a statute passed after the marriage, if they already held the equitable estate otherwise than by entireties, and if the statute transfers the estate in the same manner in which they held the use. *Morgan v. Wharton*, cited in 3 Dyer, 149b (1557); *Symond's Case*, F. Moore, 92 (1536).

So, in *Holt v. Wilson*, 75 Ala. 65 (1893), the woman, being entitled absolutely to one undivided half of the land and contingently to the other, contracted with her intended husband that, if the marriage should take effect and the contingency should happen, he should have the latter share "jointly and equally" with her, and after both events had taken place he was held to be tenant in common with her.

The decision in *Mutton's Case*, 3 Dyer, 274b (1568), dealt only with the question of survivorship, and not with the distinction between entirety and joint tenancy.

But a recovery in value of lands after marriage to satisfy a warranty given to them jointly before,

This estate of the husband during coverture has probably been abolished by separate property acts, even where these acts are held not to destroy estates by entireties.

Stewart, Husb. & W. § 806, p. 469; *McCurdy v. Canning*, 64 Pa. 39; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210.

The chief purpose of the separate property acts passed in all states where the common law once prevailed was to free the property of wives from the marital rights of their husbands, and this estate *jure uxoris* is now almost universally abolished.

Stewart, Husb. & W. § 150.

A husband has no interest in either the fee or the usufruct of real estate deeded to him and wife jointly which can be taken in execution for his sole debts.

Corinth v. Emery, 68 Vt. 505.

Whatever rights the husband had to the use and control of his wife's real and personal property at common law during their joint lives, whether held in her individual right or as tenant by the entirety with her husband or another, was fully abrogated by the express language of the New York statutes.

Power v. Lester, 17 How. Pr. 415, 28 N. Y. 529; *Meeker v. Wright*, 76 N. Y. 262; *Matteson v. New York C. R. Co.* 62 Barb. 373; *Ballin v. Dillaye*, 87 N. Y. 85; *Bodine v. Killeen*, 58 N. Y. 93; *Rous v. Smith*, 45 N. Y. 280; *Baum v.*

Mullen, 47 N. Y. 577; *Cushman v. Henry*, 76 N. Y. 103, 31 Am. Rep. 437.

If the husband and wife are tenants in common, she holds her share freed from the common-law control of her husband.

Miner v. Brown, 133 N. Y. 308.

The purchase price for said farm was wholly paid by the wife.

In such case there is no equity in the husband, and that fact should have great weight in any particular case in determining the rights of the parties.

Ketchum v. Walworth, 5 Wis. 105, 68 Am. Dec. 49; *Re Albrecht*, 136 N. Y. 91, 18 L. R. A. 829; 1 Bishop, Married Women, § 635; Beach, Mod. Eq. Jur. § 190; *Kenny v. Udall*, 5 Johns. Ch. 465, affirmed in *Udall v. Kenney*, 3 Cow. 590; *Hariland v. Myers*, 6 Johns. Ch. 25; *Hariland v. Bloom*, Id. 178; *Glen v. Fisher*, 6 Johns. Ch. 33, 10 Am. Dec. 810; *Van Epps v. Van Deusen*, 4 Paige, 64, 25 Am. Dec. 516; *Wickes v. Clarke*, 8 Edw. Ch. 53; *Partridge v. Havens*, 10 Paige, 618.

Even in cases where the law courts will not save the rights of married women, yet in equity their rights will be protected by the courts.

2 Story, Eq. Jur. §§ 1870-1876; Beach, Mod. Eq. Jur. § 776; *Cass v. Demarest*, 87 N. J. Eq. 398; *Cunningham v. Bell*, 83 N. C. 328; *Methodist E. Ch. v. Jaques*, 8 Johns. Ch. 113; Stewart, Husb. & W. § 814.

according to the opinion in *Nichols v. Nichols*, 2 Plowd. 438 (1874), made them tenants by entireties.

So, an attornment after marriage, completing (when attornments were necessary) their title to a remainder or reversion granted to them before marriage, made them tenants by entireties, according to the opinions in *Tooker's Case*, 3 Coke, 67b (1601), and *Nichols v. Nichols*, *supra*.

So, livery of seisin made after marriage pursuant to a power of attorney executed before, according to the authorities in note to *Tooker's Case*, *supra* (1826).

III. Nature of the interest of each spouse.

a. The interest of the husband during the joint lifetime at common law.

Under limitations carrying entirety estates before the married women's property acts the husband has the possession and control so long as both spouses live. *Beach v. Hollister*, 3 Hun, 519, 5 Thomp. & C. 568 (1875); *Kip v. Kip*, 33 N. J. Eq. 213 (1880); *Washburn v. Burns*, 34 N. J. L. 13 (1880); *Hall v. Stephens*, 65 Mo. 679, 27 Am. Rep. 302 (1877); *Den, Wyckoff, v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388 (1846); *Fogleman v. Shively*, 4 Ind. App. 197 (1892) (*dictum*).

And this applies to a personal annuity equitably charged on land. *Gifford v. Rising*, 55 Hun, 61 (1899).

And he may use the estate for his own benefit during that period. *Bertles v. Nunan*, 12 Abb. N. C. 291, 68 N. Y. 152, 44 Am. Rep. 361 (1883), cases cited; *Beach v. Hollister*, 3 Hun, 531, 5 Thomp. & C. 568 (1875).

And he is absolute owner of the rents and profits. *Clapp v. Stoughton*, 10 Pick. 463 (1830); admitted in *Cole Mfg. Co. v. Collier* (Tenn.) post, 315 (1896).

And the wife has no interest in or control over the property during that period. *Boile v. State Trust Co.* 27 N. J. Eq. 308 (1878); *Fogleman v. Shively*, *supra*.

And this rule holds good though the limitation was to a trustee to permit the husband and wife to reside on the land. *Kip v. Kip* *supra*.

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And, as a consequence, the husband can, without the wife's concurrence, serve an effectual notice on tenants from year to year to quit. *Pollak v. Kelly*, 6 Ir. C. L. Rep. 378 (1856).—where the ejectment was brought by both spouses.

In Indiana an opposite rule prevails, it being held, in conformity with what the court conceived to be the common law, but in admitted contradiction to the rule prevailing in case of the wife's estate, that both spouses have an equal indivisible right. *Chandler v. Cheney*, 37 Ind. 391 (1871).

The same doctrine seems to prevail in Michigan, since the corresponding rule respecting alienation by the husband has been adopted there. See *infra*, X. b, 2.

The products of the land when severed are subject to the law regulating the personal chattels of the spouses. *Simonton v. Cornelius*, 98 N. C. 438 (1887).

See further, *infra*, X. as to Dispositions.

b. The interests of the spouses during the joint lifetime since the married women's property acts.

It has been found convenient to group the law on this subject with that relating to the question in what states entirety still exists. See, therefore, *infra*, VI. a.

c. Right of the spouses and their representatives to emblements at common law.

The holder of an estate which terminates at an uncertain time without his will or act, and the representatives of the holder of an estate which after his death so terminates, are entitled to take, at maturity, any annual crops which he may have sown during his tenure. Litt. 68; Co. Litt. 55r.

Representatives of a joint tenant or tenant by entireties, who dies before his cotenant, seem to have a similar privilege, although in this case the estate does not cease but continues in the survivor.

In *Arnold v. Skeale*, Noy, 149 (1449), the court was equally divided on this question.

In 3 Dyer, 316a (2); Co. Litt. 55b; Vin. Abr. *Emblements*, A, 16 (*obiter*), the point is regarded as doubtful.

Mr. S. D. Halliday, with Mr. George E. Goodrich, for respondent:
Defendants took title in 1866 as tenants by the entirety.

Bertles v. Nunan, 92 N. Y. 153, 44 Am. Rep. 361; *Miner v. Brown*, 133 N. Y. 308.

The fact that the wife paid the purchase money makes no difference.

Ward v. Krumm, 54 How. Pr. 95.

The plaintiff's mortgage and his purchase upon the foreclosure sale under it covered the husband's title, which included the exclusive use and control of the premises during the joint lives of defendants, and the remainder in fee in case the husband survives his wife.

1 Washb. Real Prop. 577; 1 Preston, Estates, 135; *Ames v. Norman*, 4 Sneed, 683, 79 Am. Dec. 269; *Barber v. Harris*, 15 Wend. 615; *Beach v. Hollister*, 8 Hun, 519; *Coleman v. Bresnahan*, 54 Hun, 619; *Grosser v. Rochester*, 60 Hun, 379; *Demby v. Kingston*, Id. 294.

In the case of *Meeker v. Wright*, 76 N. Y. 271, Judge Danforth says: "If . . . they, by virtue of it [the deed], became tenants by the entirety, then by the common law Samuel Daily [the husband] had the right to alienate in fee his share subject only to the wife's right of survivorship and the further right to sell, lease, or mortgage the entire property for the joint lien of himself and his wife."

Bertles v. Nunan, 92 N. Y. 156, 44 Am. Rep.

361; *Zornitlein v. Bram*, 100 N. Y. 12; *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 180.

The common-law rights of husband and wife as tenants by the entirety still prevail unchanged by the statutes in any respect.

Germania Sav. Bank v. Jung, 28 Abb. N. C. 81; *Grosser v. Rochester*, 60 Hun, 380; *Gifford v. Rising*, 55 Hun, 61; *Coleman v. Bresnahan*, 54 Hun, 619; *Hiles v. Fisher* (the case at issue) 67 Hun, 239; *Demby v. Kingston*, 60 Hun, 294.

Inasmuch as by the unity of the persons in law they take by entireties and the husband is entitled in his own right to the entirety during his life, the wife will have no equity to a settlement out of any part of the property.

2 Lewin, Tr. 1st. Am. 8th Eng. ed. 741; *Ward v. Ward*, L. R. 14 Ch. Div. 506.

The rents which accrue from the wife's real estate during coverture are absolute property of the husband and in case of his decease do not survive to the wife, but are assets in the hands of the husband's administrator and must be collected by him.

9 Am. & Eng. Enc. Law, p. 841, note 2, and authorities cited.

Courts strongly oppose any innovation upon the common-law doctrine of tenancy by the entirety.

Wright v. Saddler, 20 N. Y. 320; *Torrey v. Torrey*, 14 N. Y. 480.

In 8 Lfb. Ass. 21, it is stated that the legatee or assignee of the deceased husband would have had good title to the crops, but in an action to which his executor was not a party damages were adjudged to the surviving wife against his heir who had carried them away.

And in *Anonymous*, 8 Edw. III. T. T. pl. 46, the judge similarly directed the jury.

In *Oland v. Burdwick*, 2 Cro. Eliz. 460, F. Moore, 304 (1695), the representatives of the deceased husband were held entitled to emblements out of the entirety property. This case was observed upon in Cro. Eliz. case 3.

In *Rowney's Case*, 2 Vern. 222 (1694), the court thought otherwise.

Light may be cast on the question by the decisions relative to the wife's estate.

In *Bennett v. Bennett*, 34 Ala. 53 (1859), the court following *Weems v. Bryan*, 21 Ala. 302 (1853), but doubting its correctness on principle, held the husband's representatives entitled to emblements out of the wife's estate.

The following old authorities are sometimes cited, but none of them relate to entirety estates, although some have reference to the wife's estate; 46 Lfb. Ass. 2; 7 Lfb. Ass. pl. 13; 10 Lfb. Ass. 6; 7 Edw. III. M. T. pl. 71; 28 Edw. III. pl. 13; 21 Hen. VI. p. 137; Cro. Car. 515; *Grantham v. Hawley*, Hob. 122 (1573).

In Indiana crops raised by the husband on entirety land belong to both spouses by entireties. *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254 (1879). But this seems to refer to crops still growing.

He cannot transfer a crop sown by her on the entirety land while he is living elsewhere separated from her. *O'Connor v. McMahon*, 54 Hun, 66 (1883). See also, as to rents and profits, *supra*, III. a.

d. *Husband's right to compensation for improvements.*

The husband is presumed to have intended any improvements which he may have made in the entirety property as a gift to the wife.

And since the married women's acts it is probable 30 L. R. A.

that a corresponding presumption would be made in case of an improvement by the wife.

But compensation granted by the legislature to whomsoever may make certain improvements belongs to the spouse by whom or at whose expense they were made, and therefore to the husband where he makes them on his wife's property (see *Davids v. Harris*, 2 Pa. (1848)), and presumably, therefore, when he makes them on entirety property.

e. *Husband's right to commit waste.*

No case has been found respecting the husband's right to commit waste on the entirety property, save that in *Kip v. Kip*, 33 N. J. Eq. 213 (1880) (which was decided on a point of pleading), it was admitted that he had no right to sell timber trees growing on entirety land. But the following relative to his right to commit waste on the wife's property may cast light on the subject. His wife could not sue him for waste committed by himself personally (*Davis v. Gilliam*, 5 Ired. Eq. 306 (1848); *Babb v. Perley*, 1 Me. 6 (1820)); but probably she may under any statute authorizing her to bring actions against him. He could not grant to another a right to commit waste (*Davis v. Gilliam*), nor could he dispose of her trees uncultivated during his lifetime (11 Hen. IV. 32, pl. 59, cited in *Hales v. Pettit*, 1 Plowd. 253 (1562)); and much less could he confer on another a right to take them after his death. *Stroebe v. Fehl*, 22 Wis. 337 (1867). Yet it is the better opinion that he may cut down trees on her wild land with a view to immediate cultivation, but not otherwise. Id. 346.

f. *Husband's right to estovers.*

This right would presumably not be less than on the wife's land. On the latter he might cut wood for fencing, mending, etc. *Stroebe v. Fehl*, 22 Wis. 337 (1867).

g. *Right of either spouse to sue for wrongs to the entirety property.*

The concurrence of both spouses was necessary in an action for a wrong to the wife's property and affecting the inheritance, before the married women's acts. *Van Note v. Downey*, 23 N. J. L. 219

Andrews, Ch. J., delivered the opinion of the court:

It was decided in *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 861, that the separate property acts relating to the rights of married women had not abrogated the common-law doctrine; that under a conveyance to husband and wife they take, not as tenants in common, nor as joint tenants, but by the entirety, and upon the death of either the survivor takes the whole estate. In that case the husband had died, leaving his wife surviving, and the question was whether the wife, as survivor, took upon the death of her husband the entire fee under the doctrine of the common law. The question, what change, if any, had been wrought by the separate property acts in respect to the common-law rights of the husband to control and use the property conveyed to husband and wife, during their joint lives, was not considered or decided, but was expressly reserved, on the ground that it was not involved in the case then before the court. That question is involved in the present case, and must now be decided. The decision in *Bertles v. Nunan* is supported by the great weight of authority in other jurisdictions in this country, but in some of the states it has been held that, as a consequence of statutory provisions substantially like those in this state, conferring upon married women the right to

take and hold separate property to their own use, free from the control of their husbands, as *femes sole*, estates by entireties have been abrogated, and turned into tenancies in common. In the states where this construction has been put upon the married women's acts, the question of the rights of the parties to the usufruct during their joint lives could scarcely arise, because it is one of the generally admitted results of this legislation that the common-law right vested in the husband to the rents, profits, and use of his wife's real estate during their joint lives has been destroyed.

It is, however, a much more serious question what the effect of this legislation is upon the common-law right of the husband to the usufruct during the joint lives of the husband and wife, of lands conveyed to them jointly, in those states where it is held that, notwithstanding new legislation, a conveyance to husband and wife retains its common-law character and incidents. If the right of the husband to the use during the joint lives of lands held under this tenure was a right growing out of and incident to this particular species of tenancy,—in other words, if it was one of its specific and essential characteristics,—then it would be difficult to segregate this right from the other rights incident to and flowing from the tenancy, and to say that, while the estate by entireties con-

(1890); *Chancey v. Strong*, 2 Root, 399 (1790); *Shaw v. Partridge*, 17 Vt. 626 (1845); *Dold v. Geiger*, 2 Gratt. 98 (1846).

And the same rule applies to entirety property. *Harrer v. Wallner*, 80 Ill. 208 (1875).

But the husband might have brought an ejectment on his sole demise, because he could have made a lease of her land for a period not exceeding the joint lifetime. And consequently he might do this to recover entirety property in a state where power to alienate the entirety estate for the period of the joint lifetime is recognized (as to which see *infra*, X. b. 3); *Jackson, Suffern v. McConnell*, 19 Wend. 175 (1836); *Topping v. Sadler*, 5 Jones, L. 357 (1858); *Park v. Pratt*, 38 Vt. 545 (1866), in which last case the court, pp. 550, 551, seems to ground its decision on general principles irrespective of this distinction.

And he may sue alone for a wrong done to personal chattels which have vested in him by marital right, even though they were trees which before severance grew on the entirety land. *Fairchild v. Chastelleux*, 1 Pa. 176, 44 Am. Dec. 117 (1845), where the action was not for cutting the trees but for carrying them away.

And he may sue alone for injuries to land which he is farming, though it belongs to her, seemingly on the ground that he stands in the position of a tenant. *Alexander v. Hard*, 64 N. Y. 228 (1876). This would probably hold since the married women's acts.

The concurrence of the wife was not necessary in an action for a wrong done to her property, but affecting the possession only, and therefore injuring the husband's interest only. *Van Note v. Downey*, *supra*, and other cases above cited. This would hold as regards entirety estates acquired before the married women's acts in states where the husband's life interest is recognized.

And he was held entitled to sue alone for expenses incurred by him in remedying a wrong to the inheritance, presumably because when remedied it no longer injured the inheritance. *Demby* 80 L. R. A.

v. Kingston, 60 Hun, 294 (1891), affirmed, 138 N. Y. 538 (1892).

In Maine the husband is disabled by statute from suing alone for injuries to his wife's property. *Bradford v. Hansoom*, 68 Me. 103 (1878).

The right of action for a wrong done to an entirety property acquired since the married women's acts would, of course, depend upon the effect attributed to the act. In states where there is an entirety of estate these acts do not affect the question and independently of them both spouses must (it is presumed) concur in all cases. Where each takes, under the acts, a half share in fee, each (it would seem), may sue alone and recover half the damage suffered. Where each takes a half share for the joint lifetime, and the survivor takes all, each (it is conceived) may sue alone for an injury to the possession, and they must sue jointly for an injury to the inheritance.

But the wife can sue alone to restrain an intended act injurious to the entirety inheritance if the defendants have acquired a right as against the husband to commit it,—as, to restrain a municipality from constructing a sewer through the entirety property, which they had, by the necessary formalities and by payment of money into court, acquired as against the husband the right to construct. *Grosser v. Rochester*, 80 Hun, 373, 380 (1891).

And probably either spouse would have a similar right if the other refused to concur.

IV. *Survivorship of one of the spouses after the death (actual or civil) of the other.*

The spouse surviving acquires the whole entirety estate (*Arnold v. Arnold*, 30 Ind. 305 (1868); *Barnes v. Loyd*, 37 Ind. 623 (1871); *Falls v. Hawthorn*, 30 Ind. 444 (1868); *Den, Needham v. Branson*, 5 Ired. L. 426, 44 Am. Dec. 451 (1845); *Den, Motley v. Whitmore*, 2 Dev. & B. L. 537 (1837); *Garner v. Jones*, 52 Mo. 68 (1873); *Margarie de Mose's Case*, cited in Co. Litt. 132a, (1291); *Robinson v. Eagle*, 29 Ark. 202 (1874); *Rogers v. Grider*, 1 Dana, 242 (1833)), whether the death be actual, as in most of the above cases,

tinues, this feature of it was intended to be taken away. But the taking away from the husband the usufruct during the joint lives of lands conveyed to husband and wife would not be inconsistent with the continuance of tenancies by entireties, provided the common-law right to the usufruct was not an incident of the tenancy, but of the marital right, operating upon property so held as upon all other real property of the wife. The grand characteristic which distinguishes a tenancy by the entirety from a joint tenancy is its inseverability, whereby neither the husband nor the wife, without the assent of the other, can dispose of any part of the estate so as to affect the right of survivorship in the other. 1 Bl. Com. 182; 1 Washb. Real Prop. 425. Each is said to be seised of the whole estate, and they do not take by moieties, and the reason assigned in the old books for this anomalous characteristic of this estate is the legal unity of the husband and wife, and the incapacity of the wife to hold a separate and severable estate in lands under a joint conveyance to both. The alleged incapacity of a wife to take and hold lands conveyed to husband and wife as joint tenant or tenant in common with him seems inconsistent with the doctrine which has finally obtained,—that by express words of a grant or devise to husband and wife that species of tenure would be created. This was pointed out in

Miner v. Brown, 133 N. Y. 308, and authorities were cited to show that, where the intention disclosed by the deed or will was to create a tenancy in common, that estate would be created. See also *McDermott v. French*, 15 N. J. Eq. 78; *Wales v. Coffin*, 13 Allen, 218; 1 Washb. Real Prop. 425. There is a tendency now to regard the creation of an estate by the entirety as resting upon a rule of construction rather than upon a rule of law, and to regard the intention as disclosed by the deed or will creating it as the governing rule for determining whether that estate was created rather than a joint tenancy or tenancy in common. See *Re March*, L. R. 27 Ch. Div. 166, and cases before cited. It was conceded under the old law that husband and wife, who were joint tenants or tenants in common of lands before marriage, remained so afterwards. Co. Litt. 187b. It would seem to follow that there was no general incapacity in the wife to hold lands with the husband in joint tenancy or as tenant in common. The quality of the estate held by husband and wife as tenants by the entirety, in the aspect of its inseverability, has been adverted to. But it is important, in view of the subsequent discussion, to observe that the wife, as well as the husband, took an estate under a grant to both. Each was said to be seised of the whole, and not of any separate part. Neither could convey his or

or civil, as banishment. *Margarie de Mose's Case*, *supra*. See also *Wright v. Wright*, 2 Desaus. Eq. 242 (1804), and *Troughton v. Hill*, 2 Hayw. (N. C.) 426 (1806), where cases which do not relate to entirety are cited from 2 Vern. 104, and 2 Bos. & P. 226. And this holds, though the estate was the gift of the parent of the spouse first dying. *Barnes v. Loyd*, *Garner v. Jones*, and *Robinson v. Eagle*, *supra*.

And though the wife surviving accepted dower out of the estate as if it had been her husband's,—at least under the special circumstances of *Falls v. Hawthorn*, 30 Ind. 444 (1868).

And (as against the husband's representatives and creditors) though she has brought a partition suit on the supposition that the property was her husband's, and has accepted a purparty allotted to her in that suit. *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577 (1860).

And though she and her husband had represented to one who was about to lend him money that both were interested in the estate, for such a statement will not be held to imply that they owned it in abarea. *Gardonier v. Furey*, 50 Hun, 62 (1888).

But the bringing of a partition suit and accepting of a purparty as above would bar her rights as against a party to the suit, or any one who was deceived by the partition. *Simpson v. Pearson*, *supra* (*dictum*).

This survivorship is not a species of inheritance from the spouse first dying nor included in the laws regulating inheritance. *Barnes v. Loyd*, *supra*; *Taul v. Campbell*, 7 Yerg. 330, 27 Am. Dec. 508 (1853).

Hence, a clause in an inheritance act entitling the half blood to inherit does not entitle the heirs of the spouse first dying, who are of half blood to the heirs of the spouse last dying, but are merely step-children of the spouse last dying, to inherit from the last-mentioned spouse. *Barnes v. Loyd*, *supra*. (The clause would entitle the step-brothers and step-sisters of the spouse last dying to inherit.)

Abandonment of the wife by the husband is not 30 L. R. A.

equivalent to his civil death. For example, it did not preclude him, before the married women's acts, from giving valid receipts for rents due out of her property. *Haralson v. Bridges*, 14 Ill. 87 (1852).

A widow entitled by survivorship to entirety property in a state where homestead laws prevail cannot be compelled to accept homestead rights instead (*Chambers v. Chambers*, 93 Tenn. 707 (1898);) nor is she entitled to do so. *Ibid.* (*dictum*).

A spouse entitled by survivorship to a rent charge held by entireties is entitled also to arrears thereof unpaid at the death of the other spouse. *Temple v. Temple*, Cro. Eliz. 791 (1601); *Browne v. Dunnery*, Hob. 208 (1617), *Brownl.* pt. 1, p. 171 (1618).

The spouse surviving takes discharged from all encumbrances and partial interests created by the spouse first dying. See *infra*.

Yet a widow could confirm a lease made by her husband of her property (*Brown v. Lindsay*, 2 Hill, Eq. 542, Riley, Eq. 97 (1837)), and therefore, presumably, of the entirety property.

And she may maintain an action for waste against a tenant holding under a lease made by her and her husband jointly (21 Hen. VI., 24 C. pt. 5 (*dictum*),) and therefore, presumably, against a tenant holding under a lease made by him alone which she has confirmed.

Yet in *Kip v. Kip*, 33 N. J. Eq. 215 (1880), she was held not entitled to share in the purchase money arising from a sale by her husband alone of the entirety property, but merely to hold or claim possession against the purchaser.

And a widow succeeding by survivorship to a life estate which she and her husband held by entireties, and accepting and occupying the estate after his death, is responsible to the reversioner for waste committed by her husband in his lifetime (21 Hen. VI. 24 B. pt. 5 (*dictum*), where the negative is omitted before the word "occupy." It is supplied in *Brooke*, Abr. Barre. 27).

The spouse surviving also takes discharged from all encumbrances and transmissions by act of law from the spouse first dying.

her interest to the prejudice of the right of survivorship in the other. The common law, however, wholly ignored this principle of equality between husband and wife in regulating the rights of the parties to the enjoyment of the estate during the joint lives. They were not regarded as having a joint seisin or a joint possession for the purpose of the use during coverture. The husband was held to be entitled to the full control, and to take the rents and profits of the land, during the joint lives, to the exclusion of the wife; and he had power to sell, mortgage, or lease for the same period; and this life interest was, according to the weight of authority, subject to the claims of his creditors. *Barber v. Harris*, 15 Wend. 615; *Jackson v. McConnell*, 19 Wend. 175; *Meeker v. Wright*, 78 N. Y. 262; *Bertles v. Nunan*, *supra*; *Ames v. Norman*, 4 Sneed, 688, 70 Am. Dec. 269; *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462. But the right of the husband at common law to take the rents and profits of lands held by him and his wife as tenants by the entirety, during coverture, and to assign and dispose of them during that period, did not, we apprehend, spring from the peculiar nature of this estate. He acquired no such right by force of the conveyance itself, and it was not an incident thereto. It was a right which followed the conveyance and inured to the husband from

the general principle of the common law which vested in the husband, *jure uxoris*, the rents and profits of his wife's lands during their joint lives. 3 Kent, Com. 130; *Stewart, Husb. & W.* § 308. The husband took the rents and profits of lands held in entirety upon the same right that he took the rents and profits of her other real estate, whether held by a sole or joint title, namely, his right as husband. In none of the definitions of tenancies by entireties have we found any suggestion that this was one of the incidents or characteristics of such estates, and we think it is plain, both upon reason and analogy, that it had its origin in those harsh principles of common law which destroyed for most purposes the legal identity of the wife, and subjected her person and property to the control of her husband.

In considering what effect, if any, the legislation in this state has had upon the right of the husband to the rents, profits, and control of lands held by him and his wife in entirety during their joint lives, it is important to regard, not only the language, but the spirit, of the new enactments. The sole purpose of the original statute of 1848 was to secure to married women the enjoyment of their real and personal property which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant, or bequest from third

Consequently a forfeiture under the feudal law did not bar the wife surviving, though she had concurred in it, because, owing to her coverture, it was regarded as the act of her husband only.

For example, husband and wife, tenants for life by entireties, defending a real action and praying aid of one who was not the reversioner, did not thereby bar the title of the wife if she survived. 15 Edw. IV. 23, pl. 10 (*dictum*).

And husband and wife tenants for life by entireties making a feoffment in fee did not thereby bar the wife if she survived, although the reversioner had entered and become an idiot and the land has passed into the custody of the King. 29 Lib. Ass. 43.

And the lord of a villein whose wife was free could not retain the entirety estate against her surviving. Co. Litt. 187b.

And the creditors of the husband, and those purchasing under an execution levied at their suit have no claim against the estate after his death, if the wife survive. *Simpson v. Pearson*, 81 Ind. 1, 99 Am. Dec. 577 (1880); *Beach v. Hollister*, 3 Hun. 519, 5 Thomp. & C. 568 (1875); *French v. Mehan*, 56 Pa. 286 (1867); *Brownson v. Hull*, 16 Vt. 308, 42 Am. Dec. 517 (1844); *Ketchum v. Walsworth*, 5 Wis. 96, 68 Am. Dec. 49 (1851).

Unless the estate had been conveyed to the spouses in order to defraud the husband's creditors, in which case she is barred to the extent of the money supplied by him for the purchase of it. *Newlove v. Callaghan*, 86 Mich. 301 (1891), affirming *Id.* 297 (1891).

The enforcement of a lien for public improvements against an estate by entireties will not be enjoined on a mere allegation that judgment was not taken against the wife because a personal judgment is not necessary, and if she was a party to the action she would be bound by the judgment against the property. *Barren Creek Ditching Co. v. Beck*, 99 Ind. 230.

So, the title of the spouse surviving is preferred to that of the Crown or state claiming the interest 80 L. R. A.

of the spouse who dies first as escheated. *Jacobs v. Miller*, 50 Mich. 119 (1888) (*dictum*).

The claim by survivorship holds good, notwithstanding a statute abolishing survivorship between joint tenants, even though it does not expressly except husband and wife. *Harrison v. Ray*, 108 N. C. 215, 11 L. R. A. 722 (1891); *Rogers v. Grider*, 1 Dana, 242 (1833).

Banton v. Campbell, 9 R. Mon. 587 (1849), is sometimes referred to on this subject, but seems rather to have depended on the fact that the equitable estate was in the wife only.

The wife surviving was barred from acquiring a term of years vested in her and her husband by entireties by a forfeiture thereof incurred by him in his lifetime or at his death, no doubt because he could absolutely dispose of the term,—for example, a term so held by them and forfeited by his suicide. *Hales v. Pettit*, 1 Plowd. 253 (1562).

The heirs of the surviving spouse may inherit under a limitation to the spouses and their heirs, though the spouse who died first may have been attainted, and therefore incapable of having an heir, whether the attainder was for treason (Oole's Case, cited in Co. Litt. 187 a, b), or for felony. 4 Lib. Ass. pl. 4.

But they cannot take under a limitation to the spouses and the heirs of their bodies (at least in an entailable estate), unless they are capable of inheriting to both. *Beaumont's Case*, 9 Coke, 140a, 141a (1613); *Grenelley's Case*, 8 Coke, 71b (1610); 1 Leon. 157, case 221, and see *Jenk. Cent.* 51a, 22.

V. Operation of technical rules on the entirety estate. a. Rule in *Shelley's Case*.

A limitation of realty, situate in a state where the rule in *Shelley's Case*, 1 Coke, 88 (1579), prevails, to the husband and wife with remainder to their heirs, vests the whole fee in them by entireties. *Auman v. Auman*, 21 Pa. 343 (1853).

A limitation to them, providing that after the death of either the estate shall go to the survivor, and that after the death of the survivor it shall be

persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands, *jure uxoris*, during the joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her own property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of courts of chancery to secure to married women the enjoyment of their own property. In determining the question now before us, too much emphasis cannot be placed upon the fact that the legislation of 1848 and the subsequent years uprooted the principle of the common law, hoary with age, which vested in the husband, by virtue of the marriage relation, control of the property of his wife and the right to exclude her from its enjoyment. If it is still held, notwithstanding this legislation, that the husband takes the whole rents and profits, during coverture, in lands held in entirety, and may exclude the wife from any participation therein, an exception is allowed, standing upon no principle, and

it deprives the wife, although she has an undoubted interest and estate in the land, from any benefit thereof during the lives of both. There are, as we can perceive, but two other alternatives,—either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in *McOurdy v. Canning*, 64 Pa. 89; or the parties become tenants in common or joint tenants of the use, each being entitled to one half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common-law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right, *jure uxoris*, in his wife's property, and to enable the wife to have and enjoy "whatever estate she gets by any conveyance made to her, or to her and others jointly,

divided among the heirs of both, gives an estate for their lives to them, and a contingent remainder in fee to their heirs. *Hadlock v. Gray*, 104 Ind. 506 (1885).

A limitation to them, and after the death of the survivor to the right heirs of both, passes an estate to them by entirety in fee. *Green, Crew, v. King*, 2 W. Bl. 1211 (1778).

But a limitation very slightly differing from this was held in *Doe, Dormer, v. Wilson*, 4 Barn. & Ald. 806 (1821), to pass it to them for their lives with contingent remainder in fee to the survivor.

A limitation to one spouse, with remainder to the heirs of both, passes one undivided share to the former spouse in fee, and upon her death it will pass to her heirs although the other is in possession. *Anonymous*, 8 Leon. 4, case 10 (1568).

A devise to husband and wife and their children and their children's children forever, prohibiting conveyance by the husband and wife, gives them an estate by entirety for life with estate tail to children. *Peterborough Real Estate Invest. Co. v. Patterson*, 18 Ont. Rep. 142 (1887).

b. Merger.

A conveyance to both spouses by entirety in fee was held in *Purefoy v. Rogers*, 2 Saund. 886b, 887 (1870), to merge an estate for life then already vested in the wife, subject, however, to be divested by her disagreeing to the conveyance after her husband's death. It does not seem possible to reconcile this with the statement in *Littleton*, 523, and Co. Litt. 290b, that there is no merger. *Littleton* and *Coke* refer to instances in which the subsequent conveyance purports to operate by way of confirmation, but this can hardly be essential, since the operation is to enlarge, not confirm, the estate. *Coke* cites 16 Hen. VI. *Releasees*; 9 Edw. IV. 18; 6 Edw. III. 9; 17 Edw. III. 68b.

In *Bomar v. Mullins*, 4 Rich. Eq. 80 (1851), it was held that there was no merger, either as regards the legal or the equitable estate.

Such a conveyance would have merged the wife's

previous estate for years before the married women's acts, because the husband had an absolute power of disposing of it, and therefore of merging it, by accepting a larger estate to himself. *Litt. 518*, explained in Co. Litt. 290b.

c. Equity to a settlement.

A married woman has not an equity to a settlement out of an entirety estate. *Ward v. Ward*, L. R. 14 Ch. Div. 808, 49 L. J. Ch. 409, 43 L. T. N. S. 822, 28 Week. Rep. 943 (1879), and authorities there cited.

d. Vendor's lien.

A vendor's lien for unpaid purchase money against an estate sold and conveyed by entirety holds good against the wife surviving. *Anderson v. Tannehill*, 42 Ind. 141 (1878).

e. Notice.

Notice given to a husband of an equitable claim, affecting property which he and his wife purchase, and in which they obtain the legal estate, is not operative against the wife,—especially if the purchase money was hers. *Snyder v. Sponable*, 1 Hill, 567 (1841). *Quare*, whether, since the married women's acts, he could not be deemed her agent if he negotiated the purchase. Before these acts she could not appoint an agent.

f. Homestead exemption.

A statute exempting homestead "or real estate" in the possession of or belonging to the head of a family from debts includes an entirety estate, even when, after a divorce, such homestead rights, if any, as may exist in the property have been transferred, by decree, to the wife. *Jackson v. Shelton*, 89 Tenn. 82 (1890). The point, however, cannot be considered as concluded by this decision, as two of the judges dissented, and gave strong reasons.

Such an exemption was held applicable to entirety property. *Bennett v. Child*, 19 Wis. 322, 38 Am. Dec. 622 (1855).

g. Construction of statutes.

A remedial statute respecting estates held in right of the wife extends also to estates by entirety. *Greneley's Case*, 8 Coke, 71 B (1610). See

and does not enlarge or diminish that estate." The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the enjoyment of any share thereof, except with the concurrence and permission of his wife.

The conclusion we have reached requires a reversal of the judgment below so far as it adjudges that the mortgage executed by the husband to the plaintiff, and the sale thereunder, vested in the plaintiff the right to the possession of the whole estate during the joint lives of Mr. and Mrs. Fisher. The husband had a right to mortgage his interest, which was a right to the use of an undivided half of the estate during the joint lives, and to the fee in case he survived his

wife; and by the foreclosure and sale the plaintiff acquired this interest, and became a tenant, in common with the wife, of the premises, subject to her right of survivorship. The opinion of the general term exhibits with great clearness the reasons upon which it was held that a conveyance or mortgage by the husband without restrictive words binds the fee in case he survives the wife. See 1 Washb. Real Prop. 425; 1 Preston, Estates, 135; *Ames v. Norman*, *supra*.

The judgment below should be modified in accordance with this opinion, and, as modified, affirmed, without costs to either party.

All concur, except Haight, J., not sitting.

also *Corinth v. Emery*, 38 Vt. 505 (1891); *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269 (1857).

See also *infra*, VI. b. as to construction of statutes on the subject of entirety estates.

VI. Where and to what extent entirety estates exist.

a. List of states, etc.

England and Ireland. A limitation to husband and wife, contained in a testamentary disposition made by one dying after 1832, or in a disposition made after that date, creates, not an entirety estate, but a joint tenancy or tenancy in common as between other persons; and this by force of the married women's acts. *Thornley v. Thornley* (1898) 2 Ch. 229; *Re March*, L. R. 27 Ch. Div. 166, 54 L. J. Ch. 143, 51 L. T. N. S. 330, 33 Week. Rep. 241 (1884) interpreted, *Judd v. Buckwell*, L. R. 39 Ch. Div. 148, 57 L. J. Ch. 774, 59 L. T. N. S. 129, 33 Week. Rep. 712 (1888).

Limitations in earlier dispositions created an entirety estate, or an estate in common, according as they would have created joint tenancy or tenancy in common between other persons. See *infra*, IX.

Canada. The married women's acts abolish entireties in estates thereafter created. *Re Wilson & T. I. Electric Light Co.* 20 Ont. Rep. 397 (1891), overruling, without referring to, *Leitch v. McLellan*, 2 Ont. Rep. 587 (1888).

There was a *quære* as to the point in *Griffin v. Patterson*, 45 U. C. Q. B. 554 (1881).

But the statute providing that on a grant to several they should take as tenants in common and not as joint tenants does not apply to entireties. *Re Shaver*, 81 U. C. Q. B. 603 (1881).

Alabama. A limitation since the married women's acts creates always an estate in common. *Donegan v. Donegan* (Ala.) 15 So. Rep. 823 (1894).

A limitation previously created an entirety. *Baker v. Prewitt*, 64 Ala. 551 (1879).

Arkansas. A limitation creates an entirety, though made since the married women's clause, and since the abolition of joint tenancy. *Robinson v. Eagle*, 29 Ark. 202 (1874).

California. Entirety estates never existed. The rights of spouses were regulated by statute (1st Sess. chap. 103; Civil Code, 632) before the adoption of English law, and since then that statute has been continued. *Re Buchanan's Estate*, 8 Cal. 509 (1857).

Connecticut. Entirety estates never existed, nor did survivorship attach on joint tenancy. This was owing to local custom. *Whittesley v. Fuller*, 11 Conn. 337 (1833); *Phelps v. Jepron*, 1 Root, 48, 1 Am. Dec. 33 (1796).

But a special limitation may produce the effect of an entirety. *Infra*, VIII. b. 4, citing *Bartholomew v. Musky*, 61 Conn. 337 (1892).

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Georgia. There is no distinct decision respecting entirety estates on other grounds, although *Scott v. Causey*, 39 Ga. 749 (1892), is decided, apparently at least in part, in favor of survivorship to a husband under a deed to him and his wife.

In *Kempton v. Hallowell*, 24 Ga. 52, 71 Am. Dec. 112 (1858), a deed of marriage settlement conveying land for joint use of husband and wife was held to give her the equivalent of a separate estate in one half of the property.

Illinois. Limitations since the married women's acts make the spouses tenants in common without survivorship. *Cooper v. Cooper*, 76 Ill. 57 (1875).

Limitations before those acts made them tenants by entirety. *Harrer v. Wallner*, 80 Ill. 197 (1875); *Almond v. Bonnell*, 76 Ill. 536 (1875); *Mariner v. Saunders*, 10 Ill. 124 (1838) (where from p. 125, it would seem that the conveyance of one spouse would not bind him surviving); *Pyle v. Oustatt*, 92 Ill. 209 (1879).

Indiana. Limitations, whether before or since the married women's acts, make them tenants by entireties, and give them an estate, which neither alone can affect. *Chandler v. Cheney*, 37 Ind. 391 (1871); *Bevins v. Citne*, 21 Ind. 37 (1868) (*dictum*).

Kansas. The common-law rule still exists and the married women's acts do not affect it. *Baker v. Stewart*, 40 Kan. 443, 2 L. R. A. 434 (1888).

Kentucky. The common-law rule seems still to exist, the statute of 1786 abolishing survivorship between joint tenants unless expressly provided for, not extending to husband and wife. *Rogers v. Grider*, 1 Dana, 242 (1833); *Doe, Ross, v. Garrison*, 1 Dana, 35 (1833).

But under limitations made since 1850 a special expression of intention is necessary,—otherwise they take in common. *Elliott v. Nichols*, 4 Bush, 502 (1868).

Maine. No later decision has been found than *Harding v. Springer*, in 1837, 14 Me. 407, 31 Am. Dec. 61, when they took by entireties; but since 1834 an intention to that effect must be expressed.

Maryland. They took by entireties in 1874 (*Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 236 (1873)) and no alteration seems to have been made to 1883. Later statutes not to hand.

Massachusetts. Limitations to husband and wife since 1885 make them tenants in common, but before that date they were tenants by entireties. *Shaw v. Hearsay*, 5 Mass. 521 (1809); *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 422 (1890); *Wales v. Coffin*, 13 Allen, 218 (1896).

Michigan. Limitations to husband and wife create the entirety estate. *Re Lewis's Appeal*, 85 Mich. 340 (1891) (expressly overruling the *dictum* in *Dowling v. Salliotte*, 83 Mich. 135 (1890)); *Vinton v. Beamer*, 55 Mich. 559 (1886); *Manwaring v. Powell*,

TENNESSEE SUPREME COURT.

COLE MANUFACTURING COMPANY
v.W. A. COLLIER and Wife, *Appts.*

(.....Tenn.....)

1. The character of an estate as one by entirety is not changed by the fact that the deed contains a proviso that in the event the wife should survive the husband "she shall have the use and enjoyment of said land," and "at her death the estate in remainder is to go to her children by the said husband."
2. A statute providing that the husband and wife shall not be ejected from the wife's real estate by virtue of

any judgment against him will apply to estates by entirety, although the rule has been adopted that the husband's rights may be seized and sold in such a way that in case he should outlive his wife the purchaser will come into possession of the whole estate.

(June 6, 1895.)

APPPEAL by defendants from a decree of the Chancery Court for Shelby County in favor of plaintiff in a suit brought to obtain possession of certain real estate which defendant Mrs. Collier claimed as tenant by entirety. *Reversed.*

The facts are stated in the opinion.

40 Mich. 371 (1879); Fisher v. Provin, 25 Mich. 347 (1872); Jacobs v. Miller, 50 Mich. 119 (1883); Naylor v. Minock, 96 Mich. 182 (1893).

Notwithstanding the married women's acts. Naylor v. Minock, *supra*; Aetna Ins. Co. v. Kesh, 40 Mich. 241 (1879).

Minnesota. Limitations to husband and wife since 1886 make them tenants in common, unless it expressly declared that they are to be joint tenants, in which they take as joint tenants without entirety incidents. Wilson v. Wilson, 43 Minn. 308 (1890).

And a contract to convey is construed as a contract to convey to them in common. Wilson v. Fairchild, 45 Minn. 203 (1891).

The effect of a limitation made between 1851 and 1866 seems doubtful. A limitation made before 1851 makes them tenants by entirety.

Mississippi. Limitations made before 1880 made them tenants by entireties (Hemingway v. Scales, 42 Miss. 1, 2 Am. Rep. 598, 97 Am. Dec. 425 (1868); McDuff v. Beauchamp, 50 Miss. 531 (1874); Gresham v. King, 65 Miss. 387 (1883)), unaffected by statutes construing conveyances to several as creating a tenancy in common.

Missouri. Limitations to husband and wife make them tenants by entireties. Gilson v. Zimmermann, 12 Mo. 385, 51 Am. Dec. 168 (1849); Garner v. Jones, 52 Mo. 68 (1873); Edmondson v. Moberly, 98 Mo. 523 (1890).

New Hampshire. Limitations to husband and wife, since the statutes of 1221, § 14, make them tenants in common, though the limitations be contained in a will made before the act by a testator dying after it, unless an intention to create a joint tenancy appears. Clark v. Clark, 56 N. H. 109 (1875).

A limitation before that date made them tenants by entireties. Wentworth v. Remick, 47 N. H. 226, 90 Am. Dec. 573 (1866).

New Jersey. Limitations since the married women's acts make them tenants in common during the joint lifetime but with right of survivorship, because the object of the acts is, not to alter the nature of the estate, but to give the wife full power to dispose of her interest. Buttler v. Roenblath, 42 N. J. Eq. 661, 59 Am. Rep. 52 (1887); Kip v. Kip, 38 N. J. Eq. 216 (1890); See v. Zablackie, 28 N. J. Eq. 422 (1877).

Save as altered by these acts entirety remains as at common law. Washburn v. Burns, 84 N. J. L. 18 (1890); Den, Hardenbergh v. Hardenbergh, 10 N. J. L. 49, 18 Am. Dec. 371 (1823); McDermott v. French, 15 N. J. Eq. 78 (1862); Bolles v. State Trust Co., 27 N. J. Eq. 309 (1876),—where the entirety estate was for life.

New York. Limitations since the married women's acts give them each a moiety of the rents and profits during the joint lifetime as in New Jer-

sey (HILES v. FISHER, overruling on this point Beach v. Hollister, 3 Hun, 519, 5 Thomp. & C. 568 (1875); Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361, 12 Abb. N. C. 238 (1883); and Bram v. Bram, 34 Hun, 487 (1886)), with survivorship, as at common law.

Notwithstanding the statutes requiring express words to make a joint tenancy. Jackson, Stevens, v. Stevens, 16 Johns. 114 (1819); Rogers v. Benson, 6 Johns. Ch. 431 (1821); Dickinson v. Codwise, 1 Sandf. Ch. 222 (1844); Farmers' & M. Nat. Bank v. Gregory, 49 Barb. 155 (1867).

North Carolina. Limitations to husband and wife make them tenants by entireties though made since the married women's acts. Gray v. Bailey (N. C.) 23 S. E. Rep. 318 (1895); Simonton v. Cornelius, 98 N. C. 433 (1887); Harrison v. Ray, 106 N. C. 215, 11 L. R. A. 722 (1891); Bruce v. Nicholson, 109 N. C. 302 (1891); Long v. Barnes, 87 N. C. 329 (1882).

Ohio. Entirety estates never existed. Sergeant v. Steinberger, 2 Ohio, 305, 15 Am. Dec. 553 (1823); Wilson v. Fleming, 13 Ohio, 68 (1864).

Limitations which would elsewhere create entirety estates create estates in common without survivorship, even though expressed to be joint. Farmers' & M. Nat. Bank v. Wallace, 45 Ohio St. 152 (1887); Penn v. Cox, 16 Ohio, 80 (1847).

Oregon. Limitations to husband and wife make them tenants by entireties notwithstanding the married women's clause in the state Constitution. Myers v. Reed, 17 Fed. Rep. 401 (1883).

And notwithstanding the complete abolition of joint tenancy. Noblitt v. Beebe, 23 Or. 4 (1882).

Pennsylvania. Limitations to husband and wife make them tenants by entireties with survivorship, notwithstanding the married women's acts, and the abolition of survivorship in joint tenancies, except when created by express words but with the same unity (in the case of limitations since the said acts as exists in Indiana. *Re Bramberry's Estate*, 156 Pa. 623, 22 L. R. A. 594 (1893); McCurdy v. Canning, 64 Pa. 39 (1870); Diver v. Diver, 56 Pa. 108 (1867); Boyertown Nat. Bank v. Hartman, 147 Pa. 558 (1892)).

South Carolina. Limitations still make them tenants by entireties. Georgia, C. & N. R. Co. v. Scott, 38 S. C. 34 and 40 (1892); Bomar v. Mullins, 4 Rich Eq. 80 (1851).

Tennessee. The same. COLE MFG. CO. V. COLLIER (Tenn.) *post*, 315; Taul v. Campbell, 7 Yerg. 330, 27 Am. Dec. 504 (1835); Chambers v. Chambers, 92 Tenn. 707 (1893); Ames v. Norman, 4 Sneed, 663, 70 Am. Dec. 289 (1857); Berrigan v. Fleming, 2 Lea, 271 (1879).

Texas. Each spouse takes an undivided share, unless the case falls within the community acts. Bradley v. Love, 60 Tex. 477 (1893).

Vermont. Limitations still make them tenants

Messrs. Smith & Tresevant and Metcalf & Walker, for appellants:

The deed vests the title by entireties, and no execution against Mr. Collier can deprive Mrs. Collier of her possession.

Ames v. Norman, 4 Sneed, 683, 70 Am. Dec. 269 (1857); Act 1849, chap. 36 (Milliken & Vertrees' Code, § 8388); *Taylor v. Taylor*, 13 Lea, 490; *Shannon v. Erwin*, 11 Heisk. 387.

Messrs. Thomas H. Jackson and D. E. Myers for appellee.

Beard, J., delivered the opinion of the court:

In 1886, a deed, reciting a valuable consideration, was made and delivered to the defendants, W. A. and Alice T. Collier, conveying to them, as husband and wife, the real estate which is the subject of this suit. Some time thereafter the complainant corporation, being a judgment creditor of the husband, caused an execution to be issued and levied on the latter's interest in this real estate, and, at the sale subsequently made by virtue of this levy, became a purchaser of the same. Having received a deed from the sheriff, this bill was filed, seeking the aid of the chancery court to eject Collier and wife from, and to place complainant in possession of, the entire property.

The first question presented for our consideration is, What interest did these defend-

ants take under the deed of 1886? As it, by express terms, conveyed this property to these two grantees as husband and wife, it is conceded that its legal effect is to create in them an estate by the entirety, unless it be that a limitation imposed upon the tenure of Mrs. Collier, should she outlive her husband, is sufficient to change the character of this estate. The clause in the deed in which this limitation is found is in these words, *viz.*: "In the event she shall survive the said William A. Collier, she shall have the use and enjoyment of said land and improvements, and the rents, issues, and profits thereof; and at her death the estate in remainder is to go to her children by the said W. A. Collier." No limitation is imposed by this deed upon the right of survivorship of either the husband or the wife. The longest liver, as between them, will take the whole. The limitation is upon the estate of the wife after she has taken by survivorship, and is then operative only in the event she should die leaving children of herself and W. A. Collier surviving. In other words, a fee in an estate by entirety is granted to Collier and wife; but the wife's fee is determinable alone upon the event indicated, she in the meantime having outlived her husband. Such a limitation does not alter or modify the estate which the granting words have created.

In *Coke on Littleton* (§ 285), in speaking

by entireties, *Atwood v. Kittell*, 9 Ben. 473 (1878) (where the limitations were peculiar); *Corinth v. Emery*, 63 Vt. 505 (1891); *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517 (1844).

Notwithstanding the abolition of joint tenancy unless created by express words. *Ibid.*

Virginia. Limitations before 1850 make them tenants by entireties. *Farmers' Bank v. Corder*, 23 Va. 238 (1839); *Thornton v. Thornton*, 3 Rand. (Va.) 179 (1825).

Wisconsin. Limitations still make them tenants by entireties. *Ketchum v. Walsworth*, 5 Wis. 66, 68 Am. Dec. 49 (1851).

Notwithstanding the statute requiring express words to create a joint tenancy. *Ibid.* See also *BROWN v. BARABOO*, *post*, 320.

b. Construction of statutes affecting this question.

An enactment that estates are divided into severalty, joint tenancy, and tenancy in common is held in Canada, Kentucky, Massachusetts, Michigan, Pennsylvania, Missouri, and New York to allow of estates by entireties, though followed by an enactment that every estate granted to two or more persons shall be in common unless expressly declared to be joint. *Miller v. Miller*, 9 Abb. Pr. N. S. 446 (1871); *Re Lewis's Appeal*, 85 Mich. 340 (1891), expressly overruling *Dowling v. Salliotte*, 83 Mich. 133 (1890); *Vinton v. Beamer*, 55 Mich. 559 (1885); *Manwaring v. Powell*, 40 Mich. 371 (1879), and other cases in preceding division.

A similar enactment is held in Minnesota to substitute tenancy in common, or, if expressly so declared, joint tenancy, but without entirety incidents. *Wilson v. Wilson*, 43 Minn. 393 (1890).

And this construction is aided by the repeal of an exception of the case of husband and wife and by enactments placing married women in the position of unmarried women, thus abolishing the unity of person between spouses. *Ibid.*

An enactment that limitations shall not create joint tenancies is construed as not including estates by entireties under that term. *Marburg v. Cole*, 49 30 L. R. A.

Md. 402, 33 Am. Rep. 266 (1873); *Robinson v. Eagle*, 20 Ark. 202 (1874); *Miller v. Miller*, *supra*; *Noblitt v. Beebe*, 23 Or. 4 (1892).

An enactment that the estate of a joint tenant shall on his death devolve as if he were tenant in common is construed as not including an estate by entireties. *McCurdy v. Canning*, 64 Pa. 41 (1870); *Den, Motley, v. Whitmore*, 2 Dev. & B. L. 537 (1837); *Thornton v. Thornton*, 3 Rand. (Va.) 179 (1825); *Thomas v. DeBaum*, 14 N. J. Eq. 37 (1861); and see *supra*, IV. *Survivorship*.

And of course this much more holds if the statute expressly excepts the case of husband and wife. *Chandler v. Cheney*, 37 Ind. 410 (1871); *Carver v. Smith*, 90 Ind. 224, 46 Am. Rep. 210 (1883); *Dowling v. Salliotte*, 83 Mich. 131 (1890).

Though the effect of their being husband and wife did not appear on the conveyance. *Dowling v. Salliotte*, *supra*.

See more on this subject, *infra*.

An enactment giving to a married woman the powers of disposition, etc., which unmarried women possess does not alter the character of the estate she takes further than is necessary to enable her to dispose of her interest therein, but operates on the interest when acquired.

Consequently it does not prevent a limitation to husband and wife from creating an entirety estate. *Baker v. Stewart*, 40 Kan. 442, 449, 451, 2 L. R. A. 434 (1888) (in which neither had attempted to dispose of the estate); *Beach v. Hollister*, 3 Hun. 519, 5 Thomp. & C. 553 (1875); *Bertles v. Nunan*, 12 Abb. N. C. 293, 92 N. Y. 152, 44 Am. Rep. 361 (1883) (distinguished by the dissentient judge in 40 Kansas on the ground that the New York statutes left the unity of person untouched); *Robinson v. Eagle*, 20 Ark. 202 (1874); *Carver v. Smith*, 90 Ind. 224, 46 Am. Rep. 210 (1883); and many Indiana authorities cited there which also appear elsewhere in this note; *Farmers' & M. Nat. Bank v. Gregory*, 49 Barb. 153 (1867); *Dowling v. Salliotte*, *supra*; *Gresham v. King*, 65 Miss. 387 (1883); *Hemingway v. Sciles*, 43 Miss. 1, 2 Am. Rep. 536, 97 Am. Dec. 425 (1868); *Mar-*

of joint tenancy, it is said: "If lands be given to two and to the heirs of one of them, this is a good jointure, and the one hath a freehold, and the other a fee simple. And if he which hath the fee dieth, he which hath the freehold shall have the entirety by survivor for terms of his life. They are joint-tenants for life, and the fee simple or estate tail is in one of them." And the authorities agree that "the same words of conveyance which would make two other persons joint tenants will make a husband and wife tenants of the entirety; so that neither can sever the jointure, but the whole must accrue to the survivor." *Green Cross v. King*, 2 W. Bl. 1213; *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489; *Farmers' & M. Nat. Bank v. Gregory*, 49 Barb. 155; *Den, Hardenbergh, v. Hardenbergh*, 10 N. J. L. 49, 18 Am. Dec. 371; 8 Jarman, Wills, 120.

The estate thus granted being one estate by entirety, what right did complainant get by its purchase of the husband's interest? That complainant could cause its execution to be levied on this interest, and purchasing at this sale, under this levy, could place itself so far in the room and stead of the execution debtor that, if unredeemed, it would ultimately come into possession of the whole should the husband outlive the wife, is settled law in this state. *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 369.

burg v. Cole, 49 Md. 402, 33 Am. Rep. 206 (1878); *Goelet v. Gori*, 51 Barb. 314 (1860), (where the estate was for years); *Miller v. Miller*, 9 Abb. Pr. N. S. 448 (1871); *Myers v. Reed*, 17 Fed. Rep. 401 (1883) (where the question had reference to survivorship and the statute was passed subsequently to the death, but the court expressed an opinion that it would have been the same if it had been passed before); *Forayth v. McCall* (no opinion filed but case referred to in 38 N. Y. 163, and 27 Alb. L. J. 190). The above decisions overruled *Feely v. Buckley*, 28 Hun. 451 (1862).

But these enactments alter the nature of the estate during the joint lifetime in several states and altogether in some. See list *supra*.

And the English enactment, that a married woman shall hold property as if sole causes a limitation to both spouses to produce the effect as if they had not been married. *Re March*, L. R. 27 Ch. Div. 168, 54 L. J. Ch. 143, 51 L. S. N. S. 380, 32 Week. Rep. 241 (1884); *Jupp v. Buckwell*, L. R. 39 Ch. Div. 143, 57 L. J. Ch. 774, 59 L. T. N. S. 129, 33 Week. Rep. 712 (1886).

Enactments altering the nature of entirety estates, or the effect of limitations to spouses operate though the marriage may have taken place before the passing of the act. *Re March, supra*; *Clark v. Clark*, 56 N. H. 106 (1875).

But not on estates acquired before the passing of the act. *Stilphen v. Stilphen*, 65 N. H. 127 (1889); *Harrer v. Wallner*, 80 Ill. 197 (1875); *Elliot v. Nichols*, 4 Bush. 502 (1866); *Gresham v. King*, 65 Miss. 387 (1886),—in all which the estate was conveyed by deed in possession.

But the married women's acts operate on limitations in wills made before the act if the testator died after the act. *Re March*, L. R. 27 Ch. Div. 170, 54 L. J. Ch. 143, 51 L. T. N. S. 380, 32 Week. Rep. 241 (1884).

Enactments abolishing survivorship would be unconstitutional if intended to operate on entirety estates acquired by the spouses before they took effect. *Elliot v. Nichols, supra*; *Myers v. Reed*, 17 Fed. Rep. 401 (1883).

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Complainant, however, insists that, having the sheriff's deed, it is entitled to immediate possession of the whole estate, though the wife is still alive; and it is urged that this is equally settled by our decisions. This makes necessary an examination of the cases relied upon by complainant as authority for this position. *Ames v. Norman, supra*, is the leading case. The facts there were that a deed made to a husband and wife created in them an estate by entirety in certain realty. During marriage the husband's interest in this property was levied upon and sold. Subsequently the wife filed her bill against her husband for divorce, and joined with him, as a defendant, Norman, who as a judgment creditor had redeemed from the execution purchaser. This was done for the purpose of obtaining a decree canceling or extinguishing Norman's title and having the land settled upon complainant. The decree thus asked for was passed by the chancellor, and Norman brought the case to this court for review. A careful reading of the reporter's synopsis of the pleadings and evidence, as well as of the briefs of the respective counsel, fails to discover any intimation that Norman was in possession of the land in controversy, or that complainant was out of possession. It is certain that, so far as the redeeming creditor was concerned, this suit was purely defensive,—a defense on his part limited to the title ac-

As to legislative power to change rights by curtesy and dower, see *note* to *McNeer v. McNeer* (Ill.) 19 L. R. A. 256 (1892).

VII. In what subjects, estates, and interests entirety may exist.

a. In what subjects.

An entirety estate may exist in realty, whether corporeal (so in most of the cases), or incorporeal,—as a rent. *Browne v. Dunnyer*, Hob. 208 (1617), *Browl*, pt. 1, p. 171 (1618); *Temple v. Temple*, Cro. Eliz. 791 (1601); *Robb v. Beaver*, 8 Watts & S. 107 (1844).

As to crops, see *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254 (1879).

And therefore it may exist (as regards the beneficial interest) in personality which is subject to a trust for investment in the purchase of real estate, for this belongs, under the doctrine of constructive conversion, to the persons who would be entitled to the real estate if purchased.

Hence the surplus of the purchase money arising from the sale of mortgaged entirety estates to satisfy the mortgage is held by entireties. *Germania Sav. Bank v. Jung*, 23 Abb. N. C. 61 (1892); *Vartie v. Underwood*, 18 Barb. 561 (1854).

And so is the surplus of the purchase money arising from the sale of an entirety estate which formed part of the estate of a deceased person and was sold to satisfy his debts. *Mebane v. Yanoy*, 8 Ired. Eq. 88 (1843).

And so is the share of the spouses in the proceeds of land sold in a partition suit which share corresponds to a share which they held by entireties in the land. *Bryan v. Bryan*, 1 Dev. Eq. 47 (1827); *Re Dozier*, 1 Dev. Eq. 118 (1823),—qualified by *Jones v. Plummer*, 20 Md. 420 (1862); *Eberts v. Eberts*, 55 Pa. 110 (1867); *Mildmay v. Quicke*, L. R. 6 Ch. Div. 553 (where at p. 555 this reason is given), 46 L. J. Ch. 667, 25 Week. Rep. 788 (1877); *Ex parte Mobley*, 2 Rich. Eq. 57 (1845); *Scull v. Jernigan*, 2 Dev. & B. Eq. 144 (1838); *Stoner v. Com*, 16 Pa. 337 (1851).

Consequently, such purchase money will be kept invested and not paid out to the husband unless he

quired by him as the result of the execution sale. He did not by cross bill or otherwise, so far as the reporter's notes or the argument of counsel indicate, set up a claim to possession or to rents and profits. The stress of his contention was that a husband had a leviable interest in an estate by entirety, which passed to the purchaser at an execution sale, and through him to the redeeming creditor, and that the interest thus acquired by the latter was not affected by the subsequent divorce of the husband and wife. These were the only points involved in that case, and this court, upon abundant authority, resolved both of them in favor of Norman, and reversed the chancellor in so far as he had held otherwise. It is true that in the course of the opinion the learned judge delivering it said: "The defendant by his purchase became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and to enjoy the profits of the land as owner during the joint lives of the husband and wife." This statement, however, was not called for by any issue in the case. It was therefore a *dictum*, and not controlling as authority. *Jackson v. Shelton*, 89 Tenn. 82, and *Hopson v. Foulkes*, 92 Tenn. 697, 23 L. R. A. 805, also relied on by complainant, have no bearing on the question now being considered. The first of these involved the right of a divorced wife to a homestead in property held with her husband prior to the divorce as an estate by entirety; while the second held that such an estate was converted into a tenancy in common by

a divorce *a vinculo*. We think it apparent that the furthest limit to which this court has gone is in holding that the purchaser of the husband's interest in such an estate stands in his shoes, so far as ultimate survivorship is concerned, but that the question of the purchaser's right to the rents and profits of the property pending the wife's life is yet an open one in this state.

It may be conceded that at common law the husband, during coverture, had the unlimited right to the usufruct of this estate and that he could mortgage the property, or otherwise make a valid transfer of the possession of the same. *Fairchild v. Chastelleux*, 1 Pa. 181, 44 Am. Dec. 117; *Barber v. Harris*, 15 Wend. 617; *Jackson, Suffern, v. McConnell*, 19 Wend. 175; *Bolles v. State Trust Co.* 27 N. J. Eq. 308. This right necessarily resulted from the common-law view of the effect of marriage upon the wife's property rights. Marriage conferred upon the husband the dominion of the wife's real estate. The rents and profits belonged to him *jure mariti*. They were not only under his personal control, but they could be seized by his creditors. To modify this rule, and to give, at least, partial protection to married women, owning real estate, against the creditors of their husbands, as well as against husbands themselves, the act of 1849-50 (embodied in § 8338, Milliken & Vertrees' Code) was passed. That section is as follows: "The interest of the husband in the real estate of his wife acquired by her . . . shall not be sold or disposed of by virtue of any judg-

survives the wife. *Germania Sav. Bank v. Jung*, 28 Abb. N. C. 81 (1892).

But in *Osborne v. Edwards*, 11 N. J. Eq. 73 (1855), payment to the husband of the wife's share of the proceeds of sale in a partition suit of land, in which the wife had a share, and which was not affected by the married women's acts, was good if made before the wife had asserted her rights.

As to whether personalty can be held by entireties (when not subject to constant conversion), the cases differ; but the dispute is mainly verbal. *Fogleman v. Shively*, 4 Ind. App. 197 (1892).

That it cannot be held by entireties was declared respecting stock in a land company in *Blake v. Jones*, Bail. Eq. 146, 21 Am. Dec. 530 (1830).

Respecting investments, in *Watt v. Bovee*, 35 Mich. 425 (1877); and *Re Bryan*, L. R. 14 Ch. Div. 516, 49 L. J. Ch. 504, 28 Week. Rep. 761 (1880).

Respecting a promissory note, in *Abshire v. State*, 53 Ind. 66 (1876).

But that there is survivorship on a promissory note given to both spouses for the purchase money of entirety land in Mississippi before the Mississippi Code of 1880, see *Allen v. Tate*, 58 Miss. 535 (1887).

Respecting a bequest, in *Polk v. Allen*, 19 Mo. 457 (1854).

Respecting a mortgage debt, in *Re Albrecht*, 136 N. Y. 91, 18 L. R. A. 329 (1892).

Respecting a mortgagee's interest in the mortgaged land in New York where a mortgage is merely a lien, in *Re Albrecht*, 136 N. Y. 94, 18 L. R. A. 329 (1892).

Respecting a recognizance given to husband and wife to secure money for equality on a partition of land in which the wife solely had a share, in *Lodge v. Hamilton*, 2 Serg. & R. 491 (1816).

As to the income of general personal estate, see *See v. Zabriskie*, 28 N. J. Eq. 422 (1877).

That it may be held by entireties was declared 30 L. R. A.

respecting bank stock, in *Phelps v. Simons*, 150 Mass. 415 (1893).

Respecting a personal annuity equitably secured on land, in *Gifford v. Rising*, 55 Hun. 61 (1890).

Respecting promissory notes, in *Gillan v. Dixon*, 65 Pa. 395 (1870).

Respecting an annuity or dividends, in *Ward v. Ward*, L. R. 14 Ch. Div. 506 (1879).

Pollard v. Merrill, 15 Ala. 175, 176 (1849), accords with this decision.

It was declared in *Re Bramberry's Estate*, 156 Pa. 623, 22 L. R. A. 504 (1896), that any kind of property may be held by entireties, and the purchase money (secured by a mortgage) of an estate which the spouses had held by entireties was decided to be entirety property. See note to this case in 22 L. R. A. 594. See also *infra*, VIII. and IX.

If personalty cannot be held by entireties it follows that real estate held upon trust to be sold (without any ultimate trust for reinvestment in the purchase of realty) cannot be so held. And this was so decided in *Blake v. Jones*, *supra*.

That instruments payable to husband and wife will belong to the wife if she survives the husband, is also held in many cases which do not call the right an estate by entireties. As in case of government stock, *Re Gadbury*, 32 L. J. Ch. N. S. 780, 11 Week Rep. 995 (1863); note and mortgage, — *Draper v. Jackson*, 16 Mass. 436 (1820); mortgage and bonds, — *Christ's Hospital v. Budgin*, 2 Vern. 683 (1712); stocks, — *Craig v. Craig*, 3 Barb. Ch. 104 (1848); *Dummer v. Pitcher*, 5 Sim. 35 (1851); a bequest, — *Hamm v. Meisenhelter*, 9 Watts, 350 (1840); promissory notes, — *Shields v. Stillman*, 48 Mo. 88 (1871); a bond, — *Coppin v. —*, 2 P. Wms. 496 (1723); a devise, — *Cowper v. Scott*, 3 P. Wms. 119 (1731).

These are referred to merely as instances of this class of cases.

The proceeds of an entirety estate, sold since the

ment; . . . nor shall the husband and wife be ejected from or dispossessed of such real estate by virtue of any such judgment," etc. That this section will protect the wife's realty when held in severalty is clear. Does it not also protect her interest in an estate held in entirety? What is this estate? As was said in *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269, the husband and wife in such an estate "do not take in joint tenancy; constituting one legal person, they cannot be vested with separate or separable interests. They are said, therefore, to take by entireties; that is, each of them is seised of the whole estate, and neither of a part." The estate thus held is a unit of indivisible parts, differing from a joint tenancy in that the latter is a unit of divisible parts. In the case of the latter relation, when one joint tenant dies the survivor takes *jus accrescendi*. But in the case of the former estate, upon the death of husband or wife, no new estate arises; there is a mere change in the properties of the legal person holding the originally granted estate. *Stuckey v. Keefe*, 26 Pa. 397. Or, as was said in *Thornton v. Thornton*, 8 Rand. (Va.) 179: "The husband and wife have the whole from the moment of the conveyance to them, and the death of either cannot give the survivor more." And during their joint lives the common law in the case of this anomalous estate gave to the husband the full and entire control and possession of the property, and the right to collect the rents and profits, vesting this right, as in the case of the wife's estate in severalty, in *jure mariti*. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 802. This estate, therefore, being a "unit of indivisible

parts," in which the wife, no less than the husband, "is the owner of the whole from the moment of the conveyance to them," and equally with him entitled to the whole (*McCurdy v. Canning*, 64 Pa. 39), and it being apparent also that his right to collect his entire rents rests alone *jure mariti*, and there being no way for the purchaser of the husband's interest to dispossess him without at the same time dispossessing the wife, we have no hesitation in holding that the act of 1849-50 (Milliken & Vertrees' Code, § 8338) excludes such purchasers from possession against the wife.

It is urged, however, that the case of *Ames v. Norman*, *supra*, is against this conclusion. It is sufficient to say in reply that an examination of the briefs of the counsel will show that the application of the statute in question was not the subject of suggestion or argument in that case. Even had it been, as the right of possession, as has been already stated, was not an issue in the case, the statement in the opinion that "this act did not apply to a wife's interest in an estate by entirety was dictum. It is proper to say that other courts of the highest respectability have made a similar application of statutes very much like ours. *McCurdy v. Canning*, *supra*; *Corinth v. Emery*, 63 Vt. 505; *Davis v. Clark*, 26 Ind. 424, 79 Am. Dec. 471; *Bruce v. Nicholson*, 109 N. C. 202.

Other points raised in the assignment of errors have been disposed of in our oral opinion.

A decree reversing the chancellor, and embracing the conclusions of this court, announced in the oral and written opinion, will be rendered.

married women's acts, was held to belong to the spouses in shares, in *Fogleman v. Shively*, 4 Ind. App. 197 (1892); and *Feely v. Buckley*, 23 Hun. 451 (1882),—which last proceeded on the ground, since overruled, that entirety was abolished by those acts.

As to terms of years, see *infra*, VII. a.

b. In what tenures.

Entireties may exist in freehold (as in most of the cases), and in copyhold. *Back v. Andrew*, 2 Vern. 120 (1690), Prec. in Ch. 1 (1699); *Bullock v. Dibley*, 4 Coke, 23a (1563); *Doe, Dormer, v. Wilson*, 4 Barn. & Ald. 303 (1821); *Green, Crew, v. King*, 2 W. Bl. 1211 (1778).

Leases to husband and wife for life are included. *Leitch v. McLellan*, 2 Ont. Rep. 597 (1883); *Britton v. Knight*, 29 U. C. C. P. 567 (1879).

But the survivorship in such cases is of course only a continuation of the life use to the survivor.

c. In what titles.

Entirety may exist in a seisin, as in almost all the cases.

Or in an outstanding right. *Wentworth v. Remick*, 47 N. H. 226, 90 Am. Dec. 873 (1866).

d. In what species of estate,—legal or equitable.

Entirety may exist in the legal estate combined with the beneficial,—as in most of the cases.

It may exist in an outstanding legal estate. *Jackson, White, v. Cary*, 16 Johns. 302 (1819); *Norman v. Cunningham*, 5 Gratt. 63 (1848); *Moore v. Moore*, 12 B. Mon. 661, 663 (1851); *Wright v. Saddler*, 20 N. Y. 320 (1859).

It may exist in an equitable estate. *Freeman v. Barber*, 3 Thomp. & C. 574 (1874).

But in *Stoeblor v. Knerr*, 5 Watts, 181 (1866), a 30 L. R. A.

conveyance to the husband to be by him held upon certain conditions specified in an agreement which purported to make him a trustee for himself and his wife in special tail was held to vest the beneficial as well as the legal estate in him, so as to entitle a creditor of his to have it sold to satisfy the debt. *Quere*.

e. In what estates.

A fee simple may be held by entirety,—as in most of the cases.

A fee limited, qualified, or conditional may be held by entireties. *Greneley's Case*, 8 Coke, 73 b (1610); *Beaumont's Case*, 9 Coke, 140 (1613), citing 12 Hen. IV.; *Formedon*, 15, 21 Edw. III. 33, 35.

A fee tail may be held by entireties. *Greneley's Case*, *supra*.

An estate for the life of husband and wife and the survivor may be held by entireties. *Georgia C. & N. E. Co. v. Scott*, 13 S. C. 24 and 40 (1882); *Wentworth v. Remick*, 47 N. H. 226, 90 Am. Dec. 873 (1866); *Doe, Dormer, v. Wilson*, 4 Barn. & Ald. 303 (1821); *Purefoy v. Rogers*, 3 Saund. 386 b, 387 (1670); 21 Hen. VI. 24 B. pl. 5; 15 Edw. IV. 29, pl. 10; *Torrey v. Torrey*, 14 N. Y. 430 (1856). See *infra*, VIII. b. 5.

An estate for the joint lifetime of husband and wife may be held by entireties. *Thomas v. De Baum*, 14 N. J. Eq. 87 (1861).

An estate for the life of one of the spouses, and as to the other spouse in fee, may be held by entireties. *COLE MFG. CO. v. COLLIER* (Tenn.) post, 815.

No case of a limitation to husband and wife for the life of another has been found, but beyond doubt it also may be held by entireties.

An estate for years may be held by entireties. *Hales v. Pettit*, 1 Plowd. 250 (1562) (but that the husband alone could forfeit it, see *supra*, end of IV., citing 7 Hen. VI.); *Goelet v. Gori*, 21 Barb. 320 (1860).

WISCONSIN SUPREME COURT.

William BROWN, *Appl.*,
v.
City of BARABOO, *Resp.*

(90 Wis. 151.)

Husband and wife taking by descent as next of kin take by moieties, and not by entireties, and without any right of survivorship.

(April, 3, 1895.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Sauk County in favor of defendant in an action brought to recover possession of certain real estate. *Reversed.*

Statement by Pinney, J.:

This is an action of ejectment for the recovery of the undivided four sevenths of an undivided half of a certain parcel of land in the city of Baraboo. George W. Brown died, intestate, seised of the entirety of the premises, December 15, 1847, and without any children. Both his father, Chauncey Brown, and his mother, Clarissa Brown, survived him, and the latter predeceased her husband, dying, intestate, February 26, 1854. The plaintiff, also a son of the said Chauncey and

Clarissa Brown, claims the interest in the premises for which he sues as an heir of his deceased mother, and as grantee of the interest of three others of her heirs. Having produced evidence to show that he was the owner of four sevenths of the interest in the premises, if any, of which his mother died seised, he claimed that upon the death of George W. Brown intestate the entirety of the premises descended equally to his said father and mother, as his next of kin, computing by the rules of the civil law. After the plaintiff had rested his case, the court gave judgment of nonsuit against the plaintiff, upon the ground that George W. Brown's mother, under whom alone the plaintiff claimed title, took no interest whatever in the premises, and that his father inherited the entirety. From this judgment the plaintiff appealed.

Messrs. William Brown and Bentley & Bentley, for appellant:

Those who take property as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take in equal shares.

Knapp v. Windsor, 6 Cush. 156; *Snow v. Snow*, 111 Mass. 889.

The term "qualified or limited fee" imports a fee limited to endure until a specified event. It then ceases and reverts to the donor if it has not meanwhile been disposed of, but all intervening dispositions have the same operation as a fee simple. The term "fee conditional" imports a fee limited in property not entailable to the parties and the heirs of their bodies. It differs from other limited fees in that dispositions made of it in the lifetime of the first taker are not valid beyond that life, unless there are issue inheritable under the limitation.

1. In what shares.

An undivided share held by the spouses in common with others may be held by entireties, and so may their interest in a joint tenancy. *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64 (1877); *Fox v. Fletcher*, 8 Mass. 274 (1811); *Jones v. Chandler*, 40 Ind. 588 (1872). And see *infra*, IX.

VIII. Creation of entirety estates.

a. By act of law.

Spouses who inherit as coheirs do not take by entireties, whether they married before inheriting as in *BROWN v. BARABOO*, or intermarry afterwards. *Symond's Case*, F. Moore, 92 (1536) (*dictum*).

Even though the estate inherited was equitable and the legal estate was transferred to them after the marriage by the statute of uses subsequently passed, because it transfers the same estate as they had in the use. *Ibid*.

But there is a statutory exception in Pennsylvania. Stat. 3 App. 1883, § 3 (Brightley's Dig. ed. 1894 p. 1068); *Gillan v. Dixon*, 85 Pa. 395 (1870).

The fact that money with which land is purchased in the wife's name was supplied in part by her husband does not make them tenants by entirety, but if the presumption that the purchase was intended as a gift to the wife be rebutted, the spouses take the beneficial estate in shares proportionate to the sums paid by them respectively. *Harden v. Darwin*, 77 Ala. 472 (1884); *Tebbetts v. Tilton*, 31 N. H. 273 (1855).

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So also in *Springer v. Young*, 14 Or. 230 (1893), land purchased by the husband out of the proceeds of the sale of a donation claim which the husband and wife had held in common was held to belong to them in shares, the husband having afterwards recognized the right of the wife to a half share.

The husband can acquire seisin of the wife's estate on her behalf. *Nesson v. Hampton* (Eng. March, 90, pl. 145 (1640), and therefore presumably also of an entirety estate on behalf of both.

b. By act of the party.

1. Limitation to husband and wife without specifying how they are to take.

A limitation of property capable of being held by entireties, made to a husband and wife without specifying how they are to take, is construed as meant to limit it to them by entireties. *Litt. 523, 528*; *Beach v. Hollister*, 8 Hun. 519, 5 Thomp. & C. 568 (1875); *Croan v. Joyce*, 3 Bush. 454 (1867); *Elliott v. Nichols*, 4 Bush. 502 (1868); *McCurdy v. Canning*, 64 Pa. 39 (1870); *McDermott v. French*, 15 N. J. Eq. 78 (1862); *McLeod v. Tarrant*, 39 S. C. 271, 20 L. R. A. 848 (1893); *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462 (1896); *Zitna Ins. Co. v. Resh*, 40 Mich. 241 (1879); *Robinson v. Eagle*, 29 Ark. 208 (1874); conceded in *Doe, De Peyster, v. Howland*, 8 Cow. 277, 18 Am. Dec. 445 (1848).

Whether the limitation be by way of grant, as in the above cases, or by way of reservation of a particular estate in the land. *Vinton v. Seamer*, 55 Mich. 559 (1885).

Or by way of reservation of a rent in fee on a conveyance of the land which was itself held by entireties. *Robb v. Beaver*, 8 Watts & S. 107 (1844).

Even though the fact that they are spouses is not stated in the deed but must be proved by extrinsic oral evidence. *Chandler v. Cheney*, 37 Ind. 391 (1877); *Dowling v. Sallotte*, 33 Mich. 131 (1890); *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64 (1877).

And though the wife was named in the habendum only, the husband being named both in the habendum and in the premises. *McLeod v. Tarrant*, *supra*.

The creation of an estate in joint tenancy depends on the wording of the deed or devise by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the acts of the parties, and never by the act of law.

3 Bl. Com. 180; *Knapp v. Windsor*, 6 Cush. 160; Chitty's Bl. pp. 180, 181.

Chauncey Brown and Clarissa Brown, the father and mother of George W. Brown, heir of this property from George W. Brown, who was the son of Chauncey Brown and Clarissa Brown, and Chauncey Brown and Clarissa Brown, having heir of this property of George W. Brown, were, under the law, made tenants in common of this property.

Snow v. Snow and Knapp v. Windsor, supra; *Higbee v. Rice*, 5 Mass. 344, 4 Am. Dec. 63; 1 Chitty's Bl. p. 181, *146; Rev. Stat. 1839, 178, § 4, 184, § 38; Rev. Stat. 1849, p. 380, §§ 4, 9, 15, 17, 18.

Mr. R. D. Evans, for respondent:

Under the English statutes of distribution, if an intestate left no widow, nor lineal issue, the father took the whole of the personal property.

Schouler, Exrs. & Adms. § 501; Wms. Exrs. 1506; *Blackborough v. Davis*, 1 P. Wms. 51.

This construction, both as to personal and real estate, had been uniformly followed in Massachusetts prior to the enactment of this statute here. The next of kin according to the construction given to the statute (22 &

23 Car. II.), which has always been adopted here, would be the father of such child, if any, who would, of course, take the whole.

Sheffield v. Loeving, 13 Mass. 491.

The old doctrines of the common law forbade that mother and father should have equal title as parents.

Schouler, Exrs. & Adms. §§ 102, 103; Wms. Exrs. 423; *Blackborough v. Davis*, supra. Preferences have always been recognized among kindred of the same degree.

Schouler, Exrs. & Adms. § 108.

This preference modern legislation has greatly modified, but it has required the enactment of specific statutes to place the mother of an intestate upon terms of equality with the father.

Schouler, Exrs. & Adms. § 108.

Had Chauncey Brown, the father of said George Brown, been dead at the time of the death of said George Brown, his mother, if the construction claimed by appellant is correct, would have taken the whole of said George Brown's estate. But it is settled law in this state that the mother, in the circumstances specified, would not have taken the whole,—would have taken equally with the surviving brothers and sisters of said George Brown, or the one-eleventh part of said estate.

Westcott v. Miller, 42 Wis. 454.

Would she take a larger interest, her husband being alive?

And though the conveyance purported to be a confirmation of a previous estate which was not held by entireties. Litt. 535, 523.

And (as regards the beneficial estate) even though the purchase money was paid by the wife only, if she acquiesced in the conveyance to both. Ward v. Krumm, 54 How. Pr. 35 (1876).

See, however, *infra*, VIII. c. citing Trimble v. Reis, 37 Pa. 443 (1860).

And though the conveyance be expressly made as an advancement by the wife's father. Garner v. Jones, 53 Mo. 28 (1873).

But when the wife's father had long retained a deed in his possession and finally delivered it for the use of the wife only after her husband had deserted her, the spouses were held to be trustees for the wife alone, so that her husband's creditors could not have the estate sold. Barncord v. Kuhn, 36 Pa. 383 (1860).

There were other points in this case. The court held that a judgment in Pennsylvania does not touch property which the defendant acquires after the judgment, and that the entirety estate was therefore originally exempt; and was afterwards effectually surrendered to the father. The estate, however, was on fee, and therefore could not be surrendered in the strict sense of that word, but reconveyed. The reconveyance was oral by tearing up the deed and agreeing to accept a new one to the wife alone, which was granted. The decision, if supportable, must be rested on the ground that so much of the beneficial estate as did not pass to the separate use of the wife remained in the father by way of resulting trust for want of an intention to part with it.

In Garner v. Jones, 52 Mo. 71, 72 (1873), the court said that Barncord v. Kuhn must have been controlled by the statute of 1848 respecting married women.

And the general rule holds notwithstanding an enactment that a limitation to two or more persons shall create a tenancy in common (unless otherwise expressed) because the spouses are, "one person." 30 L. R. A.

son in law" (rather *sicut una persona*). Shaw v. Hearsey, 5 Mass. 521 (1809); Beach v. Hollister, 3 Hun, 520, 5 Thomp. & C. 538 (1875); Hemingway v. Soates, 42 Miss. 17, 2 Am. Rep. 556, 97 Am. Dec. 425 (1868); Robinson v. Earle, 29 Ark. 206 (1874); Hall v. Stephens, 65 Mo. 676, 27 Am. Rep. 302 (1877).

Especially if this construction be aided by a provision in the same statute that partition may be made by those holding by entireties, which provision was held to imply that entireties must still exist. Bertles v. Nunan, 12 Abb. N. C. 202, 92 N. Y. 152, 44 Am. Rep. 351 (1883) (where the question was whether the administrator of a surviving wife could sell), overruling Meeker v. Wright, 7 Abb. N. C. 299 (1879), reversing 11 Hun, 538 (1877),—which is commented on in 12 Abb. N. C. 208, 290, and therein stated to have been reversed in 27 Alb. L. J. 190.

But in Clark v. Clark, 56 N. H. 105 (1875), an opposite decision was pronounced on a similar enactment on the ground that the married women's act in New Hampshire had destroyed the unity of person, a theory not admitted in the New York cases.

But an enactment that a limitation to two or more (omitting the word "person") shall create a tenancy in common applies to a limitation to married spouses. Hoffman v. Stigers, 23 Iowa, 309 (1860).

And the rule holds notwithstanding an enactment that no estate shall be adjudged a joint tenancy unless an intent to that effect be expressed. McDermott v. French, 15 N. J. Eq. 73 (1862); Craft v. Wilcox, 4 Gill, 504 (1846); Den, Wyckoff, v. Gardner, 20 N. J. L. 556, 45 Am. Dec. 388 (1846).

As to the effect of an enactment that a joint estate shall pass as an estate in common, see *supra*, VI. b.

2. Limitation especially by entireties in a state where entirety does not exist.

A limitation of property situate in a state where entirety estates have been abolished or never existed, made to a husband and wife expressly to hold

The father excludes all other next of kin.

Prof. E. Robertson, Article on *Inheritance*, 13 Enc. Britannica, p. 198; Sweet, Law Dict. subject, *Next of Kin*, p. 555; *Blackborough v. Davis*, 1 P. Wms. 48; Robertson, Law of Personal Succession, 10 Law Lib. § 8, ¶ 8, p. 148; Burn's Ecclesiastical Law, 9th ed. p. 545; 4 Wms. Exrs. 4th Am. ed. chap. 1; *Sheffield v. Lovering*, 12 Mass. 490.

Pinney, J., delivered the opinion of the court:

1. It was provided by the statute of descent in force at the time of the death of George W. Brown that "when any person shall die seised of lands, tenements, or hereditaments not by him devised, . . . where there are no children of the intestate, the inheritance shall descend equally to the next of kin in equal degree, and those who represent them, computing by the rules of the civil law." Terr. Stat. 1839, p. 194, § 38. Consanguinity, it is said, is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between an intestate and his father or grandfather, etc., in the direct ascending line, or between him and his son or grandson, etc., in the direct descending line; and every generation in lineal, direct consanguinity constitutes a different degree, reckoning either upward or downward. This method of computation of degrees of kindred in the direct line obtains as well in the civil and canon law as in the common law. 2 Chitty's

Bl. 203. The difference in the method of computation of degrees exists only in relation to collateral consanguinity. As George W. Brown left no children, his father and his mother were his next of kin, and in the first degree. They stood as such in equal degree, and the statute declared, in substance, that his inheritable property should descend to them equally, as his next of kin. The common-law canon of inheritance, by which males were preferred to females in the same degree, was abrogated by this statute. "It is a general rule that those who take property as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take in equal shares." Reeve, Descent, 105, 123; *Knapp v. Windsor*, 6 Cush. 156; *Snow v. Snow*, 111 Mass. 890; *Batch v. Stone*, 149 Mass. 43. The statute leaves no question, but declares in express terms that "the inheritance shall descend equally to the next of kin in equal degree." It is very evident that the real estate in question descended equally to the father and to the mother of the deceased; and as they took by descent, and not by purchase, as by grant or devise, we think that they took as tenants in common, and by moieties, and not by entireties, and, therefore, that, upon the death of the mother, her interest did not go to the father, her husband, by right of survivorship. The creation of an estate in joint tenancy, it is said, "depends on the wording of the deed or devise by which the tenants claim title, for this estate can only arise by purchase or grant, —

by entireties, is construed so as to produce as nearly as possible the effect intended.

Hence, a limitation of land in Pennsylvania (where it was at the time of the decision undetermined whether the married women's act had abolished entirety estates) to a husband and wife to hold in the manner prescribed in *Stuckey v. Keefe*, 26 Pa. 387 (1856), in which case the parties had been held to take by entireties¹, was held to operate as a limitation to both spouses so long as both should live, and after the death of one to the survivor in fee. *Bates v. Seely*, 46 Pa. 248 (1863).

See also VIII. b, 6, citing *Bartholomew v. Muzzy*, 61 Conn. 387 (1892).

3. Limitation to husband and wife as joint tenants.

A limitation of property capable of being held by entireties to a husband and wife expressly as "joint tenants" seems by the old authorities to make them tenants by entireties, the entirety estate being regarded as a joint tenancy with peculiar incidents; although it is clear from the authorities cited *supra*, II. that if they were ordinary joint tenants before the marriage they continue so after it. The modern authorities are divided.

In *Pollak v. Kelly*, 6 Ir. C. L. Rep. 373 (1866), it was held that such a limitation makes them tenants by entireties.

In *Re Bramberry's Estate*, 156 Pa. 623, 22 L. R. A. 594 (1898), and *McDuff v. Beauchamp*, 50 Miss. 531, 535 (1874) (in which case the limitation is stated to have been to them jointly), the court declared that whatever words would make other persons joint tenants would make husband and wife tenants by entireties.

And this was held to be so in *McDuff v. Beauchamp*, *supra*, notwithstanding an enactment that a conveyance to two or more persons should create an estate in common. So in many old books it

is laid down that husband and wife cannot take by moieties.

On the other hand, it has been held by the New York cases that a limitation of realty in New York, expressed to be to them jointly, will make them ordinary joint tenants,—at least since the married women's acts. *Joos v. Fey*, 129 N. Y. 17 (1901); *Cloos v. Cloos*, 55 Hun. 450, 24 Abb. N. C. 219 (1890); *Wurz v. Wurz*, 27 Abb. N. C. 58 (1891), overruling *Farmers' & M. Nat. Bank v. Gregory*, 49 Barb. 155 (1867).

So, a limitation of realty in Maryland to husband and wife "as joint tenants the survivor of them and the heirs and assigns of each survivor" was held to make them joint tenants since the married women's acts, and that each could serve accordingly. *Fladung v. Rose*, 58 Md. 13 (1881).

The court doubted what would have been the effect of a limitation before the acts.

So, a limitation of realty in Indiana to them as joint tenants was held to make them ordinary joint tenants, irrespectively of any statute. *Thorburn v. Wiggins*, 136 Ind. 173, 22 L. R. A. 22 (1893).

So under Ind. Rev. Stat. 1894, § 5341. *Wilkins v. Young* (Ind.) 41 N. E. Rep. 68 (1895).

In Illinois, in *Mette v. Felten*, 143 Ill. 357 (1894), such a limitation was held to give a right of survivorship, notwithstanding *Cooper v. Cooper*, 76 Ill. 57 (1875), *supra*, VI., and notwithstanding somewhat complicated statutes in force there.

4. Limitation to husband and wife as tenants in common.

A limitation of property capable of being held by entireties to husband and wife expressly as tenants in common, or, what is the same thing, in undivided shares, seems effectual according to the old authorities to make them so.

In Co. Litt. 199 b, it is said: "If a man let land

that is, by the act of the parties,—and never by the mere act of law." 2 Chitty's Bl. 180. By the common law, where an estate is granted to husband and wife, they take by entireties, and not by moieties. Neither could sell without the consent of the other, and the survivor took the whole. *Ketchum v. Walworth*, 5 Wis. 95, 68 Am. Dec. 49. This result was upon the ground that the estate was created by act of the parties, and that in such cases husband and wife are but one person in law for the purposes of the grant; but where the estate is created by act of law, as by descent, the rule is otherwise, and they take as tenants in common and by moieties. The father and mother of George W. Brown inherited his estate equally, by reason of the relation of each to him, and not by reason of their relation to each other, as husband and wife. The right of each is separate and distinct, and is in no way dependent upon the right of the other. In *Knapp v. Windsor*, 6 Cush. 157-161, the whole subject is considered, and Shaw, Ch. J., says: "It appears to us that the analogy between the acquisition of property by operation of law, giving to each individual of a class a share *suo jure*, and a grant giving a certain amount of property to several persons named, two of whom are husband and wife (as in that case), and named and designated as such, is very slight. The former has its operation from the provisions of law, which are general and unlimited, and look simply at the relation of each to the intestate, and intend to give to each because so related; the other takes its effect from the presumed intent

of the grantor or deviser, who has the power to make such gift as he pleases." This case is an exhaustive and instructive consideration of the subject, and, we think, fully sustains the conclusions at which we have arrived. We have not been referred to any authority, nor do we know of any, sustaining the position that, where husband and wife take by descent as next of kin, they take by entireties, and not by moieties, or that, as between them, the right of survivorship obtains. Many authorities were cited showing that, as to personal estate in such a case, the father and husband would take it, to the exclusion of the mother and wife; but this is because the estate is personal, which, as soon as it is property of the wife, becomes the property of the husband by right of marriage. "It would be idle to distribute to her, when by the very act of distribution it would become the property of the husband. But it is otherwise in the case of real property. This is not his, but belongs to her, and she is as capable of inheriting it as her husband." Reeve, Descents, 123. During coverture he is entitled to the use of her real estate, or the rents and profits of it. Subject to this right, she might convey or devise it, and it would descend to her heirs. We hold, therefore, that upon the death of George W. Brown his real estate descended equally to his father and mother, as tenants in common, and that upon her death her moiety descended to her heirs at law. It follows, therefore, that the nonsuit was erroneous.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

to husband and wife to hold, the one moiety to the husband for life and the other moiety to the wife for life, and the lessor confirm the estate to hold to them and their heirs; as to the moiety of the husband, it enureth only to the husband, and as to the moiety of the wife they are joint tenants, for the husband holdeth such estate in the wife's moiety in her right as is capable of confirmation. (The meaning of the statement that they are joint tenants appears *supra*, L., citing *Stroebe v. Fehl*, 22 Wis. 337 (1867).)

And in the modern English case of *Marchant v. Cragg*, 31 Beav. 401 (1862), the master of the rolls said that the passages in Littleton to the effect that a husband and wife cannot hold by moieties meant that they cannot hold a joint estate by moieties, and he added: "Any property may be given in equal shares to husband and wife;" and he so decided with regard to a personal fund on the ground that the law regulating it was the same on this point as that regulating real estate."

In New Jersey a limitation to them expressly as tenants in common makes them so. *MacDermott v. French*, 15 N. J. Eq. 78 (1862); *Burtlar v. Rosenblath*, 42 N. J. Eq. 655, 59 Am. Rep. 62 (1887) (*dictum*). And so in Indiana. *Brown v. Brown*, 133 Ind. 476 (1892).

So as to limitations for life. *Hadlock v. Gray*, 104 Ind. 596 (1885).

And, in New York, any expression which will make other persons tenants in common will make husband and wife so independently of any statute. *Hicks v. Cochran*, 4 Edw. Ch. 107 (1843).

And so according to *Miner v. Brown*, 133 N. Y. 208 (1892), will any limitation indicating an intention to that effect, or even any limitation accompanied by expressions which cannot be operative unless the wife is admitted to be on equal present

enjoyment with her husband, and that her estate is not to be subvertent to his exclusive control (reasons which would not apply since *HILMS v. FISHER*). And on this ground a limitation in a will to them "for their use, benefit, and support during their natural lives" was held sufficient to make them tenants in common. This, however, seems extreme. The question in *Miner v. Brown*, *supra*, was whether an execution against the husband was effective against the land during the wife's life. The court held it invalid as regarded one moiety. But the court intimated an opinion (p. 314) that the survivor might be entitled absolutely, thus restricting the tenancy in common to the joint lifetime. They in fact merely anticipated *HILMS v. FISHER*, on other grounds.

The above decisions in effect overruled *Dias v. Glover*, *Hoffman*, Ch. 71 (1890), where the limitations to them "as tenants in common and in equality of estate, and not as joint tenants," was held to make them tenants by entireties.

In Pennsylvania, however, it was, till recently, held that the common law absolutely forbids the making of husband and wife tenants in common by one and the same conveyance; and also, that a limitation intended to make them so would enure (on the *cy pres* principle) to make them tenants by entireties. A limitation to them "as tenants in common and not as joint tenants" was held so cooperative in *Stuckey v. Keefe*, 26 Pa. 397 (1850); *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489 (1856); and *Diver v. Diver*, 56 Pa. 106 (1867).

And this, even though the limitation was subsequent to the abolition of survivorship between joint tenants. *Martin v. Jackson*, *supra*.

And to the married women's act. *Diver v. Diver*, *supra*.

But since these decisions it has been held in Penn-

ARKANSAS SUPREME COURT.

Mary P. BRANCH, *Appt.*,

v.

Sallie M. POLK *et al.*

(.....Ark.....)

1. A joint conveyance to husband and wife vests in them an estate in entirety.
2. A wife may execute a mortgage on her interest in lands held by the entirety, where the state Constitution and statutes have excluded the marital rights of the husband in such property during the wife's life, and given her control of her property.
3. Separate mortgages made by husband and wife on land held by the entirety, each made without the joinder of the other, purporting to cover an undivided half interest in the land, although made to the same person and for the same purpose, will give to the mortgagee on the death of the husband no lien beyond an undivided half interest.

(December 14, 1895.)

A PPEAL by complainant from a decree of the Circuit Court for Phillips County in favor of defendants in an action brought to foreclose a mortgage. *Modified.*

Statement by Riddick, J.:

Mary P. Branch brought suit in the Phillips circuit court against Sallie M. Polk and the heirs of Lucius E. Polk, Sr. For cause of action she alleged that Lucius E. Polk, Sr., executed to her, on the 1st day of March, 1891, several promissory notes, amounting in the aggregate to between \$6,000 and \$7,000; that to secure the payment of these notes he executed to her a mortgage on an undivided half interest in certain lands in Phillips county, Ark.; that the defendant Sallie M. Polk, at that time the wife of said Lucius E. Polk, in order to further secure the payment of said notes, did, on said 1st day of March, 1891, also execute a mortgage upon an undivided half interest in said lands owned by her; that Lucius E. Polk had died since the execution of the notes and mortgage; and that said notes were due and unpaid. She prayed that the mortgage be foreclosed, etc. Mrs. Polk filed her separate answer to the complaint, wherein she admits the execution of the notes and mortgage as alleged, that at the time of the execution of the same she was the wife of L. E. Polk, and that he has since died, and that said notes are past due and unpaid; but, to quote the language of

sylvania that a limitation expressly unfolding the incidents of a tenancy in common and prescribing that the estate shall have these incidents will operate, independently of statute, to make them tenants in common,—as, a limitation stating that one spouse is to take one undivided half, and the other the other, and that each is to be capable of disposing of his or her share, and that on the death of either his or her share is to pass to his or her representatives. *Re Young's Estate*, 166 Pa. 645 (1895), reversing 8 Pa. Dist. R. 443 (1894). The reason given—that they might have been made to take thus by separate conveyances—would apply equally to a simple limitation to them in common. The subject there was a mortgage, but the decision professed to be general applicability. Strange to say, the court approved of *Stuckey v. Keefe*, *supra*, and professed their willingness to follow it if the wording were similar.

A conveyance expressly made to husband and wife as tenants in common and not joint tenants is also held in the District of Columbia to create a tenancy in common, and not by the entirety. *Carroll v. Raby*, 22 Wash. L. Rep. 820.

The American decisions on both sides of this question are fully considered in *Baker v. Stewart*, 40 Kan. 454, 468, 2 L. R. A. 434 (1893). Those of them which deny the power to make the spouses tenants in common are founded on the expressions in the old books that they cannot take by moieties.

Words importing a tenancy in common in a devise to several persons of whom two are husband and wife are construed as meaning that the other persons are to take in common with one another and with the spouses, not that the spouses so take as between themselves. *Bricker v. Whatley*, 1 Vern. 233 (1684).

5. Limitation to husband and wife for their lives.

A limitation to husband and wife for their lives is construed as including the life of the survivor, whether it be by way of grant (*Cooper v. Cooper*, 76 Ill. 57 (1875), citing *Brudnel's Case*, 5 Coke, 9 (1592); *Torrey v. Torrey*, 14 N. Y. 430 (1856); *Han-* 80 L. R. A.

nan v. Towers, 3 Harr. & J. 147, 5 Am. Dec. 427 (1810); *Todd v. Zachary*, Busbee, Eq. 237 (1853); and see *Hodlock v. Gray*, 104 Ind. 596 (1885)), or of reservation. *McRoberts v. Copeland*, 85 Tenn. 211 (1886).

And a limitation of a life estate to husband and wife, contained in a conveyance in fee of an estate which they held by entirety, gives them a life estate by entirety. *Jones v. Potter*, 89 N. C. 220 (1883); *McRoberts v. Copeland*, *supra*.

6. Limitations in peculiar forms.

The phrase "party of the second part" is a sufficient description of the husband and wife in the habendum of an indenture in which the husband and wife were parties of the second part. *Den, Hardenbergh, v. Hardenbergh*, 10 N. J. L. 49, 18 Am. Dec. 371 (1828).

A limitation to "A and his family" means to A and his wife and children if any, and consequently makes him and his wife tenants by entirety of their share in common with the children. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302 (1877).

A limitation in a deed to a husband and wife for life and "to the survivor of them in his or her own right" was held to vest the estate in them for life with remainder in fee to the survivor. *Mittel v. Karl*, 133 Ill. 65, 8 L. R. A. 655 (1890).

A limitation to one of the spouses for life and afterwards to the other cannot make them co-owners, though in the premises of the deed the grant was to the former without words of limitation. *Riegin v. Love*, 72 Ill. 553 (1874).

A limitation to husband and wife "as joint tenants and to the survivor of them," with the addition of a statement that it is understood that in case of the death of the wife "her children are to inherit her interest," means that in case of the death of the wife after that of the husband they are to inherit her interest, but that if she dies first her husband is to take the whole.

And the fact that the husband permitted them to occupy a part from their mother's death until his own makes no difference. *Barden v. Overmeyer*, 131 Ind. 660 (1892).

the answer, "she denies that the deed of trust so executed by the said husband and delivered to the said plaintiff is a lien upon said lands described in said complaint, or an undivided half interest in the same, or upon any part, or any interest therein, or that the deed of trust so executed by herself and delivered to said plaintiff is a lien upon said lands, or any interest therein, or any part thereof, because she says that the sole and only title which she or her said husband had or held to said land or any part thereof was the title derived through a deed executed by Clarence Quarles, as commissioner in chancery of the circuit court of Phillips county, Ark., dated the 10th day of December, 1877, wherein and whereby he conveyed the whole of said several tracts of land to her said husband and herself. . . . And so she says that, for the reasons aforesaid, said mortgages or deeds of trust, executed as aforesaid by herself and husband, are no lien upon the said hereinbefore described lands." There was a demurrer to this paragraph of the answer, which was overruled by the court. Plaintiff electing to stand on her complaint and demurrer, the complaint was dismissed, and plaintiff appealed.

Mears, Rose, Hemingway, & Rose, and Tappan & Porter, for appellant:

Although it may be true that the mortgage

by the wife could not operate during her husband's lifetime, so as to disturb his and her joint possession, yet on his death it became immediately operative under our statute.

Of course, on the death of the husband the entire estate vested in the wife.

Robinson v. Eagle, 29 Ark. 202; *Kline v. Ragland*, 47 Ark. 116; *Noelley v. Lancaster*, Id. 179, 58 Am. Rep. 752.

There is no doubt but that the husband may charge the estate by entireties, subject to divestiture if the wife should survive him.

Ames v. Norman, 4 Sneed, 693, 70 Am. Dec. 269.

But if the husband can do so, the wife, being now as free to convey as he is, can do the same thing.

Bodine v. Killeen, 53 N. Y. 98; *Gibson v. Herriott*, 55 Ark. 85.

The husband could not by any conveyance prejudice the right of the wife to the whole of the land in case she survived him.

Den, Wyckoff, v. Gardner, 20 N. J. L. 556, 45 Am. Dec. 888.

The wife owned the rest of the estate not vested in her husband; and that estate might be "conveyed by her the same as if she were a *feme sole*."

Ark. Const. 1874, art. 9, § 7; *Roberts v. Wilcorson*, 36 Ark. 356; *Donahue v. Mills*, 41 Ark. 421; *Criscoe v. Hambright*, 47 Ark. 235; *Stone v. Stone*, 43 Ark. 160; *Manf. (Ark.) Dig.* 642.

A limitation to a woman and her husband to be held by her as her own property, the husband to have the possession during his lifetime, and the possession to return to her if she survives him, gives the estate to him for life with remainder to her in fee. *Edwards v. Beall*, 75 Ind. 404.

A limitation to husband and wife and his heirs gives the entirety estate to both in fee if contained in a will. *Jones v. Chandler*, 40 Ind. 588 (1872).

But, in a deed, a similar limitation substituting "her" for "his" gives the estate by entirety to both spouses so long as both live, with remainder to the heirs of the wife. *Davis v. Davis*, 46 Pa. 842 (1863).

A limitation to husband and wife, one equal half to each with subsequent proviso, makes them tenants in common. *Hicks v. Cochran*, 4 Edw. Ch. 107 (1843).

A valid conditional limitation that the wife continue to live with the husband unless she has good cause for divorce may be included in a conveyance creating an estate by entireties. *Smith v. Smith*, 23 Wis. 176, 99 Am. Dec. 153 (1868).

A limitation of realty in Connecticut to a husband conditionally on his surviving his wife, and to the wife conditionally on her surviving him, was held to imply a limitation to both during the joint lifetime, and thus to produce the effect of an estate by entireties, which estate cannot be created in Connecticut. *Bartholomew v. Muzzy*, 61 Conn. 387 (1892).

See, further, *supra*, VII. c, citing *Stoeblor v. Knerr*, 5 Watts, 181 (1836), and *V. A. "Rule in Shelley's Case."*

c. *Conveyance by entireties to spouses one of whom already has an estate in the land or other subject-matter.*

The acceptance by a married woman of a conveyance to herself and husband of property already belonging to herself does not produce any effect, but she continues sole owner,—at least if it happened before the married women's act. *Jackson, White, v. Cary*, 16 Johns. 302 (1819).

80 L. R. A.

Probably since this act the result would be the same, notwithstanding her contracting power, unless she had made a contract for value to the contrary. At least we shall see below that her acceptance, after her husband's death, of a conveyance to her of land of her own which her husband had conveyed to the person making the conveyance to her, does not alter her prior title. *Infra*, X. b, 1, citing *Greeneley's Case*, 8 Coke, 71b (1610).

So, an acceptance by one of the spouses of a conveyance to both, of land of which the former was already equitable owner, operates on the legal estate only, leaving the former spouse still sole beneficial owner. *Moore v. Moore*, 12 B. Mon. 668 (1851).

As regards a conveyance to the spouses of premises in which one of them already has a particular or terminable estate, see *supra*, V. b, *Merger*.

A conveyance of land in which one of the spouses already owns a share, made to both by the persons entitled to the other shares, and so made in order to carry out a partition of lands of which the premises formed part, does not operate as a conveyance but as a common-law partition, merely substituting a divided purparty for an undivided share, and consequently leaving the title undisturbed, and the estate (beneficially, and, it seems, legally also) still in the spouse, who before it solely owned a share. *Stehman v. Huber*, 21 Pa. 280 (1853); *Harrison v. Ray*, 108 N. C. 215, 11 L. R. A. 722 (1891); *Dooley v. Baynes*, 86 Va. 644 (1890); *Yancey v. Radford*, 86 Va. 638 (1890).

Even though the conveyance does not purport to be a partition deed, this fact being proved by oral evidence. *Dooley v. Baynes*, *supra*.

But the ground of decision in *Yancey v. Radford*, *supra*, was that the partition took effect by force of the oral agreement of the parties and consequent actual division, there being no statute to render a deed necessary; and that the deed, when executed, could not divest the estates from the allottees. See *Yancey v. Radford*, 86 Va. 642 (1890); and see p. 649, where the new Code of Virginia is referred to.

And in *Harrison v. Ray*, 108 N. C. 217, 11 L. R. A.

This statute applies to mortgages as well as to deeds absolute.

Kline v. Ragland, 47 Ark. 112; *Brown v. Roquin*, 57 Ark. 107; *Jefferson v. Edrington*, 53 Ark. 565.

The after-acquired title does not pass by way of estoppel, but simply by force of the statute, which operates precisely as does the statute of uses.

2 Washb. Real Prop. p. 405, *111; 8 Washb. Real Prop. *473.

The statute is with us a rule of property, not dependent in any manner upon covenants. As the statute makes no exceptions, the court can make none.

Erwin v. Turner, 6 Ark. 14; *Branch of State Bank v. Morris*, 13 Iowa, 186; *Pryor v. Ryburn*, 16 Ark. 671; *Smith v. Macon*, 20 Ark. 18.

It comprehends and supersedes the former doctrine of estoppel.

Crittenden v. Johnson, 14 Ark. 468.

As in this case both of the tenants by entireties conveyed the lands upon the same consideration, to the same person, upon the same uses, the result is precisely the same as if they both joined in the same conveyance.

St. Louis, I. M. & S. R. Co. v. Beidler, 45 Ark. 17; *Nicks v. Reclor*, 4 Ark. 278; *Ish v. Morgan*, 48 Ark. 415; *Joy v. St. Louis*, 188 U. S. 2, 34 L. ed. 815.

For the application of this rule it is not nec-

essary that both instruments should be of the same date.

Van Hagen v. Van Rensselaer, 18 Johns. 431; *Lawson*, Cont. § 889, and cases cited; *Robinson v. Eagle*, 29 Ark. 205.

Messrs. John J. Horner and E. C. Horner, for appellee:

If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common, for husband and wife being considered one person in law, they cannot take the estate by moieties, but both are seized of the entirety. The consequence of which is, then, neither husband nor wife can dispose of any part without the consent of the other, but the whole must remain to the survivor.

2 Bl. Com. 182.

Neither the provisions respecting joint tenancies (Rev. Stat. chap. 31, § 9), nor (Const. 1868, art. 12, § 6), respecting the separate estate of married women, destroyed the common-law estate by entireties.

Robinson v. Eagle, 29 Ark. 202.

The separate estate of a married woman is that alone of which she has the exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases.

Petty v. Malier, 14 B. Mon. 246; *Johnston v. Jones*, 12 B. Mon. 829; *Bowen v. Sebree*, 2 Bush, 115.

722 (1891), the court seems to have entertained a similar view.

And the acceptance and registration of the deed by the spouse, who had been entitled to the undivided share (who was in this instance the husband), does not estop him from claiming the sole ownership. *Harrison v. Ray*, and *Yancey v. Radford*, *supra*.

But the opposite decision was made in *Wright v. Saddler*, 20 N. Y. 322, 323 (1859), and in *Babbitt v. Soroggin*, 1 Duv. 272 (1864), the deeds being there treated as mutual conveyances.

So, a mortgage to both spouses, of land which had belonged to the wife but had been sold and conveyed to the purchaser, made by him to secure the purchase money, passes to them as trustees for the wife only. *Trimble v. Reis*, 37 Pa. 448 (1860).

The husband's sanction of his wife's concurrence with him in a conveyance of a grant of a particular estate in his property does not make her tenant by entireties with him in the reversion (which was not reserved to any one in particular), especially if she concurred merely to release her dower. *Strawn v. Strawn*, 50 Ill. 33 (1869). See also *supra*, V b, *Merger*.

d. Invalidity, on other grounds, of a limitation.

A wife may disagree to a limitation to herself and husband by entireties. *Green, Crew, v. King*, 2 W. Bl. 1211 (1778) (*dictum*); *Purefoy v. Rogers*, 2 Saund. 866, 867 (1870) (*dictum*).

But if it be for her advantage her assent is presumed. *Green, Crew, v. King*, *supra*.

A conveyance by which an entirety estate would otherwise be created, but which is voidable or subject to encumbrance as against one of the spouses, is equally so against the other. *Manwaring v. Powell*, 40 Mich. 371 (1879).

IX. The share taken by husband and wife under a limitation to them and another or others.

A limitation to husband and wife in common with another or others is construed as meant to give them together no larger share; and a limitation to them jointly with another or others is construed as meant to give them together no greater

interest than each of the other persons obtains, unless the contrary be expressed. *Litt. 291*; *Co. Litt. 136, 137*; *Bricker v. Whatley*, 1 Vern. 238 (1684) (where there were corroborative circumstances, immaterial since the recent decisions); *Re March*, L. R. 27 Ch. Div. 166, 54 L. J. Ch. 143, 51 L. T. N. S. 880, 32 Week. Rep. 241 (1884); *Jupp v. Buckwell*, L. R. 39 Ch. Div. 148, 57 L. J. Ch. 774, 59 L. T. N. S. 123, 36 Week. Rep. 712 (1888); *Re Wyld's Estate*, 2 DeG. M. & G. 724 (1862), 16 Jur. 1029 (1849), 22 L. J. Ch. N. S. 87 (1853) (a case of personality); *Atcheson v. Atcheson*, 18 L. J. Ch. N. S. 230, 11 Beav. 485, 13 Jur. 666 (1849) (a case of personality, overruling *Paine v. Wagner*, 12 Sim. 184 (1841)); *Anderson v. Tannehill*, 42 Ind. 141 (1873) (where this distribution had been agreed upon by the parties); *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302 (1877); *Barber v. Harris*, 15 Wend. 615 (1836); *Johnson v. Hart*, 6 Watts & S. 319, 40 Am. Rep. 565 (1842); *West Chicago Park Comrs. v. Coleman*, 108 Ill. 591 (1884).

And this holds, though some of the other shares come into existence after the making of the conveyance. *Barber v. Harris*, *supra*.

And though the will directed that the property should be divided between the husband and wife and the others in equal parts. *Jupp v. Buckwell*, *supra*.

And though the will was made after the married women's acts. *Ibid.*, overruling *Re March*, L. R. 24 Ch. Div. 222, 52 L. J. Ch. 680, 49 L. T. N. S. 163, 31 Week. Rep. 885 (1888).

And though the other sharers are children of the spouses, and though the devise was in these words: "To A [the husband] and his family." *Hall v. Stephens*, *supra*.

But the rule is merely one of construction (*Re March*, *supra*), and consequently can be prevented by words indicating an opposite intention.

And the rule does not apply to a will made under Roman-Dutch law. *Dias v. DeLivera*, 5 App. Cas. 135, 49 L. J. P. C. 23, 42 L. T. N. S. 237 (1897).

A gift by a will of the residue to a brother and sister and a nephew of his wife, the nephew and

The statutes for the protection of the property of married women were not designed to embrace estates which the *feme covert* takes and holds jointly with her husband, but those which she takes and holds (to the extent defined) as if she had no husband. The marital rights remain as they were at common law, unaffected by the statutes formed for the protection of the separate property.

McDuff v. Beauchamp, 50 Miss. 535; *Garnier v. Jones*, 52 Mo. 71; *Speier v. Opfer*, 78 Mich. 33, 2 L. R. A. 845; *Stuckey v. Kerfe*, 26 Pa. 401; *Diver v. Diver*, 56 Pa. 106; *Beriles v. Nunan*, 92 N. Y. 158, 44 Am. Rep. 361; *Zornitsein v. Bram*, 100 N. Y. 15; *Fisher v. Provin*, 25 Mich. 347; *Baker v. Stewart*, 40 Kan. 442, 2 L. R. A. 434; *Carver v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Pray v. Stedbins*, 141 Mass. 219, 55 Am. Rep. 462; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Buttlar v. Rosenblatt*, 42 N. J. Eq. 651, 59 Am. Rep. 52.

In order to divest the wife of her estate in lands held by entirety, she must join her husband in the conveyance.

Doa, De Peyster, v. Howland, 8 Cow. 277, 18 Am. Dec. 445; *Pierce v. Chace*, 108 Mass. 258.

While the policy of our state has been to free the married woman from the disabilities of coverture, yet this class of legislation is in derogation of the common law, and can be extended no further than the plain provisions of the statutes permit.

wife being of the same relationship to the testatrix, was held to give to each of them a share. *Warrington v. Warrington*, 2 Hare, 56, 6 Jur. 372 (1842).

And the rule was denied application on a gift to seven persons named, two of whom were the wives of two of the others, the conjunction "and" appearing before the last name only. *Re Dixon*, L. R. 42 Ch. Div. 306 (1899).

Much stress is laid in several of the English cases on the use of "and" as a subcopula between the names of husband and wife as indicating an intent to treat them as one person. So in *Bricker v. Whitley*, and *Re Wyld's Estate*, *supra*.

And does not apply on a devolution of an intestate's estate. *Knapp v. Windsor*, 6 Cush. 157-161 (1850).

And a limitation of different interests to each is said (says Co. Litt. 187b) to give the husband and wife separate shares, each equal to that of the other party; as, a limitation to the other party for life, the husband in tail, and the wife for years.

The above rule may have been founded on the feeling that each family should take equally; for example, a man having two sons, one already married and the other not unlikely to marry, might limit an estate to the former and his wife and the latter, and yet might intend each son to take equally. The reason generally given for it, namely, the unity of person, can hardly be maintained since *Jupp v. Buckwell*, *supra*, in which the ground of decision was that the married women's act was not intended to give the spouses greater rights against third persons than they had before.

X. Disposition or encumbrance of entirety property. a. By both spouses concurring.

The spouses concurring can convey the entire estate or any interest derived under it.

And a conveyance by way of mortgage is no exception to the rule. *People's Bldg. & L. Assn. v. Billing* (Mich.) 62 N. W. Rep. 373 (1895); *McDuff v. Beauchamp*, 50 Miss. 531 (1874).

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Robinson v. Eagle, 29 Ark. 202; *Stillwell v. Adams*, Id. 346; *Wood v. Terry*, 30 Ark. 385; *Jefferson v. Edrington*, 53 Ark. 545.

A contract on the part of the husband to sell the wife's land, though known and assented to by her, is not binding upon her or her heirs. She can only bind herself by executing a deed in the form prescribed by law.

Rogers v. Brooks, 30 Ark. 628.

No estoppel can accrue against a married woman in regard to lands not held as her separate estate.

Wood v. Terry, *supra*.

The legislature of Michigan, by the act of 1855, enacted that a married woman might convey her estate "in like manner and with like effect" as if she was unmarried. Our statutes deal only with the separate estates of married women, yet in Michigan an estate of entirety could not be conveyed by the deed of the wife in which her husband did not join.

Naylor v. Minoock, 96 Mich. 182.

Riddick, J., delivered the opinion of the court:

The lands upon which appellant claims a lien were held by Lucius E. Polk and his wife, Sallie M. Polk, under a joint conveyance executed to them by Clarence Quarles, commissioner. This joint conveyance to husband and wife vested in them an estate in entirety. *Robinson v. Eagle*, 29 Ark. 202;

But a mortgage of entirety property for a purpose which by statute is not binding on the wife is invalid against her,—as (in some states), for the purpose of securing a debt due by the husband. *Wilson v. Logue*, 131 Ind. 191 (1891); *Dodge v. Kinzy*, 101 Ind. 102 (1884); *Bartholomew v. Pierson*, 112 Ind. 430 (1887); *State v. Kennett*, 114 Ind. 160 (1887).

Therefore, in those states in which one spouse alone cannot convey any interest in entirety property (as in Indiana and Michigan), it is void as to the husband also. *Dodge v. Kinzy*, *supra*.

But it has been held in Indiana that such a mortgage, though voidable by the wife, is valid against those deriving title under her. *Crooks v. Kennett*, 111 Ind. 347 (1887); *Bennett v. Mattingly*, 110 Ind. 197 (1886).

Even though the conveyance by her was expressly made free from the mortgage. *Crooks v. Kennett*, *supra*.

This seems contrary to the cardinal principles of law, for in every other case those who derive under any person take free from whatever he himself was free from. See also the Indiana case cited *infra*, X. b. 2.

And, in accordance with this clear principle, one who derives title under a wife to land of hers which her husband had made a void conveyance of, was held entitled against his alienee, in *Jenney v. Gray*, 5 Ohio St. 49 (1855).

A wife who acquiesces in her husband's purchase of material to rebuild a barn on the premises is estopped to deny the right to a mechanics' lien therefor. *Wilson v. Logue*, *supra*.

A prohibition against the wife becoming surety for her husband's debt does not extend to a mortgage made to raise money for the purpose of benefiting the common property, or for that of securing a debt due by the wife, nor, therefore, are such mortgages invalidated thereby. *McLead v. Aetna L. Ins. Co.* 107 Ind. 394 (1886); *Fawcner v. Scottish American Mortg. Co.* 107 Ind. 555 (1886); *Bartholomew v. Pierson*, 112 Ind. 430 (1887).

The concurrence of the wife in a conveyance of

Kline v. Ragland, 47 Ark. 116; *Den, Hardenbergh, v. Hardenbergh*, 10 N. J. L. 49, 18 Am. Dec. 877; *Bertles v. Nunan*, 93 N. Y. 152, 44 Am. Rep. 361. After receiving this conveyance, each of the grantees gave to Mary P. Branch a mortgage on an undivided half interest in said land to secure notes executed to her by Lucius E. Polk. These mortgages were executed at different places and at different times. The one by Lucius E. Polk was executed on the 4th day of April, 1892, and his wife executed one on the 81st day of May, 1892. Neither of them joined in the mortgage executed by the other. Now, the right of survivorship is a distinction characteristic of an estate of entirety, and neither of the tenants holding by the entireties can by a separate deed affect the right of survivorship existing in the other. *Ames v. Norman*, 4 Sneed, 688, 70 Am. Dec. 269; *Den, Hardenbergh, v. Hardenbergh*, 10 N. J. L. 49, 18 Am. Dec. 871, and note; 8 Kerr, Real Prop. § 1975. In order to convey land held in entirety, the husband and wife must convey by a joint deed, or the deeds, if separate, must purport to convey the entire estate. Neither of the mortgages set up by the appellant purports to convey more than an undivided half interest in the land. It is contended by appellant that these two mortgages, being executed for the same purpose, must be taken and construed as one deed.

If this be conceded as correct, it would not strengthen the position of appellant, for it would still be a deed conveying an undivided half interest only. When persons owning lands as tenants in common each convey an undivided half interest therein, they have conveyed the title to the whole, for neither of them held more than an undivided half interest, and the deed of each conveys his entire interest; but the entire estate is vested in each of the tenants by the entireties, for they hold, not by moieties, but by entireties, and a conveyance of an undivided half interest by one tenant does not purport to convey his whole interest. The deed of the husband can have no effect after his death. When that happened, Mrs. Polk became the sole owner, his interest passing to her by right of survivorship. If appellant has any lien upon Mrs. Polk's land, it must be by force of her own deed, for she did not join in the deed of her husband, and is not affected by it. As the mortgage executed by Mrs. Polk only purported to convey an undivided half interest in the land, we think it clear that in no event can appellant claim a lien beyond this undivided half interest.

But the most serious question for us to determine is whether Mrs. Polk, during coverture, had the power by a separate deed to mortgage her interest in the lands held by herself and husband as tenants of the entirety.

the entirety property for the purpose of releasing a supposed right to dower does not pass the entirety estate as against her. *Wales v. Coffin*, 13 Allen, 213 (1866); *Pierce v. Chace*, 108 Mass. 254 (1871).

The execution by the wife of a deed purporting to convey the entirety estate without the insertion of her name as grantor does not appear to be sufficient to pass the estate as against her. *Stone v. Sledge*, 87 Tex. 49 (1894), citing cases to show that a similar rule prevails as to naming the grantor in conveyances generally.

A contract by the wife with a person that he should receive benefits out of the entirety property did not bind her before the married women's acts, even though she had accepted benefits under it. *Pierce v. Chace*, *supra*.

A misdescription of the premises in a conveyance by both spouses, originating in mistake, rendered the conveyance voidable and irreformable against the wife before the married women's acts, although she could only recover possession by refunding the purchase money or other consideration. *Shroyer v. Nickell*, 55 Mo. 264 (1874).

The husband and wife can reserve a rent to themselves by entireties out of the entirety land when conveying it. *Robb v. Beaver*, 8 Watts & S. 107 (1844).

A purchaser for value from the husband and wife of an estate which had been conveyed to them by entireties, having obtained from them the legal estate without notice that that estate had been purchased by them with the wife's money, and that they had intended to have it conveyed to her, is, of course, not affected by any equity which she may consequently have had. *McDuff v. Beauchamp*, 50 Miss. 537 (1874).

A married woman is liable at common law on a covenant of warranty given by her on a conveyance or demise of property by her. *Wootton v. Hele*, 1 Mod. 290 (1670).

But only if the estate passes from her. *Strawn v. Strawn*, 50 Ill. 38 (1889); *Bevins v. Cline*, 21 Ind. 42 (1863).

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As to married women's covenants generally, see *Goelet v. Gori*, 81 Barb. 314 (1880).

b. By one of the spouses alone.

1. Neither can derogate from the survivorship right of the other.

Neither spouse can deal with an entirety estate in derogation of the other's right by survivorship, nor have disposes of the spouse who dies first any right against the survivor. *Varnum v. Abbot*, 13 Mass. 478, 7 Am. Dec. 87 (1815); *Back v. Andrew*, 2 Vern. 120 (1690); *Doe, Freestone, v. Parratt*, 5 T. R. 652 (1794); *Fox v. Fletcher*, 8 Mass. 274 (1811); *Den, Wyckoff, v. Gardner*, 20 N. J. L. 556, 45 Am. Dec. 388 (1840); *Clithero v. Franklin*, 2 Salk. 567 (1691); *Atkinson v. Henry*, 80 Mo. 161 (1893); *Martin v. Jackson*, 27 Pa. 504, 67 Am. Dec. 489 (1856); *Hawtry's Case*, 2 Dyer, 191b (1590); *Bullock v. Dibley*, 4 Coke, 23a (1593); *Phillips v. Hodges*, 109 N. C. 248 (1891).

Whether the disposition be testamentary. *Martin v. Jackson*, and *Varnum v. Abbot*, *supra*.

Or by sale on execution for debt of husband. *Brownson v. Hull*, 16 Vt. 309, 42 Am. Dec. 517 (1844).

Or otherwise. *Hawtry's Case*, and *Bullock v. Dibley*, *supra*.

Even though the statute authorizing them to partition the entirety estate be in force at the time of the disposition. *Zornstein v. Bram*, 100 N. Y. 12 (1885), reversing 17 Jones & S. 476 (1882).

Especially if the entirety estate was vested before the passing of that act; which circumstance, however, was not deemed essential. *Zornstein v. Bram*, *supra*.

Consequently, the husband cannot bind the wife as regards the boundaries of the entirety land either by agreement or conveyance. *Dyer v. Eldridge*, 136 Ind. 654 (1894); *Atkinson v. Henry*, *supra*.

And, of course, the husband cannot take away the wife's land by fraudulently obtaining a decree of a court of justice for a conveyance to himself. *Orthwein v. Thomas*, 127 Ill. 554, 4 L. R. A. 434 (1899).

Nor does a decree made on a motion on which the husband was not represented and directing a con-

Whether a wife may in this state convey an interest held by her as such a tenant, as she may her interest in other real property, has not been determined by this court. The question decided in *Robinson v. Eagle*, *supra*, was that estates of entirety were not abolished by the Constitution of 1868. This ruling was approved in *Kline v. Ragland*, 47 Ark. 116. In neither of those cases was any question concerning the power of the wife to convey her interest in such an estate by a separate deed considered by the court. At common law the husband had, during marriage, the exclusive control of such estate. *Fairchild v. Chastelleux*, 1 Pa. 176, 44 Am. Dec. 117; *Barber v. Harris*, 15 Wend. 615; *French v. Mahan*, 56 Pa. 287. But the authority of the husband to dispose of the rents and profits of land held in entirety did not arise from any peculiarity of this estate, or from any special powers conferred upon him as a tenant of the entirety, but arose out of the rule at common law that, during coverture, the husband had the control of the real estate of the wife. 3 Kent, Com. 130; *Hiles v. Fisher*, 144 N. Y. 806, *ante*, 806. Hence we find that, in many of the states, where the wife has been clothed with the power to manage, control, and use her separate property, "the courts, following the logic of the situation, have extended this right to estates by entirety to the extent of denying the right of the

husband or his creditors to deprive her of the use and enjoyment of her interest in such an estate during the life of her husband." 1 Ballard, *Annals on Real Prop.* § 241; *Hiles v. Fisher*, *supra*; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 53; *McCurdy v. Canning*, 64 Pa. 41; *Chandler v. Cheney*, 37 Ind. 891; *Shinn v. Shinn*, 42 Kan. 1, 4 L. R. A. 224. In this state a married woman has full control of her separate property, and may convey and dispose of it as if she were a *feme sole*. Our Constitution and statute have excluded the marital rights of the husband therefrom during the life of the wife. Const. 1874, art. 9, § 7; Sand. & H. Dig. § 4945; *Neelly v. Lancaster*, 47 Ark. 175, 58 Am. Rep. 752; *Roberts v. Wilcoxson*, 86 Ark. 355. We think that the effect of these provisions was to give the wife control of all the property owned by her, including her interest in an estate by entirety as well as other real estate. To say that it did not apply to an estate by entirety would be to deprive her of a share in the rents and profits of such an estate during the life of her husband, and would establish an exception to the operation of the Constitution and statute resting on no valid principle or reason. *Hiles v. Fisher*, *supra*. On the other hand, to say that neither she nor her husband could convey any interest in such an estate except by a joint deed would tie up the estate and pre-

veyance to the wife, bind the husband's rights. *Freeman v. Barber*, 8 Thomp. & C. 574 (1874).

A lease to husband and wife was held extinguished by his acceptance of a feoffment, but it was said that it would be otherwise if the conveyance had been by bargain and sale enrolled, or by fine. *Downing v. Seymour*, 3 Cro. Eliz. 812 (1603).

Where husband and wife were joint tenants during coverture for sixty years his lease for seventy years was held good against the wife after his death. *Grute v. Loocroft*, 1 Cro. Eliz. 287 (1591).

The leasing power conferred on the husband by the statute, 22 Hen. VIII., chap. 28, extends by its express words to estates which husbands hold jointly (which word then included entireties) with their wives.

A patent for a walk in a chase taken by the purchaser in the names of himself, his wife, and a third person was held on his death not to be subject to his debts while the others lived. *Kingdon v. Bridges*, 2 Vern. 67 (1688).

The husband of a minor wife has the powers of a guardian over her estate during her minority. *Bartlett v. Cowles*, 15 Gray, 445 (1860).

And, presumably, this extends to an entirety estate.

Such powers enable him to sell trees growing on her land for an adequate price unless the cutting be injurious to the inheritance. *Bartlett v. Cowles*, *supra*.

The wife's acceptance of an estate of freehold after her husband's death in land of her own, which her husband has wrongfully conveyed to the person who afterwards conveys to her, did not estop her from setting up her own title; but, on the contrary, she was remitted thereto. *Greneley's Case*, 8 Coke, 716 (1610); *Beaumont's Case*, 9 Coke, 140 (1613), citing 12 Hen. IV., and *Formedon*, 15, 21 Edw. III. 845.

And no doubt the same rule would apply to an entirety estate. But it must be remembered that there is no remitter when the later conveyance operates by the statute of uses. Co. Litt. 342b.

Silence of the wife when the husband represents a poor title to be good does not estop her to claim 30 L. R. A.

her rights under the entirety estate. *Phillips v. Hodges*, 109 N. C. 248 (1891).

The wife's power to contract relative to separate estate does not extend to entirety estate. *Speler v. Opfer*, 78 Mich. 35, 2 L. R. A. 345 (1888).

The theory of the law, unless the married women's acts have made a difference, seems to be that the conveyance by the husband passes the estate, and that it remains in the donee unless and until disaffirmed by the wife or those deriving under her, which must, before those acts, have been after his death; in other words, it is voidable, not void.

Thus, in North Carolina a conveyance by the husband of the wife's land which he was by statute disabled from making was nevertheless held to be valid until she disagreed. *Jones v. Carter*, 73 N. C. 148 (1875); *Stroebe v. Fehl*, 22 Wis. 347 (1867) (*dictum*).

And consequently the husband's donee was held not to be a trespasser, and therefore not liable to pay damages to the wife for his occupation prior to her demand for possession. *Jones v. Carter*, *supra*.

The same rule seems applicable to entirety estates, and the cases cited below respecting the husband's disposition at common law for the period of the joint lifetime confirm this view.

But in *Kip v. Kip*, 33 N. J. Eq. 213 (1880), it was held that the wife could not claim a share of the purchase money obtained on a sale by the husband which was invalid as against her, but was restricted to her remedy by holding or claiming the possession.

The husband can convey the entirety estate to any person upon trust or condition to convey it to the wife, and a conveyance by the latter to the wife vests the estate in her solely. *Donahue v. Hubbard*, 154 Mass. 587, 14 L. R. A. 123 (1891).

2. Each can in most states pass his or her own survivorship right.

A disposition by or under one of the spouses, made in the life of the other, is held in most of the states to be valid as from the death of the latter spouse if the former survives.

vent either of them from controlling or disposing of his or her interest without the consent of the other. It would also result in placing it beyond the reach of the creditors of either of them, and such is the rule followed in several of the states. *McCurdy v. Canning*, 64 Pa. 39; *Chandler v. Cheney*, 37 Ind. 391; *Naylor v. Minock*, 96 Mich. 182, 35 Am. St. Rep. 595, note.

But it would seem that this rule is to a certain extent illogical, for under it the effect of the statutes giving married women control of their own property is also, in this instance, to curtail the power of the husband over his own interest in real estate. The object of these laws was not to affect in any way the control of the husband over his own property. Their sole purpose was to give to the wife—what she did not have at common law—the right to control and convey her own property as if she were unmarried. *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361. While such legislation has taken away the control of the husband over the interest of the wife in estates of entireties, as it has removed his control from her other property, yet it does not seem reasonable to hold that it also affected his right to control his own interest in such an estate, or that it exempted such interest from seizure by his creditors. As was said in *Buttler v. Rosenblath*, *supra*: "Any device of this character for the protection of

the husband's property from his creditors is unknown to the common law, and so contrary to public policy that it ought not to be engrafted upon our system of laws by the interpretation of this statute, unless the intent to do so is clearly expressed." The rational construction of these provisions of our Constitution and statute, which "uprooted principles of the common law hoary with age," swept away the marital rights of the husband during the life of the wife and gave enlarged powers to married women, is, not that they lessen the power of the husband over his own interest in an estate by entirety, but that they deprive him of the control over the interest of the wife which he formerly exercised *jure uxoris*, and confer upon the wife the control of her own interest. The right of the wife to control and convey her interest, we think, is now equal to the right of the husband over his interest. They each are entitled to one half of the rents and profits during coverture, with power to each to dispose of or to charge his or her interest, subject to the right of survivorship existing in the other. *Hiles v. Fisher*, 144 N. Y. 306, *ante*, 305; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52. This rule, as was said by Chief Justice Andrews, in the recent case of *Hiles v. Fisher*, "best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with

Whether the disposition be by the husband. *HILES v. FISHER*; *Berrigan v. Fleming*, 2 Lea, 271 (1879); *Aikison v. Henry*, 30 Mo. 151 (1863); *Ames v. Norman*, 4 Sneed, 638, 70 Am. Dec. 269 (1867) (*dictum*).

Or by the wife. *Bram v. Bram*, 34 Hun, 437 (1885) (*dictum*); *Baker v. Stewart*, 40 Kan. 449, 2 L. R. A. 434 (1888) (*dictum*).

Or under an execution levied against the husband. *Ames v. Norman*, *supra*; *Bednett v. Child*, 19 Wis. 362, 38 Am. Dec. 692 (1865); *Fleek v. Zillhaber*, 117 Pa. 213 (1887); *Beach v. Hollister*, 3 Hun, 519, 5 Thomp. & C. 568 (1875) (*dictum*); *Ward v. Krumm*, 54 How. Pr. 95 (1876).

And though the price of the entirety estate when purchased was supplied by the spouse, who does not concur in the disposition of it. *HILES v. FISHER*. *Ames v. Norman*, *supra*.

And though, after the disposition had been made, the marriage was dissolved. *Ames v. Norman*, *supra*.

If for a cause accruing subsequently to the marriage. See *infra*, XI. b.

And notwithstanding the married women's acts. *HILES v. FISHER*.

But in Indiana a conveyance by one spouse, made during the life of the other, has no force, even as against the spouse who makes it. *Chandler v. Cheney*, 37 Ind. 391 (1871); *Jones v. Chandler*, 40 Ind. 588 (1872) (where an execution against the husband was perpetually restrained); *McConnell v. Martin*, 52 Ind. 434 (1876).

A subsequent purchaser from both spouses can take advantage of this invalidity. *Chandler v. Cheney*, and *Jones v. Chandler*, *supra*.

Nor is such a conveyance of any force in Michigan. *Vinton v. Beamer*, 55 Mich. 559 (1895),—where there were other circumstances sufficient to support the decision; *Naylor v. Minock*, 96 Mich. 182 (1893),—where, though the spouse who had made the conveyance and survived was the wife, yet it was made since the married women's acts, and there was nothing peculiar to the wife in the grounds given for its validity as a transfer. But the court 30 L. R. A.

held, for reasons peculiar to the wife, that it could not operate by estoppel (namely, that the capacity to convey was derived from a statute authorizing her to convey any property which she had at the time of the conveyance), thus leaving open the question whether such a conveyance by the husband could operate by estoppel.

An estoppel binds privies as well as parties, and would therefore bind a subsequent donee of the husband and wife. So the converse holds in this state, *viz.*, that whatever defeats the interest of the one defeats that of the other. *Manwaring v. Powell*, 40 Mich. 371 (1879).

In Illinois such a conveyance made before the married women's acts seems to have had no force. In *Marlier v. Saunders*, 10 Ill. 124, 125 (1868), the court declared that one spouse alone could convey "no interest whatever," even though the other spouse, being the wife, had concurred, but without using the formalities necessary to bind her. But it does not appear that the wife was dead when the question was decided, so the question of survivorship can hardly have arisen.

In *Almond v. Bonnell*, 76 Ill. 536 (1875), an execution against the husband was held to pass no title whatever.

In North Carolina (where, however, there was a statute invalidating the husband's disposition of his wife's land and this was construed as including entirety land), the court, speaking with special reference to a sale under an execution against the husband, said, in *Bruce v. Nicholson*, 109 N. C. 205 (1891): "It seems that the estate is not that of the husband or the wife, but belongs to that third person recognized by law—the husband and the wife. It requires the co-operation of both to dispose of it effectually." This opinion was founded on the statements of text-writers. The decision was that a judgment lien against the husband could not be enforced against the entirety estate. Both spouses were still alive.

This decision was followed in *Gray v. Bailey* (N. C.) 23 S. E. Rep. 318 (1895), holding a conveyance by

all its common-law incidents, . . . and gives to each party equal rights so long as the question of survivorship is in abeyance, thereby conforming to the intention of the new legislation to take away the husband's right *jure uxoris* in his wife's property, and to enable the wife to have and enjoy 'whatever estate she gets by any conveyance made to her, or to her and others jointly, and does not enlarge or diminish that estate.' "

Our conclusion is that, Mrs. Polk having survived her husband and become the sole

owner of the land, her mortgage deed is valid and binding as to the undivided one-half interest in said land conveyed by her as security for the notes executed by her husband. The court erred, therefore, in not sustaining the demurrer to that extent.

The decree is reversed, with an order that the demurrer be sustained to the answer so far as it undertakes to set up a defense to the mortgage executed by Mrs. Polk for said undivided half interest; otherwise, the decree is affirmed.

MAINE SUPREME JUDICIAL COURT.

Olive O. ROBINSON'S APPEAL.

(.....Mc.....)

1. The rule of the common law creating estates by entirety is irreconcilable with both the letter and spirit of the statutes giving married women separate and independent property rights.

2. A tenancy by the entirety is not created by a will giving the residuary estate to a daughter and her husband in "equal shares and proportions and so to their respective heirs and assigns forever," where the statutes give married

women separate and independent property rights.

3. A moiety of a residuary estate descends to testator's heirs on the death, during his life, of one of the persons to whom the residue is given in equal shares.

(May 14, 1895.)

A PPEAL by Olive O. Robinson from a decree of the Probate Court for Androscoggin County ignoring her claim to a portion of the property in the distribution of the estate of Charles P. McKenny, deceased. *Affirmed.*

the husband alone while the wife was living to be ineffectual against a sale after her death to satisfy the lien of a judgment against him in case he survived the wife.

In Pennsylvania such a conveyance of an entirety estate acquired since the married women's act has no force. *McCurdy v. Canning*, 64 Pa. 41 (1870).

A purchaser under a sale made after the wife's death, to satisfy a judgment entered against the husband during the life of both spouses (in a state where one spouse alone can convey an entirety estate conditionally on his surviving, and where a judgment binds a debtor's land from the time of entering it), takes priority over a mortgage by both spouses, made after the judgment was entered but before execution was sued on it. *Fiepek v. Zillbaver*, 117 Pa. 218 (1887).

An enactment that a purchaser under a foreclosure sale shall take whatever interest the mortgagee had at the time of the mortgage, means that he shall take whatever interest the mortgagor could then dispose of; and, consequently, does not aid the purchaser under a sale to foreclose a mortgage made by one of the spouses in the lifetime of the other, in a state where such a mortgage is not valid. *Naylor v. Minock*, 96 Mich. 122 (1893).

The principle of the exception established in *O'Connor v. McMahon*, 54 Hun, 66 (1889), to the rule that a husband can convey for the period of the joint lifetime, does not apply after the wife's death.

One of the spouses may convey or release the entirety estate to the other, even if in a state where a conveyance by one during the life of the other to any other person would not be valid, if the other spouse accepts the conveyance. *Keyart v. Kepler*, 118 Ind. 34 (1888).

3. Whether a conveyance by the husband, made before the wife's death, was valid for the period of the joint lifetime.

A disposition of an entirety estate, made by the husband during his wife's lifetime, appears to have been held in former centuries valid as regards the period of the joint lifetime.

30 L. R. A.

He could by feoffment discontinue his wife's estate or the entirety estate until the statute of Hen. VIII., which was held in *Greneley's Case*, 8 Coke, 71b (1610), to prevent discontinuance of entirety estates also.

It is said, in 39 Hen. VI., 45B, that she could disagree before.

It is stated in *Brooke, Releases*, pl. 81, citing 29 Hen. VIII., that his alienation was good against her during his life.

It was said in *Mallow v. May*, F. Moore, 636 (1598), that he could surrender a life estate held by entreties, subject to her right to disagree after his death.

It is laid down in Co. Litt. 188a, that he can transfer a share which they (by entreties) hold jointly with a third person, but it is inferable from Coke's subsequent observations that she might, after his death, disagree and thus revive the joint tenancy.

On principle, it would seem that if the husband's conveyance was not good against him during the joint lifetime it could not become so afterwards, for he had no remainder and a limitation of a freehold to commence *in futuro* is void in a common-law conveyance. And it is difficult to see how it could be invalidated during his life, for he could not evict his own donee, and his wife could not sue without joining him.

A husband's interest in an entirety estate is not alienable to an assignee for creditors even after a divorce obtained after adjudication in bankruptcy. *Re Benson*, 16 Nat. Bankr. Reg. 377 (1873).

A disposition by or under a husband of an entirety estate in a state where he could without his wife's concurrence dispose of the estate conditionally on his surviving her, is also valid against both during the joint lifetime, except when the married women's acts are held to change this rule.

Whether made by him. *Georgia, C. & N. R. Co. v. Scott*, 38 S. C. 34 and 40 (1892); *Den, Wyckoff, v. Gardner*, 20 N. J. L. 558, 45 Am. Dec. 388 (1846) (in which there were other grounds sufficient for the decision); *Barber v. Harris*, 15 Wend. 515 (1836) (in which, however, the wife was not a party); *Cole-*

The facts are stated in the opinion.

Mrs. N. Morrill and J. A. Morrill, for appellant:

Judger Robinson was not "connected with the testator by blood,"—not a blood relation; hence it would seem settled that his son, Merton W. Robinson, cannot take his share of the residuary estate under Rev. Stat. chap. 74, § 10.

Elliot v. Fessenden, 88 Me. 197, 18 L. R. A. 37.

The words "and so to their respective heirs and assigns forever" are ineffectual to pass the property to a minor son, being words of limitation only and descriptive of an absolute property or fee in the legatees.

Keniston v. Adams, 80 Me. 290; *Bryson v. Holbrook*, 159 Mass. 280.

The residuary clause created a tenancy by the entirety, and Mrs. Robinson is entitled to the entire residuary estate by right of survivorship.

At common law a devise or grant to a husband and wife created a tenancy by the entirety and the survivor took the whole, and this rule has been adopted in this state, notwithstanding Rev. Stat. chap. 73, § 7.

Harding v. Springer, 14 Me. 407, 31 Am. Dec. 61.

In those states where the greatest advances have been made by statute and by judicial decision in abolishing joint tenancies, tenancy by the entirety has been generally preserved, notwithstanding acts enlarging the rights of married women.

Pray v. Stebbins, 141 Mass. 219, 55 Am. Rep.

462; *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; *Rogers v. Benson*, 5 Johns. Ch. 431; *Marburg v. Cole*, 49 Md. 402, 36 Am. Rep. 266, note, 269; *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52; *Carrer v. Smith*, 90 Ind. 222, 46 Am. Rep. 210; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64, note; *Baker v. Stewart*, 40 Kan. 442, 2 L. R. A. 484; *Harrison v. Ray*, 108 N. C. 215, 11 L. R. A. 722.

If we may assume that it was the intention of the testator to create a tenancy in common by the residuary clause of his will, and that the words "in equal shares and proportions" were intended to make certain that intention, still that intention must be governed by "the fundamental laws which establish and secure the rights of property."

Ramaddell v. Ramaddell, 21 Me. 293.

An estate by entirety is not founded upon the notion of a joint tenancy, but upon the marital relation and upon the legal theory of the absolute oneness of husband and wife.

Stolz v. Shreck, 128 N. Y. 263, 18 L. R. A. 325; *Dias v. Glover*, Hoffm. Ch. 71; *Bramberry's Appeal*, 156 Pa. 628; *Stuckey v. Keefe*, 26 Pa. 397; *Jackson, Stevens, v. Stevens*, 16 Johns. 115; *Barber v. Harris*, 15 Wend. 617; *Rogers v. Benson*, 5 Johns. Ch. 437.

All the opinions and dicta to the contrary in text-books and decisions are based upon the expressions used by Mr. Preston in his works on Estates and Abstracts of Title.

Dias v. Glover, Hoffm. Ch. 76, 77; *Den, Hardenbergh, v. Hardenbergh*, 10 N. J. L. 49, 18 Am. Dec. 385; 1 Sharswood's Bl. Com. p. 586 (bk. 2, p. 182); 4 Kent, Com. * 363; 2 Kent,

man v. Bresnahan, 54 Hun, 621 (1889) (in which the decision must have been the same either way).

Including a lease by him. *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462 (1886).

Or a fictional lease to support an ejectment, which, therefore, he might bring on his own demise. *Jackson, Suffern, v. McConnell*, 19 Wend. 175 (1839); *Topping v. Sadler*, 5 Jones, L. 367 (1858); *Park v. Pratt*, 38 Vt. 545 (1866).

Or under an execution levied against him. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302 (1877); *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269 (1857); *Bennett v. Child*, 19 Wis. 362, 38 Am. Dec. 662 (1865); *Beach v. Hollister*, 3 Hun. 519, 5 Thomp. & C. 668 (1875) (which is overruled in effect by *Hiles v. Fisher*); *Cheek v. Waldrum*, 25 Ala. 152 (1854); *Simpson v. Pearson*, 31 Ind. 1, 99 Am. Dec. 577 (1860); admitted to be the common-law rule in *Corinth v. Emery*, 63 Vt. 505 (1891).

Or a sale under a mechanic's lien in New Jersey. *Washburn v. Burns*, 84 N. J. L. 13 (1890).

And the same principle is involved in *Miller v. Miller*, Meigs, 484, 38 Am. Dec. 157 (1838).

And in *Topping v. Sadler*, 5 Jones, L. 159, 360 (1858), the court thought it self-evident that he must have rights as high over entirety property as over his wife's estate.

And in *Jackson, Suffern, v. McConnell*, 19 Wend. 170 (1839), the dictum that he cannot alienate is explained as meaning that he cannot bind his wife if she survive.

And this holds, though the money with which the estate was purchased was the wife's. *Ames v. Norman*, *supra*.

But this rule does not hold where the husband lives apart from his wife, and commits the entirety property to her; nor can he in that case transfer the crops which she has sown. *O'Connor v. McMahon*, 54 Hun, 66 (1889). See also *supra*, III. c. 80 L. R. A.

Nor does it apply where a statute is in force invalidating his conveyance of his wife's land, for this is construed as extending to entirety land. *Bruce v. Nicholson*, 109 N. C. 206 (1891).

Nor does it apply as regards sales under execution in Vermont, where a statute exempting the husband's life interest in the wife's property from his debts is construed as extending to entirety property. *Corinth v. Emery*, 63 Vt. 506 (1891).

And even as exempting his share therein. *Ibid*.

And a similar statute produces a similar effect in Tennessee. *COLLIER MFG. CO. v. COLLIER* (Tenn.) post, 315, overruling dictum in *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269 (1857).

But in Missouri such statute is held inapplicable to an entirety estate. *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302 (1877).

In Virginia a limitation of property settled by the wife's family to trustees to permit the spouses to take the profits was held (contrary to *Kip v. Kip*, 38 N. J. Eq. 212 (1880), and to the English cases) to be an active trust, and therefore to preserve the property from the husband's creditors. *Scott v. Gibbon*, 5 Munf. 86 (1816); *Roanes v. Archer*, 4 Leigh, 560 (1838).

And the homestead laws exempting the property from the husband's creditors extend to entirety estates falling otherwise within their provision. *Bennett v. Child*, 19 Wis. 362, 38 Am. Dec. 662 (1865); *Jackson v. Shelton*, 39 Tenn. 92 (1860). See *supra*, V. f.

But a disposition, by or under the husband, of an entirety estate, acquired since the married women's acts, would seem in several states to possess no validity against his wife's share, but to be valid against his own. The wife having a corresponding right. See *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52 (1887); *Hiles v. Fisher*, *supra*; *Miner v. Brown*, 133 N. Y. 308 (1892).

Com. *132; 1 Washb. Real Prop. *425; *McDermott v. French*, 15 N. J. Eq. 78; *Hicks v. Cochran*, 4 Edw. Ch. 107; *Miner v. Brown*, 138 N. Y. 808.

The rule as to tenancies by entirety applies to personal property as well as real estate.

4 Kent, Com. 8th ed. 362, 363 (380); *Gordon v. Whieldon*, 12 Jur. 988; 8 Jarman, Wills, Randolph & Talcott's ed. 2; *Atchison v. Atchison*, 11 Beav. 485; *Moffatt v. Burnie*, 18 Beav. 211; *Pike v. Collins*, 33 Me. 38; *Bramberry's Appeal*, 156 Pa. 628, 22 L. R. A. 594; *Draper v. Jackson*, 16 Mass. 480; *Craig v. Craig*, 8 Barb. Ch. 77; *Couper v. Scott*, 3 P. Wms. 121.

It was the intention of the testator to give the residuary estate to Mr. and Mrs. Robinson collectively, and not to give it to them in case Mr. Robinson lived, but to give it differently in case he died.

Mann v. Hyde, 71 Mich. 278.

Whitehouse, J., delivered the opinion of the court:

This is an appeal from the decree of a probate court.

The executor of the will of Charles P. McKenny filed a petition under the provisions of Rev. Stat. chap. 65, § 27, as amended by chapter 49 of the Laws of 1891, asking for an order of distribution which would protect him in paying out the residue of the estate in his hands. This involved a construction of the following residuary clause in the will:

"The residue and remainder of all my estate of which I may die seised and possessed, both real and personal, not herein

otherwise disposed of, I give, bequeath, and devise the same to my son-in-law, Judyer Robinson, and my daughter, Olive H. Robinson, wife of the said Judyer Robinson, in equal shares and proportions, and so to their respective heirs and assigns forever."

Judyer Robinson died before the death of the testator, leaving a minor son and a wife, who is the appellant, and the same person called Olive H. Robinson in the will.

The decree of the judge of probate required one half of the residuary estate to be paid to the appellant, and the other half to be distributed among the heirs of the testator, and this decree was affirmed by the justice presiding in the supreme court of probate. The case comes to this court on exceptions to that ruling.

It is the opinion of the court that the ruling was correct, and that the exceptions must be overruled.

It is contended by the learned counsel for the appellant that the residuary clause created a tenancy by the entirety, and that Olive O. Robinson is entitled to the entire residuary estate by right of survivorship. It is not controverted that the language employed by the testator must be construed as creating a tenancy in common, if Judyer Robinson and Olive O. Robinson had not been husband and wife. *Stetson v. Eastman*, 84 Me. 366. But it is argued that the rule of the common law by which a devise or grant to husband and wife constituted them tenants by the entirety, the survivor taking the whole, has never been changed in this state by the aboli-

But in Massachusetts such statutes do not affect entirety estates. The husband's lease is valid against both during their joint lives. *Pray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462 (1866).

On the other hand, such a disposition has no force against even his own share during the joint lifetime, or against his right by survivorship, in Illinois. *Almond v. Bonnell*, 76 Ill. 536 (1873); *Mariner v. Saunders*, 10 Ill. 124 (1866).

Nor in North Carolina. *Bruce v. Nicholson*, 108 N. C. 303 (1891); *Gray v. Bailey* (N. C.) 23 S. E. Rep. 215 (1895).

Nor in Pennsylvania. *McCurdy v. Canning*, 64 Pa. 39 (1870).

The same is held in Tennessee, see *COLL MFG. CO. v. COLLIER*, post, 515.

Nor does it seem to be in force against his share during the joint lifetime when he lives apart from his wife, who is in possession of the property. *O'Connor v. McMahon*, 54 Hun, 66 (1890).

A sale on execution against the husband was held entirely inoperative in the above cases of *Almond v. Bonnell*, *McCurdy v. Canning*, and *COLL MFG. CO. v. COLLIER*.

This is on the ground that the wife's possession would be disturbed by any possession of a stranger purchasing under the execution; but this does not seem to agree with the doctrine of *HILES v. FISHER*, where a purchaser on foreclosure is allowed the use of an undivided half of the land.

And a disposition by or under the husband in those states where he cannot without his wife's concurrence dispose of the entirety estate conditionally on his surviving, is also without force, even during the joint lifetime. *Chandler v. Cheney*, 37 Ind. 291 (1871); *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64 (1877); *Vinton v. Heamer*, 55 Mich. 559 (1895); *McConnell v. Martin*, 62 Ind. 424 (1876); *Morrison v. Seybold*, 92 Ind. 296 (1883) (where the dis-

position was a sale to satisfy a lien for taxes; see especially top of p. 302.

And even in New Jersey it was held, on general grounds (irrespective of the facts that the entirety estate in that case was for life and was subject to a clause against encumbering it), that a judgment against the husband could not affect the entirety estate. *Thomas v. DeBaum*, 14 N. J. Eq. 37 (1861).

So, condemnation of the property is ineffectual as against the wife unless she is made a party. *Grosser v. Rochester*, 148 N. Y. 235 (1895).

But this rule does not prevent the creditors of the husband from causing to be sold an estate conveyed to him and his wife by entireties instead of to him alone for the purpose of defeating them, if bought with the husband's moneys. *Newlove v. Callaghan*, 86 Mich. 301 (1891), affirming *Id.* 297; admitted. *Morrison v. Seybold*, *supra*.

As to homestead exemptions from encumbrances, see *supra*, V. 2.

XI. The effect of divorce on entirety property.

a. Generally.

The effect of a divorce is not altered by a subsequent alteration of the law. *Whitesell v. Mills*, 6 Ind. 229 (1865).

Remarriage of one spouse after an invalid divorce, with knowledge of the facts which made it so, was held, in *Marvin v. Foster* (Minn.) 63 N.W. Rep. 484 (1894), to estop him from claiming against the other spouse any estate or interest which he would not have been entitled to claim if the divorce had been valid.

b. Nullification.

Nullification of marriage, on account of some cause existing at the time of the marriage places the parties in the position of never having been married. *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 269 (1857) (*dictum*).

tion of joint tenancies or the legislation enlarging the rights of married women respecting the ownership of property. It is accordingly contended that if the words, "in equal shares and proportions," found in the residuary clause, were advisedly employed for the purpose of making certain the intention of the testator to create a tenancy in common, this intention, however clearly expressed, cannot be allowed to prevail against the early rule of the common law that husband and wife, being regarded as one person in law, are not competent to take, either as joint tenants or as tenants in common, under any form of grant or devise in fee made to them during coverture.

We are unable to concur in this view. The rule of the common law undoubtedly existed as claimed by the appellant. It is thus stated in 2 Bl. Com. 181: "If an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for, husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my*. The consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." And it is true that prior to the act of 1844, chap. 117, and subsequent legislation in this state securing to the wife the enjoyment of her separate estate,

this common-law rule was recognized by our court. *Greenlaw v. Greenlaw*, 18 Me. 186; *Harding v. Springer*, 14 Me. 407, 31 Am. Dec. 61. But it is worthy of remark that no recognition of it or reference to it can be found in the cases reported in this state since the act of 1844, entitled "An Act to Secure to Married Women Their Rights in Property."

A tenancy by entirety is *sui generis*. The right of survivorship gives it an apparent resemblance to joint tenancy, but, as already seen, it differs from a joint tenancy in important particulars. All the authorities agree that it had its origin in the marital relation, and was founded upon the legal fiction of the absolute oneness of husband and wife. At the common law the legal existence of the wife was merged in that of her husband. Her legal identity was suspended, or held in abeyance, during the existence of the marriage relation. Substantially all her property was vested in the husband during coverture, and her legal position was little better than that of a menial to her husband. Being but one person, in the eye of the law, it was considered that they could not consistently have separate and conflicting property rights. Hence the rule that property conveyed to them during coverture should be held as an estate by entirety, with the right of survivorship.

But the universal tendency of modern leg-

It precludes the offspring of the marriage from inheriting. 7 Hen. IV. 15.

It passes an entirety estate to whichever of the spouses does not sue as plaintiff for the nullification, or, in other words, suing for nullification and obtaining a decree cuts off the right of the party doing so to the entirety estate.

Even though the estate was originally the property of the other spouse, and was brought into settlement by him, 8 Edw. I., cited in Fitz. Ab. Ass. 415 (year and folio of 8 Edw. I. not specified).

And though the spouse to whom the estate thus passed had consented to the suit.

At least if the estate had been given by her father, 19 Lib. Ass. 2, cited in Fitz. Ab. Ass. 83; Anonymous, Kellw. 104. Fitzherbert also cites a case in 13 Edw. III., which, however, appears from Brooke, Ab. to have decided nothing. In these cases the suit was moved by the husband. The estate in the former case was in tail, and in the latter in frankmarriage, but nothing seems to have turned on these circumstances. The case in 12 Lib. Ass. 22, is not pertinent, but merely decides that collateral heirs of the husband could not claim an estate in frankmarriage.

But the rule that the spouse who sues for nullification loses the estate does not hold against one to whom the husband had conveyed it, except to the extent of a half share. Anonymous, Brooke, N. C. 175.

In Ames v. Norman, *supra*, however, it was said that such a donee would retain all that he could have retained if the marriage had not been nullified.

Nullification of marriage entitles the husband to emblements for crops sown by him on the wife's land (Oland's Case, 5 Coke, 116a (1592)) and therefore presumably on entirety land.

c. Dissolution.

Dissolution of marriage for a cause occurring after its celebration changes the entirety estates, as 80 L. R. A.

from the date of dissolution, into an estate in common, or (it seems) into a joint tenancy according as it would have been the one or the other if the parties had not married. Ames v. Norman, 4 Sneed, 696, 70 Am. Dec. 269 (1887) (*dictum*); Donegan v. Donegan (Ala.) 15 So. Rep. 823 (1894) (where it is not clear whether the divorce was a dissolution or a nullification); Stelz v. Shreck, 128 N. Y. 263, 13 L. R. A. 325 (1891) (expressly disapproving, at p. 263, the case of *Re Lewis's Appeal*, 85 Mich. 340 (1891)) (where it had been held in Michigan that the entirety estate remains notwithstanding the dissolution); Harter v. Wallner, 80 Ill. 197 (1875); Russell v. Russell, 122 Mo. 235 (1894); Hopson v. Fowlkes, 92 Tenn. 697, 702, 23 L. R. A. 805 (1896); Thornley v. Thornley [1893] 2 Ch. 229; Lash v. Lash, 58 Ind. 526 (1877).

Even though the divorce was granted in one jurisdiction and the land was situated in another. Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549 (1832); Barber v. Root, 10 Mass. 260 (1813).

Except in those instances in which divorce by a foreign court is not recognized by the courts of the state where the property is situated. *Id.*

But of course adultery, or other grounds for divorce, does not itself affect the entirety estate. Stelz v. Shreck, *supra*.

The dissolution of the marriage on account of the wife's adultery was held in Lodge v. Hamilton, 2 Serg. & R. 491 (1816), not to deprive her of her right by survivorship to a recognizance given to her and her husband as a security for her share of the price of real estate which had been disposed of in a partition suit.

The same conclusion might have been reached on the ground that the money was subject to a trust for reinvestment in the purchase of realty. See *supra*, VII. a, citing *Milday v. Quicke*, L. R. 6 Ch. Div. 553, 46 L. J. Ch. 667, 25 Week. Rep. 788 (1877).

The rule that the entirety estate becomes joint or common on a dissolution does not operate against a purchaser from the husband of an interest which the purchaser could have retained if the

islation has been to abrogate this theoretical unity of husband and wife; to recognize and maintain the legal identity of the wife, and secure to her a distinct and separate right to the acquisition and enjoyment of property. By the law of this state, "a married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey and devise the same by will without the joinder or assent of her husband." Since the act of 1844, above named, a husband by marriage acquires no right to any property of his wife. "She may receive the wages of her personal labor, not performed for her own family, maintain an action therefor in her own name, and hold them in her own right against her husband or any other person." She is liable for her debts and torts, and her property may be taken on execution therefor, as if she were sole. She may prosecute and defend suits at law or in equity in her own name without the joinder of her husband, for the preservation and protection of her property and personal rights, as if unmarried. Rev. Stat. chap. 61.

It is manifest that these statutes have wrought great modifications and radical changes in the relative property rights of husband and wife. In contemplation of law, they are no longer one person, and their interests in property are no longer identical, but separate and independent. Under these statutes the wife is invested with greater privileges, and weighted with greater responsibilities and liabilities, than before. The rule of the common law creating estates

by entirety is irreconcilable with both the letter and the spirit of these statutes. It never rested upon a rational or substantial groundwork. It had its origin in feudal institutions and social conditions which were superseded centuries ago by the more enlightened principles of a progressive civilization. It is now repugnant to the American idea of the enjoyment and devolution of property, and to the true theory of the marriage relation. "The reason of the law," says Lord Coke, "is the life of the law, and *cessante ratione lex ipse cessat*." The fictitious basis of this rule having been removed, the rule itself must fail. To declare that there is no authority in the court to effectuate a clearly expressed and unmistakable intention of a grantor or testator, against such an antiquated and exploded dogma, would be a poor tribute to the creative power of the law, and the original conceptions of justice in modern courts. The common law would ill deserve its familiar panegyric as the "perfection of human reason," if it did not expand with the progress of society, and develop with new ideas of right and justice. "Considering the influence of manners upon law," says Chancellor Kent, "and the force of opinion which is silently and almost insensibly conducting the course of business and the practice of our courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time."

These views are sanctioned by approved text-writers and courts of the highest re-

marriage had not been dissolved. *Ames v. Norman*, 4 Sneed, 683, 70 Am. Dec. 299 (1857). *Harrer v. Wallner*, *supra*, is favorable to the same view.

So, in *Beach v. Hollister*, 8 Hun, 519, 5 Thomp. & C. 668 (1875), an execution creditor of the husband was held not precluded from continuing, after the dissolution, a levy begun before, nor, it seems, from making after the dissolution a levy by force of a judgment recovered before; but on the latter point the report is not clear.

There do not appear to be any other authorities as regards the rights of a purchaser from the husband of an entirety estate; but the estate of a purchaser from the husband of his life interest in the wife's property was held to be divested or terminated by the dissolution in *Boyd v. Rain*, 28 Ala. 332, 65 Am. Dec. 349 (1856); *Gould v. Webster*, 1 Tyler (Vt.) 409 (1802). And see *Lynch v. Rotan*, 39 Ill. 18, 19 (1865); and, as to the husband's creditor's, *Townsend v. Griffin*, 4 Harr. (Del.) 443 (1843); as to a lease by him, *Gould v. Webster*, *supra*.

But the contrary was held in *Aiken v. Suttle*, 4 Lea, 108 (1879), where strong reasons were given and many authorities cited, and in *Jennings v. Montague*, 3 Gratt. 350 (1845).

An enactment that the wife shall, upon divorce, be restored to all her lands and tenements, terminates the interest of a purchaser from her husband of land held in her right. *Kruger v. Day*, 2 Pick. 316 (1824).

In *Jenney v. Gray*, 5 Ohio St. 45 (1855), there was an enactment that dispositions of the wife's estate made by the husband should be void against her, and consequently the question could hardly arise.

d. Separation without dissolution of marriage.

A judicial separation or divorce *a mensa et thoro* does not affect entirety estates or generally the property rights of the parties. As regards the former no authority has been found.

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Of course a separation by consent has no effect on property rights unless so agreed. *Gonsolis v. Douchouquette*, 1 Mo. 666 (1826).

XII. Partition between tenants by entirety.

Partition of an entirety estate cannot be compelled by one of the parties, nor obtained by judicial process (*Miller v. Miller*, 9 Abb. Pr. N. S. 444 (1871); *Chandler v. Cheney*, 37 Ind. 391 (1871) (*dictum*)), except in states where it has been authorized by the legislature.

But either of them may have partition of land of which they are ordinary joint tenants. *Wurz v. Wurz*, 27 Abb. N. C. 58 (1891).

And, after dissolution, one may compel it. *Russell v. Russell*, 122 Mo. 235 (1894); *Harrer v. Wallner*, 80 Ill. 197 (1875).

And, in Illinois, a partition may be sought in the same suit by which the dissolution is sought. *Harrer v. Wallner*, *supra*.

But not so in Indiana. *Alexander v. Alexander* (Ind.) 40 N. E. Rep 55 (1895).

XIII. Adverse possession and the statute of limitations.

The limitation period does not begin to run against the wife holding by entirety until she becomes entitled to sue alone; that is, until her husband's death. *Harrer v. Wallner*, 80 Ill. 203 (1875).

Or on a dissolution of the marriage. *Hopson v. Fowkes*, 92 Tenn. 704, 23 L. R. A. 805 (1893).

Nor is he barred until she is. *Johnson v. Edwards*, 109 N. C. 466.

And this is so notwithstanding the married women's acts (*Harrer v. Wallner*, *supra*), except it may be presumed where they contain a provision authorizing her to sue.

The title of a donee from the husband before the married women's acts is not adverse to the wife until his death. *Miller v. Miller*, Meigs, 484, 33 Am. Dec. 157 (1838). But no doubt a dissolution of the marriage would make it so. H. W. B. M.

spectability in England as well as in this country.

In his Treatise on Estates, Mr. Preston makes the confident assertion, based upon his own cultivated reason, rather than upon reported cases at that time, that "in point of fact, and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons, and accordingly, when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons would do." 1 Preston, Estates, 182. This is cited as authority for the following statement in 4 Kent, Com. 411: "It is said, however, to be now understood that husband and wife may, by express words, be made tenants in common by a gift to them during coverture."

In his note to 2 Bl. Com. 181, Judge Sharswood says: "But when an estate is conveyed to a man and woman who are not married, together, and who afterwards intermarry, as they took originally by moieties, they will continue to hold by moieties after the marriage. There is nothing, therefore, in the relations of husband and wife, which prevents them from being tenants in common. There are great opinions in favor of the position that husband and wife may, by express words, be made tenants in common." So, in 1 Washb. Real Prop. 444, the author says, "It is always competent, however, to make husband and wife tenants in common by proper words in the deed or devise by which they take, indicating such an intention."

In *Clark v. Clark*, 56 N. H. 105, it was held that a statute in that state enlarging the rights of married women practically abolished tenancies by entirety between hus-

band and wife; and the legal unity of husband and wife, as respects the holding of property and making of contracts by the wife, was obliterated.

In *Cooper v. Cooper*, 76 Ill. 57, it was held that under the married woman's law of 1861 in that state—an act having a scope and purpose similar to our own above cited—"no reason can be perceived, and none is suggested, why a married woman should not hold property thus acquired in fee, and as a tenant in common with her husband, precisely as she might with any other person."

In *Hoffman v. Stigers*, 28 Iowa, 307, the court says: "If no contrary intent is expressed in the conveyance to them, or the instrument under which they hold, the husband and wife take as tenants in common, and not in entirety. At common law, they were so far, so completely, so essentially one, that they could not take by moieties."

But the doctrine always stood upon what was little more than the merest fiction, and, as this, by our legislation, has measurably given way to theories and doctrines more in accord with the true and actual relation of husband and wife, the rule itself must be abandoned." See also *Wilson v. Fleming*, 18 Ohio, 68; *Whittlesey v. Fuller*, 11 Conn. 337; *Re Dixon* (*Byram v. Tull*) L. R. 42 Ch. Div. 806; *Warrington v. Warrington*, 2 Hare, 54.

Under the residuary clause in the case at bar, the appellant took only a moiety of the residue of the estate. As Judyer Robinson died before the testator, the devise and bequest to him lapsed, and the moiety of the residue, which he would have taken if he had survived, descended to the heirs of the testator.

Exceptions overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

Anson A. BIGELOW, *Plff. in Err.*,

v.

Harold W. NICKERSON, Admr., etc., of
Erick Anderson, Deceased.

(70 Fed. Rep. 113.)

1. The territorial limit of sovereignty with respect to high seas on the 8-mile zone should not be applied to a lake which is not the common boundary of nations or open by nature for the commerce of the world, but is within the exclusive jurisdiction of each nation.
2. A Federal court of admiralty may enforce a state statute giving a right of action for death by negligence, where the death occurs in consequence of a collision between vessels.
3. The sovereignty of the state of

Wisconsin extends to the middle of Lake Michigan; and its laws, so far as they do not conflict with those of the United States regulating commerce and navigation, are operative within such limits.

4. A state statute giving a right of action for death by negligence is applicable in case of a death occurring in the waters of Lake Michigan beyond more than 8 miles from the shore of such state, and may be enforced in a Federal court of admiralty.
5. A provision of a state statute giving a cause of action for death by negligence, that the action shall be brought in some court established by the Constitution and laws of the state, is not operative to deprive a Federal court of jurisdiction of such action.
6. A vessel bound to keep out of the way of another has the burden of proving that

NOTE.—The boundary of states by lakes and rivers is the subject of a note to *Buck v. Ellenbolt* (Iowa) 15 L. R. A. 187.

On the question of the validity of a state statute restricting to state courts the enforcement of it, 30 L. R. A.

and the question of the scope of the statute giving the right of action in respect to injuries on the Great Lakes more than 8 miles from land, the case is believed to be one of first impression.

a collision between them was due to the failure of the latter.

7. The luffing of a vessel in the presence of imminent danger of collision is not such a fault as will preclude recovery for damages from such collision.

8. Failure of a schooner to exhibit a torch light will not render her responsible for collision with a vessel who sees her lights, where her position and course are distinctly apparent.

(Showalter, Circuit Judge, dissents.)

(October 12, 1895.)

APPEAL by defendant from a judgment of the District Court of the United States for the Eastern District of Wisconsin in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Affirmed.*

Before Woods, Jenkins, and Showalter, circuit judges.

Statement by Jenkins, Circuit Judge:

This was a libel *in personam*, exhibited in the Court below by the appellee against the owner of the steamer Robert Holland, claiming damages for the death of Erik Anderson, in a collision between the schooner William Aldrich and the barge Parana, which barge, with the barge Stevenson, was at the time in tow of the steamer Robert Holland. The collision is asserted to have been caused by the fault of the Robert Holland. The collision occurred at about 5 A. M. of the morning of November 1, 1891, under the following circumstances: The Aldrich, a three-masted schooner of 20 tons burden and laden with lumber, was proceeding on a voyage from Nahma, Mich., bound for the port of Milwaukee, Wis., having three jibs, a foresail, and a mainsail set, and with mizzen furled. The wind was northwest, and fresh. The vessel was on a course S. by W. 4 W., and was abreast of, and some 6 miles distant from, Pilot Island and from the Wisconsin shore, and about a like distance north of Canna Island light. The steamer Holland, having the barges Stevenson and Parana in tow astern, and in the order mentioned, all being light, was upon a voyage from the port of Chicago to Ashland, on Lake Superior. Her course was N. N. E. The barge Stevenson carried a foresail and staysail, and the Parana a foresail only. The combined length of the tow was about 1,900 feet. The Holland had the usual green and red lights in proper position, and also properly exhibited a white light, indicating a tow. The barges had their side lights properly placed, screened, and burning brightly. The proper signals upon the Aldrich were also set and burning. The schooner's lookout reported the white light of the steamer about a point on the lee bow of the schooner, and distant some 15 miles, and afterwards saw and reported the steamer's red light distant about 5 miles, and afterwards, when the steamer was about 4 mile away, he reported the steamer's green light over the port or lee bow. Each vessel claims to have kept her course. The Holland claimed that if no change had occurred in the course of either vessel, she would have passed to

the windward of the schooner; that, when about 100 feet away from the schooner, the Holland's wheel was put to starboard, changing her course to the windward a point and a half, and she claims to have passed the schooner some 500 feet to windward, and that the latter suddenly came up into the wind and struck the tow line between the barges, and then drove on to the Parana. The schooner was struck on her port bow between the stem and cathead, her bows were carried away, and she filled with water. Anderson, who at the time was off watch, and asleep in the fore-castle, was drowned. The schooner claimed that, seeing the red light of the steamer, it was supposed the latter would pass to leeward; that such was, in fact, the purpose of the steamer; that she had crossed the point of intersection of the courses of the two vessels, when her course was changed in an attempt to pass to windward, which, so far as the steamer was concerned, was accomplished, but that the manœuver was not resorted to in time to make it effectual as to the tow; that, when the collision was seen to be inevitable, the schooner, to ease the blow, or to escape, if possible, the stern of the barge Parana, put her wheel up to enable the schooner to fall off, but that the effort was ineffectual. It was claimed by the Holland that the Aldrich, instead of putting her wheel up, put it down, and luffed up into the wind. The combined speed of the vessels was about 15 miles an hour. The libellant claimed to be entitled to recover of the libelee under the provisions of sections 4255 and 4256 of the Revised Statutes of the state of Wisconsin, which are as follows:

"Sec. 4255. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this state, and in some court established by the Constitution and laws of the same.

"Sec. 4256. Every such action shall be brought by, and in the name of, the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every such action the jury may give such damages, not exceeding \$5,000, as they shall deem fair and just in reference to the pecuniary injury resulting from such death, to the relatives of the deceased specified in this section."

The court below pronounced for the libellant (*The Robert Holland*, 59 Fed. Rep. 200; *Nickerson v. Bigelow*, 62 Fed. Rep. 900), and the owner of the Holland appealed.

Mr. Charles E. Kremer for appellant.
Messrs. Frank M. Hoyt and George D. Van Dyke for appellees.

Jenkins, Circuit Judge, delivered the opinion of the court:

It is determined that, at the common law, no civil action would lie for an injury resulting in death (*Mobile L. Ins. Co. v. Brame*, 95 U. S. 754, 24 L. ed. 590), and that, in the absence of an act of Congress, or a statute of a state, giving a right of action therefor, no suit will lie in the admiralty for personal injury causing death through negligence on the high seas, or on waters navigable from the sea (*The Harrisburg*, 119 U. S. 199, 80 L. ed. 858; *The Alaska*, 180 U. S. 201, 32 L. ed. 938). It is also settled that, if a state statute gives a right of action touching a subject of maritime nature, the admiralty can administer the law by a proceeding *in rem*, if the statute grants a lien, or *in personam*, no lien being granted. *The Corsair*, 145 U. S. 385, 347, 86 L. ed. 727, 781. It is also the law that, if the negligent act causing death occur within the jurisdiction of a state, the law of such state governing such action is applicable. *American S. B. Co. v. Chace*, 83 U. S. 16 Wall. 523, 21 L. ed. 869; *Sherlock v. Alling*, 98 U. S. 99, 23 L. ed. 819; *The Transfer No. 4*, 20 U. S. App. 570, 9 O. C. A. 521, 61 Fed. Rep. 864, affirming *The City of Norwalk*, 55 Fed. Rep. 99. In the first of these cases the negligent act causing death occurred upon the waters of Narragansett bay, within the jaws of the headlands, and so within the territory of the state; in the second, upon the Ohio river, above the line of low-water mark, and within the territorial jurisdiction of the state of Indiana; in the last, upon the East river, just above Blackwell's island, and within the territorial jurisdiction of the state of New York. In *Re Humboldt Lumber Mfrs. Assn.* 60 Fed. Rep. 428, the negligent injury causing death occurred on the high seas on Humboldt bar, off the entrance to Humboldt bay, and within 2 miles of the shore. The court applied the doctrine "that the sea, within a belt or zone of 8 miles from the shore, as distinguished from the rest of the open sea, formed part of the realm," and held that the statute of California giving a right of action for negligent injury causing death was applicable.

It will be observed that in none of the cases to which we have referred did the negligent injury occur upon the high seas beyond the 8 mile belt or limit, and that is true of all the cases which have come under our notice. *The Corsair*, *supra*; *The Oregon*, 45 Fed. Rep. 63; *Killian v. Hyde*, 68 Fed. Rep. 172; *The Victory*, 68 Fed. Rep. 682. The statute only takes cognizance of torts within the jurisdiction of the state, and has no extraterritorial effect. It is urged that the collision and negligent injury here took place upon the waters of Lake Michigan, and without the belt limit of 8 miles, and that therefore, within the decision in *United States v. Rodgers*, 150 U. S. 249, 87 L. ed. 1071, it occurred upon the high seas, and without the territorial jurisdiction of the 30 L. R. A.

state of Wisconsin. The question is thus sharply presented whether the *locus in quo* lies within the territorial waters and within the jurisdiction of the state of Wisconsin.

The precise point decided in *United States v. Rodgers*, was that a district court of the United States had jurisdiction to entertain the trial of one for a crime committed on an American vessel on the waters of the Detroit river, beyond the boundary line between the United States and the dominion of Canada, and within the waters of the province of Ontario. Jurisdiction was held, under sections 5346 and 780, Rev. Stat., upon the ground that the *locus in quo* was on a river within the admiralty jurisdiction of the United States, and out of the jurisdiction of a state of the Union. It was ruled that, by the statute, Congress intended to include "the open, uninclosed waters of the lakes under the designation of high seas," with respect to the offenses enumerated in the statute; and the *locus in quo* being within the admiralty jurisdiction of the United States (*The Genesee Chief*, 58 U. S. 12 How. 448, 13 L. ed. 1058), it was competent for Congress to provide for the punishment of offenses committed upon an American vessel within a foreign jurisdiction.

The question still remains open and undecided by the supreme court whether the jurisdiction of a state bordering upon one of the Great Lakes extends beyond low-water mark; whether the doctrine of a 8-mile belt, recognized in the case of oceans, may be applied to the Great Lakes; and whether state jurisdiction, with respect to such lakes, is coextensive with the boundary line of the state, when one of its lines is declared to be a line running through the middle of the lake. We think it must be conceded that Lake Michigan is not a "high sea," in the sense that it is "open and uninclosed, and not under the exclusive control of any one nation or people, but is the free highway of adjoining nations or people," to use the language employed by Mr. Justice Gray. This lake lies wholly within the territory of, and as respects foreign nations is under the exclusive dominion of, the government of the United States. If we may indulge the expression, it is not "no man's land." It is not by nature free to the commerce of the world. It is so free solely by the grace of this government. It is included within the territorial boundaries of four states. The organic law of the territory of Michigan, enacted in 1805, made its westerly boundary a line drawn from the southerly bend or extreme of Lake Michigan, through the middle of the lake, to its northern extremity. 2 Stat. at L. 309. This line was confirmed and established upon the admission of the state of Michigan into the Union in 1836. 5 Stat. at L. 49. The act provided that the state of Michigan should "have jurisdiction over all the territory included within" the boundaries described in the act. The organic law of the territory of Wisconsin, enacted in 1836, established its eastern boundary "by a line drawn from the northeast corner of the state of Illinois through the middle of Lake Michigan to a point in the middle of said lake,

and opposite the main channel of Green bay," etc. 5 Stat. at L. 10. The same line, substantially, was established by the enabling act for the admission of the state of Wisconsin into the Union, passed in 1846. 9 Stat. at L. 56.

It is said that, while the geographical limits of the state extend beyond the place of collision, its territorial limit, its right of sovereignty, its power to enact and enforce laws, does not extend further than the point of navigability, or, at the most, beyond a 3-mile belt or zone. We think the vice of the contention lies in the application of international law to the subject in hand. As between nations, the territorial limit of sovereignty with respect to the high seas anciently extended no further than to low-water mark. In later days, "to make good the assertion of the jurisdiction over the foreigner therein," the character of territory was given to the 3 mile zone. This, as we think, ought not to be applied to a lake which is not the common boundary of nations, and which is within the exclusive jurisdiction of one nation,—to a body of water that is not by nature open to the commerce of the world. It has never, so far as we are able to say, been applied by any nation, except with respect to its external littoral waters. Lake Michigan is a high sea, within the provisions of the act under consideration in *United States v. Rodgers*, but it is not an open sea, nor a boundary line between nations. The government of the United States had the sole jurisdiction over this body of water. It saw fit to give to the different states, founded out of the surrounding territory, jurisdiction over its waters, subject to its paramount right in the regulation of commerce and navigation. The Northwest Territory was ceded by the state of Virginia, and accepted by the United States in trust, for the purpose only of the creation of states, and the vesting in them over the whole of this territory of the sovereignty that formerly pertained to the granting state. *Shively v. Bowlby*, 153 U. S. 1, 26, 88 L. ed. 331, 341.

In the case of *Illinois C. R. Co. v. Illinois*, 146 U. S. 887, 86 L. ed. 1018, and in the case of *Shively v. Bowlby*, 153 U. S. 1, 88 L. ed. 331, it is said to be the settled law of this country that "ownership of, and dominion and sovereignty over, lands covered by tide waters or navigable lakes, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be without substantial impairment of the interest of the public in such waters, and subject to the paramount right of Congress to control their navigation, so far as may be necessary for the regulation of commerce." In the latter case it is said (page 58, 153 U. S., and page 332, 88 L. ed.) that, upon admission of states into the Union, the "administration and disposition of the sovereign rights in navigable waters, and in the soil under them," passed to the control of the states within whose boundaries such waters were included. See also *Mann v. Tacoma Lund Co.* 158 U. S. 273, 286, 38 L. ed. 714, 718.

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The grant to the United States, in the Constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over them. Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union, but the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away, and the residuary power of legislation will still remain in the state. *United States v. Bevans*, 16 U. S. 3 Wheat. 336, 4 L. ed. 404. We are therefore of opinion that the surrounding states, within the limits prescribed in their respective organic acts, have sovereign rights in and over the navigable waters of Lake Michigan, subject to the paramount right of the Federal government to regulate navigation and commerce between the states and with foreign nations. The right of the state to legislate and to enforce its laws is plenary, within the boundaries prescribed, limited and controlled only by the paramount law of the nation. There does not necessarily result any conflict. Both jurisdictions can coexist in the same plane in complete harmony.

Legislation of the character of that under consideration is not open to the objection that state laws cannot extend or restrict the jurisdiction of the admiralty court. As suggested by Mr. Justice Clifford, in *American S. B. Co. v. Chase*, 88 U. S. 16 Wall. 522, 21 L. ed. 369: "The practical effect allowed to the state statute is to take the case out of the operation of the common-law maxim that personal actions die with the person."

And, as well observed by Judge Lacombe, in *The Transfer No. 4*, *supra*: "The admiralty courts, before the passage of the statute, exercised jurisdiction over precisely such claims for damages, when brought in his lifetime by the person injured, and there seems no sound reason why they should not exercise like jurisdiction when the tort is committed in a locality where the municipal law preserves the right to redress beyond the life of the injured person. It is not logically an enlargement of jurisdiction so as to cover a general subject not cognizable before, but a mere increase of the varieties of the cases embraced within that subject."

This jurisdiction of the admiralty court, with respect to subjects maritime, to enforce new remedies granted by state laws, is fully recognized by the supreme court. Thus, Mr. Justice Brown, delivering the opinion of that court in *The Corsair*, *supra*, observes: "A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the admiralty. In much the larger class of cases, the lien is given by the general admiralty law, but in other instances, such, for example, as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire

whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceedings *in personam*, as was done with a claim for half-pilotage dues under the law of New York, in the case of *Ex parte McNiel*, 80 U. S. 13 Wall. 236, 20 L. ed. 624, but unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the court of admiralty.

We think the clear result of the authorities to be that the sovereignty of the state of Wisconsin extends to the middle of the lake, and that its laws, so far as they do not conflict with the laws of the United States passed in the regulation of commerce and of navigation, are operative within its prescribed boundary. Such state legislation upon subjects of a maritime nature has been generally recognized in the admiralty (*The J. E. Rum- ball*, 148 U. S. 1, 37 L. ed. 245; *The Lottava- nna*, 68 U. S. 21 Wall. 558, 22 L. ed. 654; *The America*, 1 Low. Dec. 170, Fed. Cas. No. 280; *The Marion*, 1 Story, C. C. 68, Fed. Cas. No. 9,087; *The California*, 1 Sawy. 408, Fed. Cas. No. 2,313; *The Glenavon*, 7 Fed. Rep. 604; *The B. F. Woodruff*, 1d. 108; *The Julia L. Sherrard*, 14 Fed. Rep. 500; *The Two Marys*, 10 Fed. Rep. 919, 16 Fed. Rep. 607; *The Shady Side*, 20 Fed. Rep. 731; *Woodruff v. One Covered Sloop*, 20 Fed. Rep. 900), and we perceive no reason to deny operation of the law invoked in this case. It is not, in our judgment, like the case of the law of a state intended to be operative upon the high seas, which belong to no one nation and to no one people, but to all nations and to all peoples. In the absence of legislation by Congress denying a right of recovery for death occurring through negligent injury upon the waters of Lake Michigan, we perceive no reason for the refusal of an admiralty court to give effect to the beneficent provisions of this law within the limits of the state.

A question has arisen, not suggested by the appellant upon the argument, whether the proviso of the act of the legislature of the state of Wisconsin, that the action for damages occasioned by negligent injury causing death should be "brought for a death caused in this state and in some courts established by the Constitution and laws of the same," is a condition or limitation upon the right granted, so that the right can only be asserted and enforced by and through the courts of the state, and that suit therefore cannot be maintained in a Federal court. We are of opinion that the question must be resolved in the negative. The legislature of a state cannot confer jurisdiction of any sort upon a Federal court. Such tribunal derives its jurisdiction from the Constitution of the United States, not by grant from the legislature of a state. We enforce a right created by the state because the right given touches a subject within the constitutional jurisdiction of the Federal court. We think it not competent for a state to so restrict a general right that one entitled to invoke the jurisdiction of a Federal court in the prosecution

or defense of a suit may not assert the right so granted in a Federal court, or that the state may in any way restrict the exercise of the jurisdiction of a Federal court to administer the law of the state between persons who come within its jurisdiction. The proviso of the act in question, if it was designed to and in so far as it restricts the enforcement of the right to a state court, is, in our judgment, inoperative and void. The judicial power of the United States, lodged in the Federal courts, extends, by the very terms of the Constitution, to all classes of admiralty and maritime jurisdiction. The subject-matter of the right here asserted was within such jurisdiction. The statute, as said by Judge Lacombe, in *The Transfer No. 4*, *supra*, created a mere addition to the variety of cases embraced within that jurisdiction, so far as it comprehends deaths caused by negligent injury upon navigable waters within the state. It does not, as well held by Judge Brown, in *The City of Norfolk*, 55 Fed. Rep. 98, create a new cause of action. "It does, indeed, create a new right and liability; but it does not create a single one of the elements that make up the fundamental cause of action,—that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates the negligence or the death, nor does it, as in the pilotage and double wharfage cases, add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford, in *American S. B. Co. v. Chase*, 55 U. S. 16 Wall. 532, 20 L. ed. 272, 'the statute does no more than take the case out of the operation of the common-law maxim that an action for death dies with the person.'"

A civil right of action, acquired under the laws of a state where the injury was inflicted, or a civil liability incurred, the action being transitory, may be enforced in the courts of any other state in which the party may be found, according to the course of procedure of the latter (*Dennick v. Central R. Co.*, 108 U. S. 11, 26 L. ed. 430; *Texas & P. R. Co. v. Cox*, 145 U. S. 508, 604, 36 L. ed. 329, 333; *Huntington v. At- trill*, 146 U. S. 657, 670, 36 L. ed. 1123, 1125; *Northern P. R. Co. v. Bahrick*, 184 U. S. 190, 198, 38 L. ed. 958, 960), and this although a like wrong or liability would not be actionable in the state where the suit is brought. It is also settled that, whenever a state statute gives a right, the same may be enforced in a Federal court whenever the citizenship of the parties or the nature of the subject will permit. In *Ross Ins. Co. v. Moss*, 87 U. S. 20 Wall. 443, 22 L. ed. 365, the state of Wisconsin, having the right to determine the conditions upon which it would permit foreign corporations to transact business within its territory (*Dodge v. Continental Ins. Co.*, 94 U. S. 835, 24 L. ed. 148), provided that any foreign fire insurance company should, as a condition of being permitted to do business within the state, appoint an attorney within the state upon whom

process of law could be served, with an agreement of the company that it would not remove the suit for trial into the Federal court. It was held that an agreement of the company executed in pursuance of the provisions of the statute was void as against public policy, and that the provision of the statute was in conflict with the Constitution of the United States. The chief justice and Mr. Justice Davis dissented, upon the ground that the state could rightly exclude foreign corporations altogether from doing business within the state, and had therefore the right to impose such restrictions and conditions upon the company, in permitting its admission to the state, as it saw fit, and that the company accepted the permission with the conditions attached, and was bound thereby. This reasoning, however, was not accepted by the court. The decision has been often approved. *Doyle v. Continental Ins. Co. supra*; *Kern v. Huideloper*, 103 U. S. 486, 492, 26 L. ed. 854, 857; *Barron v. Burnside*, 121 U. S. 186, 80 L. ed. 915; *Southern P. Co. v. Denton*, 146 U. S. 202, 207, 86 L. ed. 942, 945; *Goldrey v. Morning News*, 156 U. S. 518, 523, 89 L. ed. 517, 519. Mr. Justice Blatchford, in *Barron v. Burnside*, speaking for the court, says that the supreme court "has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States." We consider the question foreclosed, and no longer open to discussion. No condition imposed upon a right granted by a state, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States, can be upheld. Such condition conflicts with the Federal Constitution, and is nugatory and void. In *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 18 Wall. 270, 20 L. ed. 571, an administrator, under letters of administration granted by the state of Wisconsin, but who was in fact a resident of the state of Illinois, brought suit against the railway company, a corporation of the state of Wisconsin, in a state court, to enforce a claim under the statute under consideration for negligent injury of the company causing the death of his intestate within the state of Wisconsin. He subsequently, under the provisions of the Federal statute, removed the suit into the Federal court. It was there objected that the right to sue in such case existed by virtue of the statute only, and that the right by the statute was given only on a condition that the suit be brought in a Wisconsin court. The contention was, however, overruled by the supreme court by the unanimous opinion of the judges, and it is there said (page 286, 20 L. ed. 576): "In all cases where a general right is thus conferred, it can be enforced in any Federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court. The statutes of nearly every state provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is

situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation." See also *Ellis v. Davis*, 109 U. S. 486, 497, 498, 27 L. ed. 1006, 1010; *Davis v. James*, 2 Fed. Rep. 618; *Holmes v. Oregon & O. R. Co.* 5 Fed. Rep. 75; *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* 25 Fed. Rep. 515.

It is sought to distinguish the *Whitton Case* from the present in this: that that suit was originally brought in a state court, and removed to a Federal court, while the case in hand was originally brought in a Federal court; and it is said that the former case was a compliance with the statute. We are unable to assent to the suggestion. The fact stated was given no significance in the *Whitton Case*. It was determined upon the broad principle stated. We cannot give to the word "brought," as used in the statute, so restricted a meaning. If the statute sought to limit the right of action to the courts of the state, it contemplated that the right given should be enforced by them and by them only. It would not be satisfied by the commencement of a suit in the state court, and its immediate removal to a Federal court. A like contention was urged in *Ex parte Schollenberger*, 96 U. S. 869, 876, 877, 24 L. ed. 853, 854, 855, and was adversely disposed of. The jurisdiction exercised upon the removal is original. Removal is only an indirect mode by which the Federal court acquires original jurisdiction. *Virginia v. Rives*, 100 U. S. 813, 887, 25 L. ed. 667, 676.

With respect to fault in the collision here, we are satisfied with the conclusion of the district judge. It was the duty of the Holland to keep out of the way of the Aldrich. Considering that she had under charge a long and unwieldy tow, it was her duty to avoid dangerous proximity to the approaching vessel. Being thus bound to keep out of the way, the burden is cast upon her to prove that the collision was due to the fault of the other vessel. This duty has not been discharged. We are satisfied, from a careful consideration of the evidence, which, as usual in such cases, is quite conflicting, that the Holland first designed to pass to leeward of the Aldrich, and, in pursuance of that intention, passed the point of intersection of the courses of the two vessels, and then changed her purpose with a view to pass to windward. Otherwise, her green light would not have been exhibited to the lookout upon the schooner over the port bow. The change of course of the schooner was after the steamer had passed her to windward, and at a time when the collision was inevitable. It is probable that the Aldrich then swung up into the wind, because she was struck on the port bow between the stern and the cathead. The wheelman of the Aldrich insists that

he put her wheel up. We think that in this he must be mistaken. The error was, however, in the presence of imminent danger, and is not such a fault as would preclude a recovery by the schooner. "Where one ship has by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind." *The Byrwell Castle*, L. R. 4 Prob. Div. 219; *The Elizabeth Jones*, 112 U. S. 514, 526, 28 L. ed. 812, 816; *The Maggie J. Smith*, 128 U. S. 849, 855, 81 L. ed. 175, 178.

It is further claimed that the Aldrich was in violation of the regulations in that she exhibited no torch light. We need not consider whether the regulation with respect to torch lights was in force at this time, or had been repealed by the legislation claimed, or was applicable to the situation. The position and course of the schooner were distinctly apparent to the Holland. Her lights were burning and seen by the lookout of the Holland. A torch would not have disclosed anything that was not known without it to those navigating the Holland. Its absence in no way contributed to or induced this collision, and, if the exhibition of a torch be required by the regulations, is not a fault availing to defeat a recovery.

Decree affirmed.

Showalter, Circuit Judge, dissenting:

The statute of Wisconsin, upon which the adjudication in the court below was predicated, gives to the administrator a right of recovery in case his suit is "brought for a death caused in this state and in some court established by the Constitution and laws of the same." Lord Campbell's act, as commonly re-enacted in the American states, gives a right of recovery to the administrator, for the benefit of specified persons, in cases where the deceased, if he had survived, could have maintained an action for the injuries which caused his death. Such enactments, being in derogation of the common law, are strictly construed. The right of recovery attaches only within the form of the statute. The fund recovered is a trust for the specified beneficiaries, not assets of the estate. Unless it appear that there are persons to be benefited answering the statutory description, the suit cannot be maintained; nor can there be any recovery in a case where the deceased left no estate, since, in that event, a probate court has no jurisdiction to appoint an administrator. *Perry v. St. Joseph & W. R. Co.* 29 Kan. 420. At common law any person may bring an action against any other person. These statutes do not give the right to bring suit. They give to the plaintiff a right of recovery in cases where at common law the judgment would have gone against him. But the formal conditions on which the statutory right goes must be met; otherwise, the common law determines the judgment against the plaintiff. Under the Wisconsin statute, the right of recovery arises within two limitations, one of which, at least, is exceptional: First, the suit must have been brought for a death

caused in Wisconsin; second, the suit must have been brought in one of the courts of that state. There is no legislative sanction in Wisconsin for any recovery by the plaintiff administrator other than within the lines as here named. The state of Wisconsin has not, by this statute, restricted a general right, or any right whatever, or made any restriction of any kind. To restrict a right is one thing; to create or grant a right within specified boundaries is another. In the former case, the common law is displaced by the restriction; in the latter, by the right. Where a right which did not exist at common law is given by statute, and the same statute specifies the court in which it is to be enforced, such right does not attach to the litigant in any other court. The specification of the particular tribunal marks, in such case, the scope of the right. This rule of statutory construction, I take it, is beyond dispute. *Dudley v. Mayhew*, 8 N. Y. 9; *Chandler v. Hanna*, 78 Ala. 290; *Dickinson v. Van Wormer*, 89 Mich. 141; *Janney v. Buell*, 55 Ala. 408; *Phillips v. Ash*, 68 Ala. 414; *St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Hollister v. Hollister Bank*, 3 Keyes, 245; *Sedgw. Stat. & Const. L.* 342.

The court, being such a one as is specified in the act, does not adjudge a recovery in favor of the plaintiff because anything has been added to its judicial power, but because the statute gives the right to the plaintiff. Nor does a court, other than as named in the statute, dismiss the suit for want of jurisdiction. It adjudges against the plaintiff, or permits him to dismiss, because he is unable to make out a cause of action. The question here is one of statutory construction, and it concerns the recovery adjudicated in favor of this appellee, rather than the jurisdiction of the district court to hear and determine whether or not a right of recovery was made out by him. The word "jurisdiction" is used somewhat untechnically in the first of the following quotations from section 899 of Sutherland on Statutory Construction: "When a right is solely and exclusively of legislative creation, when it does not derive existence from the common law or from the principles of equity, jurisdiction may be limited to particular tribunals, and new specific remedies provided for its enforcement. Then the jurisdiction can be exercised and the remedy pursued only as the statute provides." "When a right is given by statute and a specific remedy provided, or a new power and also the means of executing it are therein granted, the power can be executed and the right vindicated in no other way than that prescribed by the act."

The suit in question here was brought in the district court of the United States. Assuming for that court everything conceivable in the way of judicial power or jurisdiction, was there any law giving to this appellee a right to the recovery adjudged to him by that court? I insist that the statute of Wisconsin does not authorize the recovery, that said adjudication is without legislative sanction, is not within the statute, and is not to be vindicated any more than if it had been made in a court of Illinois or of England.

Lord Campbell's act, as re-enacted, in Illinois, for instance, contains no such limitation as that under discussion. The courts hold that the recovery may be had on such a statute in the Federal court if the citizenship be appropriate or in the courts of any state where the defendant can be found. But the recovery given by the Wisconsin statute arises within the limitation that the suit must be brought in some one of the courts of that state. If a suit intended to enforce the recovery given in that statute be brought in a foreign court, the plaintiff cannot succeed, because the Wisconsin statute fails to give him the right of recovery and by the common law the action does not survive. If, on the other hand, the suit is brought in a Wisconsin court, and be there prosecuted, or be thence removed under the Federal statute to the circuit court of the United States and be there carried on to a conclusion, the plaintiff, his case being otherwise good, will recover a judgment against the defendant. This result will not follow, as already said, because anything has been added to the jurisdiction of either the state or Federal court, but because all the conditions, including the requirement that the suit must have been brought in one of the courts of Wisconsin, have been met and the statute has thus become effective to give the recovery; because, in short, the plaintiff makes out his case.

If the legislature of Wisconsin had seen fit, the right of recovery might have been given in suits brought in certain specified courts of that state, in which event the plaintiff could not have made out a right to have judgment in his favor in any other court of the state; and this, without question, would have been the construction put upon the statute by the courts of Wisconsin. The limitation fixed in the statute is, as already stated, that the right of recovery shall arise in case the suit "be brought in some court established by the Constitution and laws of" Wisconsin. This language should be construed, if construction were needed, in connection with and in subordination to the Federal statute giving to a litigant the right to remove a suit brought in the state court to the circuit court of the United States. A suit brought in the state court, and afterwards removed to the circuit court of the United States, does not lose its identity in process of removal. The latter court takes up the proceeding where the former left off, and such proceeding continues to be a suit which was brought in the state court, and so falls within the express terms of the condition. If the recovery were given on the condition that the suit should be not only brought but thereafter carried on in a court of the state without being removed to a Federal court, the plaintiff would necessarily fail in every suit so removed. The legislative intent to give him the recovery would be wanting after the removal. As to any defendant entitled to remove, the state statute, being to that extent supplanted by Federal legislation, would be ineffective. But this exceptional result does not follow from the condition as written. I am not able to concur in a con-

struction which would narrow the scope of the statute as here suggested, nor in the conclusion, reached in the prevailing opinion, that the condition under discussion is void. The logic whereby we may put into the words of the condition a meaning which they do not express, and then declare the condition void as the result of such construction, appears to me anomalous.

Where a statute creates a right of recovery,—declares a right which did not exist at common law,—but does not limit the scope of that right by specifying the court wherein, or the method of proceeding whereby, it may be enforced, such statutory recovery may be had in any court of general jurisdiction. This proposition is included in the following from the section in Sutherland above mentioned: "If a new right is created by statute and it is silent as to the mode of its enforcement, or as to the form of redress in case of invasion, then the proprietor of that right may resort to the common law or the existing general statutory proceeding for remedial process."

Where a cause of action arises at common law or in equity, the remedy in the Federal courts cannot be taken away or abridged by state legislation. And where, as said, a right is created by a state statute, without limitation as to the tribunal in which it can be asserted, such right, the suit being otherwise within the judicial power of the United States, will be enforced in a Federal court. But I know of no instance, other than the case at bar, in which a Federal court has insisted upon extending a right created by a state statute beyond the lines of such right as marked in the grant. In this respect, the decision before us for review, so far as I can find, is without precedent. The cases cited in the prevailing opinion do not, nor does any one of them, touch the question. In *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445, 23 L. ed. 865, a statute of Wisconsin declared that a corporation of another state should not do business in Wisconsin without agreeing with the state that it would not remove to the circuit court of the United States any suit in which it might be made defendant, brought in a Wisconsin court. If the legislature of Wisconsin had declared that a foreign insurance company doing business in that state should not remove to the Federal court a suit which, under the Federal law, was removable, the sense and effect of the statute would have been the same. Such foreign corporation could not have become subject to such a regulation without coming into the state, and it could evade the same by departing from the state. The enactment as here paraphrased amounts to no more than a declaration that the foreign company shall not do business in Wisconsin unless it will agree as demanded. The common formula in the books is that a foreign corporation, coming into a state to do business, thereby agrees to all state laws touching foreign corporations. The disguise of an express agreement with the state so exacted by the state, does not change the character of the enactment. But, and this is the point to be noted, in *Home Ins. Co. v. Morse* the matter litigated

was a cause of action at common law, a suit on a contract. The right asserted by Morse and contested by the company was not brought into existence by statute and within such lines that it could not attach to a litigant in an original suit in a Federal court. In *Home Ins. Co. v. Morse* the question was whether or not the suit could be removed to the Federal court under the Federal statute. Here the question is, Had the libellant a right of recovery? In *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571, the suit was brought in a court of Wisconsin to enforce the right given by the very statute here in question. Said suit was afterwards removed to the circuit court of the United States, and that court ruled that the plaintiff was entitled to recover. This decision was affirmed by the Supreme Court of the United States. The question whether or not, in an original suit, not brought in a Wisconsin court, but in a circuit court of the United States, a recovery by plaintiff would be authorized by the statute here in question, was not before the Supreme Court of the United States, and apparently not even thought of by the learned writer of the opinion in that case.

The decision in the case at bar goes on the theory, either that the proviso here under discussion invades the judicial power of the United States as declared in the Constitution, or that said proviso conflicts with the Federal statutes specifying the jurisdiction to be exercised by the courts of the United States, and is, hence, void. If there were in this appellee a right of recovery at common law, and a state statute restricted the remedy for enforcing that right to the courts of the state, such statute would be void as in conflict with the law of the United States. If there were here a state statute which created a new right, without limitation as to the tribunal for enforcing it, such new right could be enforced as well in a Federal court as in any other. But here no restriction has been put upon the remedy for the enforcement of any right existing at common law, nor has the state created a new right which is general as respects the remedy. The same power which created the right in question, in so doing fixed the limits to which such right might extend or within which it could arise. By a rule of statutory construction, never disregarded till now, and against which it is impossible to frame a coherent objection, the right of recovery here does not attach to this appellee.

The majority opinion contains the following: "We enforce a right created by the 30 L. R. A.

state, because the right given touches a subject within the constitutional jurisdiction of the Federal court."

But here the right is not given. If the assumed right were given, if it could be found within the bounds of the statute, if the court could create the right, such right would indeed touch or concern a subject-matter within the cognizance of the district court of the United States. I quote again from the opinion: "We think it not competent for a state to so restrict a general right that one entitled to invoke the jurisdiction of a Federal court in the prosecution or defense of a suit may not assert the right so granted in a Federal court, or that the state may in any way restrict the exercise of the jurisdiction of a Federal court to administer the law of the state between persons who come within its jurisdiction."

But here the right of recovery is not within the statute. Do we "administer the law of the state" by declaring such law void? If the statute had given the recovery in some one of the state courts, and the suit should be brought in another of the state courts, the law of the state would be that plaintiff could not recover; and it is the law of Wisconsin in the case before us that appellee cannot recover. Referring, further, to the sentence last quoted, there is here no "right so granted," nor has the state restricted "a general right." If the meaning be that the state of Wisconsin had no power to grant the right, within bounds as specified in the statute, I cannot assent to the proposition. A state may grant a restricted right. The selfsame power which creates a right may specify, and thereby fix, the bounds of the grant. The authority, for illustration, which created what is known as a patent right, to wit, the Congress of the United States, declared in effect that the right so created is enforceable only in a Federal court. In other words, the grant of a patent monopoly is, as respects the remedy for its enforcement, a restricted grant. The right to recover would not belong to a patentee in a suit for infringement prosecuted in a state court. This is true, regardless of the question whether or not, in a patent case, a state court would have jurisdiction; and such, in substance, was the ruling of the court of appeals of New York in *Dudley v. Mayhew*, above cited.

On my understanding of the matter, the legislature of Wisconsin has not given to this appellee a right of recovery in this case. Therefore, I do not concur in the judgment of affirmance.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Samuel I. MYERS, *Piff. in Err.*,

v.

Frank HOLBORN.

(.....N. J.)

***1. M., a practicing physician, promised H. to attend his wife at her confinement.** Instead of doing so, however, he sent P., another physician, in his stead, who, by his unskillfulness, caused the death of the child. The shock from the child's death was such as to seriously affect the health of the mother, thereby depriving H. of her society and services, and causing him to incur expenses to which he would not otherwise have been put. *Held*, that P., being engaged in a distinct and independent occupation of his own, was not the servant or agent of M. in this matter, and that therefore M. was not liable for his unskillful or negligent acts.

***2. No action will lie, in this state, for an injury caused by the death of a human being,** except that which is given by the act of March 3, 1848 (Rev. p. 294), to the personal representatives of the decedent, for the purpose of recovering, for the benefit of the widow and next of kin, the pecuniary loss which they have suffered by such death.

***3. The case of *Grosso v. Delaware, L. & W. R. Co.* 50 N. J. L. 317, approved.**

(November 10, 1895.)

ERROR to the Circuit Court for Hudson County to review a judgment in favor of plaintiff in an action brought to recover damages for breach by defendant of his contract to attend plaintiff's wife during her sickness by reason of which plaintiff alleged that he was deprived of her society and put to great expense. *Reversed.*

The facts are stated in the opinion.

Messrs. Collins & Corbin, for plaintiff in error:

Where one desiring to employ another to perform a service in his stead is obliged by law to employ a licensed person (as, of course, is the case with physicians in New Jersey), he is not responsible for the negligent, or defective, or improper execution of the work. The relation of master and servant does not exist.

Wood, Mast. & S. p. 600.

The fact that Dr. Poole was accepted on defendant's implied or express recommendation would not create a liability.

Hitchcock v. Burgett, 38 Mich. 501.

Mr. William H. Speer, Jr., for defendant in error.

Gummere, J., delivered the opinion of the court:

This writ of error brings up for review a judgment of the Hudson circuit court rendered in favor of Holborn, the plaintiff below, and against Myers, the defendant below.

*Headnotes by GUMMERE, J.

NOTE.—The above case, which counsel writes was considered to be *res integra* in the state in which it arose, is apparently without precedent in any other forum.

As to authority of agent to employ for employee 30 L. R. A.

The principal facts which were proved at the trial of the cause are as follows: The defendant, a practicing physician of the city of Bayonne, promised the plaintiff, who resided in that city, to attend his wife professionally during her confinement. A short time before that event took place he left the city for a three-days' vacation; having first visited the wife of the plaintiff, and made an examination of her condition, from which he concluded, as he informed her, that his services would not be needed for a few days. Before his return, however, she was confined. The plaintiff, when his wife's travail came on, telephoned to the house of the defendant for him to come at once; and in response to this message one Dr. P. arrived, stating that Dr. Myers was out of town, and that he represented him, and proceeded to take charge of the case, and to deliver the plaintiff's wife of her child, without any objection being made. It was not suggested that his treatment of the wife was unskillful, but evidence was offered to show that after the birth of the child he improperly severed the umbilical cord so close to its body that it was impossible afterwards to tie it, and that the child consequently died, in a short time, of umbilical hemorrhage. The shock caused by her child's death under these circumstances, it was testified, so affected the mother as to seriously injure her health, and render her an invalid for many months, thereby depriving the plaintiff of her services and companionship, and making it necessary for him to incur expenses which he would not otherwise have been called upon to meet; and this suit was brought to recover compensation for such loss of services and companionship, and for such expenses, on the theory that Dr. P. was the agent and representative in this matter of the defendant, and that therefore he was legally liable for these results of Dr. P.'s unskillfulness. The trial judge adopted this theory, advanced on behalf of the plaintiff, in his charge to the jury, and so instructed them. In this, it seems to me, there was an error. Dr. P. and the defendant were each of them practicing physicians of this state, having no business connection with one another, except that Dr. P. was attending the patients of the latter while he was temporarily absent. Even if it be admitted, therefore, that Dr. P. was employed by the defendant to attend upon the wife of the plaintiff, that fact did not render the defendant liable for his neglect or want of skill in the performance of this service, for an examination of the authorities will show that a party employing a person who follows a distinct and independent occupation of his own is not responsible for the negligent or improper acts of the other. *Laughter v. Painter*, 5 Barn. & C. 547; *Milligan v. Wedge*, 4 Perry & D. 714; *De Forrest*

or other third person, see *note* to *Hanscom v. Minneapolis Street R. Co.* (Minn.) 20 L. R. A. 685.

As to liability for malpractice when employed by third person or serving gratuitously, see *note* to *Dubois v. Decker* (N. Y.) 14 L. R. A. 429.

v. *Wright*, 2 Mich. 363; Wood, Mast. & S. § 811.

But even if I had reached the conclusion that Dr. P. was the agent of the defendant, in his attendance upon the wife of the plaintiff, I should nevertheless consider that there could be no recovery in this case for the losses sustained by the plaintiff. He does not complain that his wife was unskillfully treated by Dr. P., and that he thereby lost her services and companionship, and incurred expenses on that account to which he would not otherwise have been put. His claim is that such unskillfulness caused the death of his child, and that the shock of its death caused the sickness of the mother, with the consequent deprivation of her services and society, and the increase of his expenses. The gravamen of the action, it will be perceived, is the death of the child; and the injury sustained by the father, for which dam-

ages are sought to be recovered, is the result of that death. Since the decision of the supreme court in the case of *Grosso v. Delaware, L. & W. R. Co.* 50 N. J. L. 317, it has been considered as settled law in this state that no action will lie for an injury caused by the death of a human being, with the exception of that provided by the act of March 8, 1848 (Rev. p. 294), which permits a recovery by the personal representatives of the decedent, for the benefit of the widow and next of kin, of the pecuniary loss resulting to them from such death. The decision in that case was rendered after a careful and exhaustive consideration, and the views expressed by Magie, J., in delivering the opinion of the court must be accepted as a correct exposition of the law on that subject.

The judgment of the Circuit Court should be reversed.

MINNESOTA SUPREME COURT.

Charles H. ERMENTROUT *et al.*, *Appts.*,
v.

GIRARD FIRE & MARINE INSURANCE
COMPANY of Philadelphia, *Reopt.*

(.....Minn.....)

*1. **Action on a policy insuring plaintiffs on their building "against all direct loss or damage by fire."** The policy further provided that if the building fell, "except as a result of fire," the insurance on the building should immediately cease. There was evidence tending to prove that a building adjacent to the one insured (the wall between them being a partition wall) caught fire and was partially consumed and as the direct result of such fire fell, carrying down with it the partition wall and a part of the insured building. *Held*, that, if such were the facts, the fall of the insured building was "the result of fire" and "a direct loss or damage by fire," although no part of it ignited or was consumed by fire.

2. **The word "direct,"** in the policy, construed as meaning "immediate" or "proximate" as distinguished from "remote."

3. **The policy provided that "if fire occur the insured shall give immediate notice of any loss thereby in writing to the company."** *Held*, that a failure to give such notice for nearly sixty days after the fire constituted, as a matter of law, a breach of this provision.

4. **The local agents of the insurance company,** who issued the policy, had authority to accept applications for insurance, to fix the rate of insurance, fill up, countersign, and issue the policies "which they received from the company signed by its general officers," and collect the premiums.

*Headnotes by MITCHELL, J.

5. **There was no evidence that they were clothed with any apparent authority other or greater than their actual authority.** *Held*, that it was not within the scope of their authority to accept or waive notice of loss; following former decisions.

6. **After the policy was dead and all liability on it had ceased by reason of plaintiffs' failure to give notice of loss, they transmitted proofs of loss to the general managers of the company, who retained the proofs but notified the plaintiffs that they "denied any liability under the policy on the part of the company."** *Held*, no waiver of plaintiffs' failure to give notice of loss.

(December 24, 1895.)

A PPEAL by plaintiffs from an order of the District Court for Hennepin County denying their motion for a new trial after verdict in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. Merrick & Merrick, for appellants:

If the insurer acquired the knowledge of the fire immediately after its occurrence, courts will not be very particular as to the manner in which the knowledge was acquired.

Roumage v. Mechanics' F. Ins. Co. 18 N. J. L. 110.

If Seeley & Co. were the general agents of respondent, and appellants had no knowledge of any limitation upon their powers, then notice to Seeley & Co. was notice to respondent.

Rivara v. Queen's Ins. Co. 62 Miss. 720; *Bernero v. South British & Nt. Ins. Co.* 65 Cal. 386; *Kendall v. Holland Purchase Ins. Co.* 2 Thomp. & C. 875, affirmed in 58 N. Y. 682;

NOTE.—The above case is said by counsel to be the only one that covers the precise point in regard to notice although there are many cases in respect to proofs of loss.

30 L. R. A.

For forfeiture by failure to furnish proofs of loss within a specified time, see note to *Steele v. German Ins. Co.* (Mich.) 18 L. R. A. 85.

Fisher v. Crescent Ins. Co. 38 Fed. Rep. 549; *Union Mut. L. Ins. Co. v. Wilkinson*, 80 U. S. 13 Wall. 232, 20 L. ed. 617.

An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal.

Bebes v. Hartford County Mut. F. Ins. Co. 25 Conn. 57, 65 Am. Dec. 558; *Lycoming County Mut. Ins. Co. v. Schollenberger*, 44 Pa. 259; *Beal v. Park F. Ins. Co.* 16 Wis. 242, 82 Am. Dec. 719; *Davenport v. Peoria Marine & F. Ins. Co.* 17 Iowa, 276.

When the respondent received, accepted, and retained the proof of loss and acknowledged the same, denying all liability on said policy of insurance, it was a distinct waiver of any irregularity in the giving of the notice of the occurrence of the fire.

Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co. 84 Conn. 569; *Pennsylvania F. Ins. Co. v. Dougherty*, 103 Pa. 568; *Cedar Rapids Ins. Co. v. Shimp*, 16 Ill. App. 251; *Zielke v. London Assur. Corp.* 64 Wis. 442; *Boyd v. Cedar Rapids Ins. Co.* 70 Iowa, 325; *McPike v. Western Assur. Co.* 61 Miss. 87; *Kansas Protective Union v. Whitt*, 86 Kan. 760, 59 Am. Rep. 607; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 866; *Enterprise Ins. Co. v. Parrott*, 85 Ohio St. 41, 85 Am. Dec. 889.

The respondent, by its acts and conduct in this matter, waived the right to make the defense that the insured failed to give the notice of the occurrence of the fire as required by the terms of the policy.

Clark v. New England Mut. F. Ins. Co. 6 Cush. 342, 53 Am. Dec. 44; *German Ins. Co. v. Gibson*, 58 Ark. 494; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 224, 24 L. ed. 689; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 573, 24 L. ed. 841; *McMasters v. Westchester County Mut. Ins. Co.* 25 Wend. 879; *Lampkin v. Ontario F. Ins. Co.* 12 U. C. Q. B. 578; *Westchester F. Ins. Co. v. Earle*, 38 Mich. 148; *Schenck v. Mercer County Mut. F. Ins. Co.* 24 N. J. L. 447; *Graves v. Washington Marine Ins. Co.* 13 Allen, 891; *O'Neil v. Buffalo F. Ins. Co.* 8 N. Y. 123; *Taylor v. Merchants' F. Ins. Co.* 50 U. S. 9 How. 390, 13 L. ed. 187; *Francis v. Ocean Ins. Co.* 6 Cow. 404; *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. 159; *Allegre v. Maryland Ins. Co.* 6 Harr. & J. 408, 14 Am. Dec. 289; *Lyon v. Travelers' Ins. Co.* 55 Mich. 143, 54 Am. Rep. 354; *Phoenix Mut. L. Ins. Co. v. Dozier*, 106 U. S. 90, 27 L. ed. 65; *State Ins. Co. v. Maackens*, 38 N. J. L. 564; *Willis v. Germania & Hanseatic F. Ins. Cos.* 79 N. C. 285; *Loeb v. American Cent. Ins. Co.* 99 Mo. 50; *West Rockingham Mut. F. Ins. Co. v. Sheets*, 26 Gratt. 854; *Insurance Co. of N. A. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Marthinson v. North British & Mercantile Ins. Co.* 64 Mich. 873; *Cobbs v. Fire Assn. of Philadelphia*, 68 Mich. 463; *North Berwick Ins. Co. v. New England F. & M. Ins. Co.* 52 Me. 336.

Courts do not favor forfeitures.

Lyon v. Travelers' Ins. Co. 55 Mich. 141, 54 Am. Rep. 354; *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 242, 24 L. ed. 692.
30 L. R. A.

Messrs. Kueffner, Fauntleroy, & Rice, and *Freeman P. Lane*, for respondent:

The power of Seeley & Co. to act for the company was limited to making the contract of insurance, and that did not relate to the loss and adjustment.

Bowlin v. Hekla F. Ins. Co. 36 Minn. 483.

The giving of this "immediate notice in writing" to the company is a condition precedent to any recovery.

Perry v. Phoenix Assur. Co. 8 Fed. Rep. 645; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Edgerly v. Farmers' Ins. Co.* 48 Iowa, 590; *Shapiro v. St. Paul F. & M. Ins. Co.* (Minn.) 68 N. W. Rep. 614; *Shapiro v. Western Home Ins. Co.* 51 Minn. 240; *Bowlin v. Hekla F. Ins. Co.* *supra*.

Its nonperformance was a bar to the plaintiff's recovery.

Quinlan v. Providence, Washington Ins. Co. 133 N. Y. 856, aff'g 89 N. Y. S. R. 820; *Sherwood v. Agricultural Ins. Co.* 10 Hun, 593; *Union Ins. Co. v. McGookey*, 38 Ohio St. 555; 2 Wood, Fire Ins. 2d ed. p. 989.

A failure to give notice within the time required stands upon a different ground from a failure to give the notice in due form.

3 May, Ins. 8d ed. p. 1069, § 464; *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560; *Rockford Ins. Co. v. Nelson*, 65 Ill. 415; *Massachusetts Mut. L. Ins. Co. v. Kellogg*, 82 Ill. 614.

A contract of insurance is a conditional contract, and all conditions precedent must be set up in the complaint.

Coolidge v. Continental Co. 67 Vt. 14.

The notice must be in writing.

Patrick v. Farmers' Ins. Co. 48 N. H. 621, 80 Am. Dec. 197; *Brown v. London Assur. Corp.* 40 Hun, 101; *Connell v. Milwaukee Mut. F. Ins. Co.* 18 Wis. 388; *Green Bros. v. Northwestern Live Stock Ins. Co.* 87 Iowa, 359; *Heywood v. Maine Mut. Acc. Assn.* 85 Me. 289; *Sherwood v. Agricultural Ins. Co.* 10 Hun, 593; *Union Ins. Co. v. McGookey*, 38 Ohio St. 555; *Trask v. State F. & M. Ins. Co.* 29 Pa. 198, 73 Am. Dec. 632; *Edwards v. Lycoming County Mut. Ins. Co.* 75 Pa. 380.

"A local agent" has no authority to receive notice of loss, and is not bound to communicate it to the company.

Edwards v. Lycoming County Mut. Ins. Co. *supra*; *Connell v. Milwaukee Mut. F. Ins. Co.* 18 Wis. 388.

A waiver must be made during the currency of time in which the policy is alive.

Everett v. Niagara Ins. Co. 142 Pa. 323; *Beatty v. Lycoming County Mut. Ins. Co.* 66 Pa. 9, 5 Am. Rep. 318; *Guernsey v. American Ins. Co.* 17 Minn. 112; *O'Reilly v. Guardian Mut. L. Ins. Co.* 60 N. Y. 169, 19 Am. Rep. 151; *Brink v. Hanover F. Ins. Co.* 70 N. Y. 594; *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 162; *Farmers' Ins. Co. v. Frick*, 29 Ohio St. 466; *Devens v. Mechanics & T. Ins. Co.* 83 N. Y. 168.

Where proofs of loss are received out of time, silence on the part of company, and their retention, are no waiver.

Everett v. Niagara Ins. Co. 142 Pa. 323; *Ripley v. Aetna Ins. Co.* 80 N. Y. 136, 86 Am. Dec. 362; *Beatty v. Lycoming County Mut. Ins. Co.* 66 Pa. 9, 5 Am. Rep. 318; *Brink v.*

Hanover F. Ins. Co. 70 N. Y. 504; *Connell v. Milwaukee Mut. F. Ins. Co.* 18 Wis. 388; *Bennett v. Lycoming County Mut. Ins. Co.* 67 N. Y. 274; *Patrick v. Farmers' Ins. Co.* 43 N. H. 821, 80 Am. Dec. 197; *Diehl v. Adams County Mut. Ins. Co.* 58 Pa. 452, 98 Am. Dec. 802; *Blossom v. Lycoming F. Ins. Co.* 64 N. Y. 164; *Armstrong v. Agricultural Ins. Co.* 130 N. Y. 560.

Nor is the company called upon to do anything to make a forfeiture complete.

Shapiro v. St. Paul F. & M. Ins. Co. (Minn.) 63 N. W. Rep. 614; *Shapiro v. Western Home Ins. Co.* 51 Minn. 239; *Johnson v. American Ins. Co.* 41 Minn. 396.

All waivers must be made before forfeiture.

Vankirk v. Citizens' Ins. Co. 79 Wis. 627; *Germania F. Ins. Co. v. Deckard*, 3 Ind. App. 361.

Direct loss or damage by fire means loss or damage occurring directly from fire as the destroying agency, in contradistinction to a remoteness of a fire as such agency.

California Ins. Co. v. Union Compress Co. 133 U. S. 415, 33 L. ed. 737.

Mitchell, J., delivered the opinion of the court:

This action was brought on a policy issued by the defendant to the plaintiff Ermentrout insuring him to the amount of \$1,000 for one year, "against all direct loss or damage by fire," on his brick, iron roof, grain warehouse building and bins therein, including foundations and all permanent fixtures, etc."

The only other provisions of the policy involved on this appeal are as follows:

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company."

"The sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy."

When the plaintiff rested the defendant moved to dismiss the action for the reason that plaintiff had failed to establish his cause of action in that, (1) it did not appear that the loss or damage was the direct result of fire; (2) that it did appear that the plaintiffs had not given immediate notice of the loss in writing to the company.

The judge granted the motion, although placing his decision exclusively on the last ground. Of course, if the action should have been dismissed on either ground the ruling of the court must be affirmed.

1. The insured building was adjacent to another used as a feed mill, the wall between them being a partition wall. There is no claim that any part of the insured building was actually ignited or consumed by fire. The fire was confined to the adjacent feed mill, which fell, carrying down with it the partition wall and a part of the elevator insured, and the question to which both the examina-

tion and cross-examination of plaintiff's witnesses seem to have been directed was whether the fall caused the fire or the fire caused the fall. While the evidence offered by plaintiffs was not of the most convincing or satisfactory character, yet we think it was such that the jury might have found either way on the question. We think that as the evidence stood when plaintiffs rested it would have justified the jury in finding that the feed mill had caught fire before it fell and that the fall was caused by the partial consumption of the feed mill and the weakening of the partition wall by the fire. If such were the facts, then we think the falling of the insured building was a "direct loss or damage by fire" within the meaning of the policy.

The provision that if the building fell, "except as the result of fire," the insurance thereon shall cease, was introduced into the policy by the insurer for its own benefit, and under a familiar rule must be construed, in case of ambiguity, most strongly against it. We think it has reference only to cases where the building might fall from some other cause than fire, as for example defective construction, the withdrawal of necessary support, storm, flood, or other like cause, and fire thereafter ensued. But it was not intended to exclude cases where fire was the immediate or proximate cause of the fall.

To render the fire the immediate or proximate cause of the loss or damage it is not necessary that any part of the insured property actually ignited or was consumed by fire. This is so well settled that the citation of authorities in support of the proposition is unnecessary. The question is, Was fire the efficient and proximate cause of the loss or damage? Thus, in one case where a house protected by a policy of insurance against damage by fire was injured by the falling of part of the wall of an adjacent house in consequence of fire in the latter house it was held that the fire was the proximate cause of the loss, and that the insurers were liable, although the house insured had never been on fire. *Johnston v. West of Scotland Ins. Co.* 7 Cases Ct. of Sess. cases (Scotch) 52.

The word "direct" in the policy means merely "immediate" or "proximate" as distinguished from "remote."

Counsel for defendant cites in support of a contrary view some language used by way of illustration in *California Ins. Co. v. Union Compress Co.* 133 U. S. 387-415, 33 L. ed. 730-737, in which the court names "destruction through the falling of burning walls" as an instance of remoteness of agency. The question was not before the court, for in that case the insured property was physically burned by the direct action of fire. If the court meant what counsel claims we cannot avoid the conclusion that the illustration was, to say the least of it, an unfortunate one.

2. Seeley & Co., who issued the policy, were the local agents of the defendant with authority "to receive proposals for insurance within the county of Hennepin, and to receive premiums thereon, and to give receipts and issue policies therefor."

It also appeared that these agents had authority to accept applications for insurance, fix the premium or rate of insurance, and fill up, countersign, and issue policies thereon which they received from the company signed by its president and secretary. So far as appeared from the evidence, this was the extent of their actual authority, and there was no evidence tending to show that their apparent authority was other or greater than their actual authority.

The only evidence of the giving of notice of loss, except the sending of proofs of loss to the general managers of the defendant at Chicago on or after October 9 (received by them on or about October 28), was to the effect that within a day or two after the loss one of the plaintiffs verbally notified Seeley & Co. that "the fire had destroyed the building." Although probably not material, it does not appear that he requested Seeley & Co. to give or forward the notice to the company or that they promised to do so or made any reply to the plaintiff.

As the loss occurred on the 12th of August it is clear, under the authorities, that as a matter of law the time for giving notice of loss had expired before the proofs of loss were sent to Chicago.

It is also settled law that where the policy requires notice of loss to be given to the insurer within a specified time such notice is a condition precedent to the right of action on the policy.

Hence for their right of recovery on the policy the plaintiffs rely on the verbal notice given to Seeley & Co. If Seeley & Co. were the proper parties to whom to give this notice,—in other words, if it was within the scope of their authority to receive notice of loss,—we would not feel any doubt but that if, when they received verbal notice, they made no objection to its form, they would be deemed to have waived the omission to give it in writing. But it is self evident that if they had no authority to receive such notice then they could waive nothing in the matter.

Upon this state of facts it was not within the scope of the authority of Seeley & Co. to receive or waive notice of loss, and hence notice to them was not notice to the company. Even if there could be any doubt of the correctness of this proposition as a new question it has been too long and too well settled in this state to be now considered open. *Boutin v. Hekla F. Ins. Co.* 36 Minn. 453; *Shapiro v. Western Home Ins. Co.* 51 Minn. 239; *Shapiro v. St. Paul F. & M. Ins. Co.* (Minn.) 63 N. W. Rep. 614.

But we think the rule is correct upon both principle and authority. It is in accordance with the general principles of the law of agency. It is elementary that a principal is only liable for acts done by his agent within the scope of the authority, actual or apparent, with which the principal has clothed him; that it rests entirely with the principal to determine the extent of the authority which he will give to his agent; also that every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority. In insurance cases courts frequently inaccurately 80 L. R. A.

classify agents as "local" and "general." But the extent of the territory which is to be the field of his agency is no test of the extent of an agent's authority within that field.

His field of operations may include the whole United States and yet his powers be special and limited. On the other hand, his field of operations may be confined to a single county or city, and yet his authority within that field be unlimited. In the present case there is no question of apparent; as distinguished from actual authority. The question is simply one of actual authority, expressed or implied. Authority to act in the matter of a loss under the policy after it has occurred is not expressly given. All the authority expressed relates to the making of the contract of insurance. It is a fundamental principle in the law of agency that a delegation of power, unless its extent be otherwise expressly limited, carries with it, as a necessary incident, the power to do all those things which are reasonably necessary to carry into effect the main power expressly conferred. But it is equally fundamental that the power implied shall not be greater than that fairly and legitimately warranted by the facts,—in other words, an implied agency is not to be extended by construction beyond the obvious purpose for which the agency was created. We do not think that mere authority to make a contract of insurance carries with it implied authority to act in the matter of a loss under the policy after it has occurred. If the implied authority extends to accepting notice of the loss it would logically follow that it also extends to proof of loss and even to the adjustment of the loss—a length to which no court has ever gone. The rule which we have adopted is also in accordance with the general current of the authorities. *Lohnes v. Insurance Co. of N. A.* 121 Mass. 439; *Smith v. Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216; *Bush v. Westchester F. Ins. Co.* 63 N. Y. 581.

Occasional statements in some of the textbooks seem to announce a different rule; but they are not borne out by the authorities cited in their support. For example, in Wood on Fire Insurance, vol. 2, section 419, it is stated that "where an agent is entrusted with policies signed in blank, and is authorized to issue them upon the application of parties seeking insurance, he is thereby clothed with apparent authority to bind the party in reference to any condition of the contract, whether precedent or subsequent, and may waive notice or proofs of loss, and may bind the company by his admissions in respect thereto."

Upon an examination of the large number of authorities cited in support of the text, it will be found that not one of them tends to support the author's proposition as to proofs of loss, unless it be the *vis prius* decision in *Ido v. Phenix Ins. Co.* 2 Biss. 333, in which the question is not discussed, no authorities cited, and the statement of facts is so meager that it cannot be ascertained what the evidence was as to the actual or apparent authority of the agent.

Most, if not all, of the other cases may be classified as follows: First, cases holding

whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceedings *in personam*, as was done with a claim for half-pilotage dues under the law of New York, in the case of *Ex parte McNiel*, 80 U. S. 18 Wall. 236, 20 L. ed. 624, but unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the court of admiralty."

We think the clear result of the authorities to be that the sovereignty of the state of Wisconsin extends to the middle of the lake, and that its laws, so far as they do not conflict with the laws of the United States passed in the regulation of commerce and of navigation, are operative within its prescribed boundary. Such state legislation upon subjects of a maritime nature has been generally recognized in the admiralty (*The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 845; *The Lottawanna*, 88 U. S. 21 Wall. 558, 23 L. ed. 654; *The America*, 1 Low. Dec. 176, Fed. Cas. No. 289; *The Marion*, 1 Story, O. C. 68, Fed. Cas. No. 9,087; *The California*, 1 Sawy. 468, Fed. Cas. No. 2,812; *The Glenearne*, 7 Fed. Rep. 604; *The B. F. Woolsey*, Id. 108; *The Julia L. Sherwood*, 14 Fed. Rep. 590; *The Two Marys*, 10 Fed. Rep. 919, 16 Fed. Rep. 697; *The Shady Side*, 23 Fed. Rep. 731; *Woodruff v. One Covered Scow*, 30 Fed. Rep. 269), and we perceive no reason to deny operation of the law invoked in this case. It is not, in our judgment, like the case of the law of a state intended to be operative upon the high seas, which belong to no one nation and to no one people, but to all nations and to all peoples. In the absence of legislation by Congress denying a right of recovery for death occurring through negligent injury upon the waters of Lake Michigan, we perceive no reason for the refusal of an admiralty court to give effect to the beneficent provisions of this law within the limits of the state.

A question has arisen, not suggested by the appellant upon the argument, whether the proviso of the act of the legislature of the state of Wisconsin, that the action for damages occasioned by negligent injury causing death should be "brought for a death caused in this state and in some courts established by the Constitution and laws of the same," is a condition or limitation upon the right granted, so that the right can only be asserted and enforced by and through the courts of the state, and that suit therefore cannot be maintained in a Federal court. We are of opinion that the question must be resolved in the negative. The legislature of a state cannot confer jurisdiction of any sort upon a Federal court. Such tribunal derives its jurisdiction from the Constitution of the United States, not by grant from the legislature of a state. We enforce a right created by the state because the right given touches a subject within the constitutional jurisdiction of the Federal court. We think it not competent for a state to so restrict a general right that one entitled to invoke the jurisdiction of a Federal court in the prosecution

or defense of a suit may not assert the right so granted in a Federal court, or that the state may in any way restrict the exercise of the jurisdiction of a Federal court to administer the law of the state between persons who come within its jurisdiction. The proviso of the act in question, if it was designed to and in so far as it restricts the enforcement of the right to a state court, is, in our judgment, inoperative and void. The judicial power of the United States, lodged in the Federal courts, extends, by the very terms of the Constitution, to all classes of admiralty and maritime jurisdiction. The subject-matter of the right here asserted was within such jurisdiction. The statute, as said by Judge Lacombe, in *The Transfer No. 4*, *supra*, created a mere addition to the variety of cases embraced within that jurisdiction, so far as it comprehends deaths caused by negligent injury upon navigable waters within the state. It does not, as well held by Judge Brown, in *The City of Norwalk*, 55 Fed. Rep. 98, create a new cause of action. "It does, indeed, create a new right and liability; but it does not create a single one of the elements that make up the fundamental cause of action,—that is, the essential grounds of the demand. All these elements exist independently of the statute, and are not in the least affected by it. It no more creates the wrong, or the damage, than it creates the negligence or the death; nor does it, as in the pilotage and double wharfage cases, add anything to the damages sustained. It authorizes no recovery except for 'the pecuniary damages' already existing. It is apparent, therefore, that, as suggested by Mr. Justice Clifford, in *American S. B. Co. v. Chace*, 83 U. S. 16 Wall. 532, 20 L. ed. 372, 'the statute does no more than take the case out of the operation of the common-law maxim that an action for death dies with the person.'"

A civil right of action, acquired under the laws of a state where the injury was inflicted, or a civil liability incurred, the action being transitory, may be enforced in the courts of any other state in which the party may be found, according to the course of procedure of the latter (*Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 604, 36 L. ed. 829, 833; *Huntington v. At-trill*, 146 U. S. 657, 670, 36 L. ed. 1123, 1128; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 198, 38 L. ed. 958, 960), and this although a like wrong or liability would not be actionable in the state where the suit is brought. It is also settled that, whenever a state statute gives a right, the same may be enforced in a Federal court whenever the citizenship of the parties or the nature of the subject will permit. In *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445, 23 L. ed. 365, the state of Wisconsin, having the right to determine the conditions upon which it would permit foreign corporations to transact business within its territory (*Doyle v. Continental Ins. Co.* 91 U. S. 535, 24 L. ed. 148), provided that any foreign fire insurance company should, as a condition of being permitted to do business within the state, appoint an attorney within the state upon whom

process of law could be served, with an agreement of the company that it would not remove the suit for trial into the Federal court. It was held that an agreement of the company executed in pursuance of the provisions of the statute was void as against public policy, and that the provision of the statute was in conflict with the Constitution of the United States. The chief justice and Mr. Justice Davis dissented, upon the ground that the state could rightly exclude foreign corporations altogether from doing business within the state, and had therefore the right to impose such restrictions and conditions upon the company, in permitting its admission to the state, as it saw fit, and that the company accepted the permission with the conditions attached, and was bound thereby. This reasoning, however, was not accepted by the court. The decision has been often approved. *Doyle v. Continental Ins. Co. supra*; *Kern v. Huidekoper*, 103 U. S. 485, 492, 26 L. ed. 354, 357; *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915; *Southern P. Co. v. Denton*, 146 U. S. 202, 207, 36 L. ed. 942, 945; *Goldley v. Morning News*, 156 U. S. 518, 523, 39 L. ed. 517, 519. Mr. Justice Blatchford, in *Barron v. Burnside*, speaking for the court, says that the supreme court "has uniformly asserted that no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States." We consider the question foreclosed, and no longer open to discussion. No condition imposed upon a right granted by a state, which prevents one from availing himself of his constitutional prerogative of appeal to the courts of the United States, can be upheld. Such condition conflicts with the Federal Constitution, and is nugatory and void. In *Chicago & N. W. R. Co. v. Whitton*, 80 U. S. 13 Wall. 270, 30 L. ed. 571, an administrator, under letters of administration granted by the state of Wisconsin, but who was in fact a resident of the state of Illinois, brought suit against the railway company, a corporation of the state of Wisconsin, in a state court, to enforce a claim under the statute under consideration for negligent injury of the company causing the death of his intestate within the state of Wisconsin. He subsequently, under the provisions of the Federal statute, removed the suit into the Federal court. It was there objected that the right to sue in such case existed by virtue of the statute only, and that the right by the statute was given only on a condition that the suit be brought in a Wisconsin court. The contention was, however, overruled by the supreme court by the unanimous opinion of the judges, and it is there said (page 286, 30 L. ed. 576): "In all cases where a general right is thus conferred, it can be enforced in any Federal court within the state having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court. The statutes of nearly every state provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is

situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation." See also *Ellis v. Davis*, 109 U. S. 485, 497, 498, 27 L. ed. 1006, 1010; *Davis v. James*, 2 Fed. Rep. 618; *Holmes v. Oregon & O. R. Co.* 5 Fed. Rep. 75; *Mineral Range R. Co. v. Detroit & L. S. Copper Co.* 25 Fed. Rep. 515.

It is sought to distinguish the *Whitton Case* from the present in this: that that suit was originally brought in a state court, and removed to a Federal court, while the case in hand was originally brought in a Federal court; and it is said that the former case was a compliance with the statute. We are unable to assent to the suggestion. The fact stated was given no significance in the *Whitton Case*. It was determined upon the broad principle stated. We cannot give to the word "brought," as used in the statute, so restricted a meaning. If the statute sought to limit the right of action to the courts of the state, it contemplated that the right given should be enforced by them and by them only. It would not be satisfied by the commencement of a suit in the state court, and its immediate removal to a Federal court. A like contention was urged in *Ex parte Schollenberger*, 96 U. S. 369, 376, 377, 24 L. ed. 853, 854, 855, and was adversely disposed of. The jurisdiction exercised upon the removal is original. Removal is only an indirect mode by which the Federal court acquires original jurisdiction. *Virginia v. Rives*, 100 U. S. 313, 387, 25 L. ed. 667, 676.

With respect to fault in the collision here, we are satisfied with the conclusion of the district judge. It was the duty of the *Holland* to keep out of the way of the *Aldrich*. Considering that she had under charge a long and unwieldy tow, it was her duty to avoid dangerous proximity to the approaching vessel. Being thus bound to keep out of the way, the burden is cast upon her to prove that the collision was due to the fault of the other vessel. This duty has not been discharged. We are satisfied, from a careful consideration of the evidence, which, as usual in such cases, is quite conflicting, that the *Holland* first designed to pass to leeward of the *Aldrich*, and, in pursuance of that intention, passed the point of intersection of the courses of the two vessels, and then changed her purpose with a view to pass to windward. Otherwise, her green light would not have been exhibited to the lookout upon the schooner over the port bow. The change of course of the schooner was after the steamer had passed her to windward, and at a time when the collision was inevitable. It is probable that the *Aldrich* then swung up into the wind, because she was struck on the port bow between the stern and the cathead. The wheelman of the *Aldrich* insists that

ment, be expedient, with a view to preventing a multiplicity of suits and costs. And also to commence and prosecute any and all such proceedings at law and in equity as may, within the judgment of our said attorneys, be necessary and proper for the purpose of collecting and realizing any and all sums of money which may become due to us, for premiums or otherwise, on account of any insurance, agreement, or policy made or entered into by us, by virtue hereof, or for the protection, establishment, or enforcement of any and all our rights in the premises, and, in their discretion, to compound, compromise, settle, withdraw, and discontinue the same. And also to do and perform for us, and in our names, every other act and thing in relation to any insurance or policy made by them by virtue hereof; hereby giving and granting unto our said attorneys full power and authority to do all and every needful and proper act and thing, and in and about the premises above specified, which we could do personally, and ratifying all that they may lawfully do, or cause to be done, by virtue hereof. Provided, always, and the power and authority hereby given and granted to our said attorneys are upon this express condition, that in no event or contingency shall the liability of any underwriter exceed the amount of the subscription by such underwriter on any one risk, and in no event or contingency shall any underwriter be liable for any part of the sum subscribed by any other underwriter, or which shall make us liable or affect us any otherwise than by a several and individual liability, or the amount insured or subscribed by us or in our names. The cost of office rent, printing, stationery, and other incidental expenses, postages, and commissions, shall be covered and paid by the said attorneys; they receiving in payment in lieu thereof 25 % commissions on the amount of premiums received, the costs and expenses of litigation excepted. And, in consideration of the premises, we do hereby covenant and agree, to and with the said attorneys, and each of them, and to and with each and every person and party to whom any policy of insurance shall be issued in our name by virtue of this power, or with whom any other agreement shall be made and entered into by our said attorneys in our name by virtue of the power and authority hereby granted, that we will, in all things, fully and faithfully carry out, execute, and fulfil the same, and do and perform everything to which our said attorneys shall by virtue hereof bind us, and pay or cause to be paid over to them, the said attorneys, on demand, any sum or sums of money that may be due by each of us, respectively, upon claims for losses incurred at any time over and above the provisions made herein; having this day, each of us, for himself only, deposited into the hands of the said attorneys, subject to the control of the finance committee, the sum of \$500 as a guaranty fund: provided, also, that if, by reason of a fire, several risks insured under policies issued pursuant to the power and authority hereby given and granted to our attorneys are involved in such fire, no one of

the underwriters shall upon such policies, collectively, become liable for more than five times the maximum amount which, under the said power of attorney, the said Whipple & Co. shall be authorized to subscribe for each of said underwriters on any one policy. In witness whereof, we have hereunto set our names, at the city of New York, this _____ day of _____, in the year one thousand eight hundred and ninety."

The license was refused and the plaintiffs then instituted this proceeding to which the auditor demurred on the following grounds:

"(1) Because the petitioners fail to allege that they have filed with the auditor a certified copy of the charter or deed of settlement of the insurance company which seeks to obtain from the auditor permission to transact business in the state of Alabama, but, on the contrary, admit and aver that the association in behalf of which the application is made is an unincorporated concern, without any charter or deed of settlement. (2) Because the petitioners fail to allege that they have filed with the auditor a statement exhibiting the following facts and items in relation to the business condition on the 31st day of December, 1894, of the concern for which they are seeking to obtain permission to transact business in the state of Alabama, viz.: they fail to allege the amount of the capital stock of the company, and how much of the same has been paid up in cash. (3) Because the petitioners fail to show that they have filed with the state auditor a statement as required by section 1200 of the Code of 1886, subscribed under oath by the president and secretary, or other chief officers or managers, of the South & North American Lloyds, but, on the contrary, disclose that the said South & North American Lloyds have no president, secretary, or other chief officers or managers. (4) Because the facts averred in the petition disclose that the concern in behalf of which the petitioners are moving is not such an insurance company as the auditor is authorized and empowered to license, under the laws of Alabama. (5) Because the facts averred in the petition fail to disclose that the South & North American Lloyds is such an insurance company as the state auditor is authorized and empowered to license, under the laws of the state of Alabama."

Further facts appear in the opinion.

Messrs. Thomas Jones and Charles P. Jones for appellants.

Mr. William C. Fitts, Attorney General, for appellee:

The true rule is contained in the majority opinion in the case of *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250. This is known as the pioneer case upon the subject of "Lloyds" and the ground therein taken by the majority of the court is thoroughly sound.

See also *Com. v. Reinohl*, 3 Pa. 287, 25 L. R. A. 247; *Noble v. Mitchell*, 100 Ala. 519, 25 L. R. A. 238, 239, and notes.

For a good demonstration of the actual practical workings of this mode of insurance, see *State v. Stone*, 118 Mo. 333, 25 L. R. A. 243.

Coleman, J., delivered the opinion of the court:

The appellants applied to the auditor for license to engage in the fire insurance business within the state of Alabama. License having been refused by the auditor, they petitioned the city court for mandamus to compel the issuance of the license. The court sustained a demurrer to the petition, and from this ruling appellants appeal to this court. The petition and grounds of demurrer require a consideration of the character in which appellants propose to do an insurance business, as well as the meaning and extent of the statutes of this state regulating the insurance business within its limits. According to the showing made by the petition, the business was to be carried on in the manner of the ancient Lloyds. The respective liabilities and limitations of liability of the individual members to each other, and the rights, interests, and privileges defined and reserved to each other, and the limitation upon their respective liability fixed and declared in the policies of insurance to be issued in accordance with the instrument of organization as shown by Exhibit A to the petition,—which exhibit is in the statement of facts by the reporter,—are such that the business of insurance thus carried on may be included within the scope of the term "company," "association," or "individuals." Each underwriter is individually liable for a fixed amount, but not for the whole, or for any part of another underwriter's liability, yet all act together to effect the contract of insurance. In the former respect it is an individual undertaking, which becomes binding by the separate action of all. In the latter respect the policy is also the contract of a "company" or "association." It is not a partnership, in a legal sense, and in no sense can it be considered a corporation. It is an association or company of individuals organized to do an insurance business upon certain stipulations and conditions, evidenced by their written agreement. It is generally conceded—and in this conclusion we concur—that each state has ample power to regulate the business of insurance within its boundary. Whether a state has the authority, under the power to regulate, to exclude all individuals, companies, partnerships, organizations, and associations of persons from engaging in the business of fire insurance, and permit or empower corporations to monopolize the business, we need not consider. We have no statute which requires the consideration of this question. It seems there is a statute of this kind in Pennsylvania. *Com. v. Vrooman*, 164 Pa. 306, 25 L. R. A. 250.

The petitioners are nonresidents of Alabama, and are citizens of the state of New York; and the question we feel bound to determine, under the constitutional provisions of the United States and of this state, is whether, if the petitioners were citizens of the state of Alabama, seeking to engage in the fire insurance business upon the same terms and conditions as petitioners, there is any statute or principle of public policy to prohibit them, and whether there are any statutory regulations for engaging in the busi-

ness applicable, and, if so, what do they require? Code 1886, pt. 1, chap. 5, title 12, art. 2, includes all the statutory provisions regulating fire insurance material in this connection. The caption to this article is as follows: "Fire, Inland, and Marine Insurance Companies Not Incorporated by This State." Trace these provisions back through the Codes of 1876 and 1867, and to the legislative enactments from which they were respectively codified, and it is evident they were intended to apply to and govern foreign corporations engaged in fire insurance in this state. The sections of the Code of 1886 originally codified from the act of February 24, 1860 (see Acts 1859-60, p. 118), and the act of March 8, 1875 (Acts 1874-75, p. 142), fairly interpreted, require this construction. Section 1200 of the Code of 1886, with its subdivisions, was taken from the Act of 8th of March, 1875, *supra*, and was enacted originally purely to regulate the business of foreign corporations doing business in this state. This was our conclusion in the case of *Noble v. Mitchell*, 100 Ala. 519, 25 L. R. A. 238, and *notes*. Under this view of the law, and which we think is undoubtedly correct, the sections of the Code of 1886 invoked by appellee can have no application to the petitioner. No such terms or conditions were imposed upon domestic corporations chartered by the legislature during the long period that corporations were chartered by the legislature.

On the 28th of February, 1867, the legislature enacted two separate acts in relation to fire insurance. The first is on page 85, and the last on page 105, of the Acts of 1866-67. These statutes have not been codified. By the first of these acts (page 85), it is provided "that all insurance companies doing business as such in the state of Alabama, whether chartered by the state, or admitted from other states, shall have an actual capital, fully paid up in cash, of not less than \$1,000, no portion of which shall be represented by stock notes, or loans on the stock of said company or companies as collateral." It is further provided, in section 2, "that all insurance companies doing business in the state, both foreign and domestic, shall be required to make annual sworn statements to the auditor of their assets, condition, business of the previous year, in premiums, losses, and expenses, in the state, and as a whole." It will be observed that this act applies wholly and solely to insurance companies, domestic and foreign; and, construing the two sections together, we are of opinion that the act applies only to chartered companies. This conclusion would seem to follow from the caption and the body of the act. It says all insurance companies, "whether chartered by the state or admitted from other states." This construction places the act beyond the objection that it is discriminating legislation. If we were to hold that it applied to companies not incorporated, a burden would be placed upon companies not imposed upon an individual engaged in the same business. We do not doubt that an individual, in this state, may engage in and carry on a fire insurance business. There is nothing in such a contract that is unlawful, or against pub-

lic policy. This proposition requires neither argument nor authority to support it. Where, then, is the constitutional authority for the legislature to impose a burden upon two or more persons who may prefer to associate together as a partnership or company to engage in the insurance business, and exempt the individual from such burden? We are constrained to the conclusion that the act cited includes only chartered companies, and has no application to the case made by the petition.

The other act, of February 28, 1887 (page 105), reads as follows:

"An Act to Require All Insurance Companies Not Organized Under the Laws of This State, to Pay a Uniform License Tax of One Hundred Dollars Per Annum into the State Treasury for the Privilege of Doing Business in This State.

"Sec. 1. Be it enacted by the general assembly of Alabama, that from and after the passage of this act, each and every insurance company not organized under the laws of this state, whether doing business as a fire, marine, or inland insurance company, and every life insurance company doing business upon any plan, whether mutual, co-operative assessment, or otherwise, and every accident or guarantee company, and every other style or class of insurance company, engaged in any business of insurance of any kind whatsoever, shall, before doing any business of insurance in this state, pay into the state treasury the sum of \$100 per annum for the privilege of carrying on such business in the state of Alabama.

"Sec. 2. Be it further enacted, that nothing in this act contained shall be construed to apply to any secret or benevolent society, such as Masons, Odd Fellows, Knights of Pythias, Knights of Honor, Iron Hall, or orders of like kind.

"Sec. 3. Be it further enacted, that all laws or parts of laws in conflict with the provisions of this act be and the same are hereby repealed."

It is clear that this act refers only to foreign incorporated insurance companies. Its caption shows that only foreign insurance companies are to be embraced in the act. To apply the body to domestic corporations would render the act obnoxious to section 2, article 4, of the Constitution, which declares that "each law shall contain but one subject, which shall be clearly expressed in its title," etc. To apply the act to companies organized in other states, not incorporated, would impose upon citizens of other states a tax not imposed upon citizens of this state, engaged in the same kind of business, and it exempts individuals altogether. We are of opinion that this act applies only to foreign corporations, and does not apply to petitioners.

Our conclusion is (1) that there is no statute law in this state, nor principle of public policy, which prohibits the citizens of this state, acting as individuals, associations, partnerships, or companies, from engaging in the business of fire insurance without first being incorporated, and that the citizens of each of the United States are entitled to like "privileges and immunities;" (2) that the state has the right to adopt all needful rules and regulations which are reasonable to regulate the business of fire insurance in this state; (3) that the statutory regulations which are in force in this state apply to and govern only those companies or associations which have been incorporated either by authority of this state, or some foreign state or country; (4) that petitioners are citizens of New York, not incorporated, and are entitled to engage in the fire insurance business with the same privileges and immunities as unincorporated citizens of this state; (5) that there is no law which requires that they shall be licensed to do business in this state, and that the auditor has no authority to issue such license.

It follows, although from different principles, that the city court did not err in refusing to grant the writ of mandamus.

Affirmed.

NEVADA SUPREME COURT.

L. A. BUCKNER, *Appt.*,

vs.

B. F. LYNIP, *Reapt.*

(.....Nev.....)

1. A judgment that one of the parties to an election contest is the duly elected officer, and that he is entitled to the office on performing necessary acts, is not a judgment in which an election has been "annulled and set aside," within Gen. Stat. § 1569, requiring the appeal in such case to be taken within thirty days.

2. Ballots from which the inspectors have unintentionally omitted to take

NOTE.—See also case of Dennis v. Caughlin (Nev.) 30 L. R. A. 781, as to marks on ballots.
30 L. R. A.

the strips containing the numbers, as required by Stat. 1891, chap. 40, § 24, will not be rejected under the provision of § 23, that any ballot upon which appear "names, words, or marks, written or printed," except as provided in the act, shall not be counted.

(Belknap, J., dissents from Proposition 2.)

(September 27, 1895.)

APPEAL by contestee from a judgment of the District Court for Humboldt County in favor of contestant in a proceeding brought to contest the right of contestee to the office of District Attorney for Humboldt County. *Reversed.*

The facts are stated in the opinion.

Meers, Thomas E. Haydon and R. M. Clarke for appellant.

Mr. David S. Truman, for respondent:

After the judgment of the court is rendered against contestee the strong presumption is, which if left without an appeal within thirty days becomes conclusive, that he is not the legally elected officer to the office which is being contested.

Steel v. Steel, 1 Nev. 27.

The intention in contested election laws is that it is a summary remedy to speedily determine who are the duly elected officers of the people.

Webster v. Byrnes, 34 Cal. 277; *Keller v. Chapman*, Id. 635.

When the office becomes vacant the contestee has lost his rights to appeal, or move, or do anything in the action, as the vacating of the office by his failure to act within the statutory period extinguishes his rights because he has brought no suit or action, and is only before the court by his attempted appeal.

Minor v. Kidder, 43 Cal. 229; *Royall v. Thomas*, 28 Gratt. 180, 26 Am. Rep. 388; *Virginia & T. R. Co. v. Ormsby County Comrs.* 5 Nev. 341; *Gilletts v. Sharp*, 7 Nev. 245; *Saunders v. Haynes*, 18 Cal. 145; *Gerrard v. Gallagher*, 11 Nev. 886.

Where the statute gives a special right or remedy, it must be followed and the proceedings in contested election cases are substantially different from any common-law remedy.

Thorpe v. Schooling, 7 Nev. 15; *Arnold v. Stevenson*, 2 Nev. 234; *State v. Washoe County Comrs.* 6 Nev. 108; *Torreyson v. State Board of Examiners*, 7 Nev. 19; *Dorsey v. Barry*, 24 Cal. 449; *People v. Rosborough*, 29 Cal. 416.

The position that this is a "case" within the meaning of the Constitution and laws of this state is erroneous.

Dorsey v. Barry, *supra*; Hayne, New Trial & Appeal, § 172.

There should be a diminution of the record in this case by striking out the statement on motion for a new trial and everything but the judgment roll.

Hayne, New Trial & Appeal, § 5; *Dorsey v. Barry*, *supra*; *Casgraves v. Howland*, 24 Cal. 457.

When our legislature adopted the California law and did not make any provision for a new trial being had in these special proceedings, there can be no doubt of the intention of the legislature of this state, and that was, that there should be no new trial had.

McLane v. Abrams, 2 Nev. 199; *State v. Robey*, 8 Nev. 312; *Williams v. Glasgow*, 1 Nev. 583; *State v. Parkinson*, 5 Nev. 24; *Gould v. Wise*, 18 Nev. 254.

If it were permissible to leave the strip containing the number upon it on the ballot, when there is a like number on the stub, it would render this an unconstitutional act.

Williams v. Stein, 88 Ind. 89, 10 Am. Rep. 97.

Belknap, J., delivered the opinion of the court:

This is an election contest. The parties were candidates for the office of district attorney for Humboldt county at the general election of November, 1894. According to the official returns, Gen. Buckner received the highest number of votes, and a certificate of 30 L. R. A.

his election was issued. Thereafter a contest was inaugurated by respondent, Lynip, and such proceedings had as resulted in a judgment of the district court in his favor, and against Buckner. A motion for a new trial was made in the district court by appellant, and denied by that court; and from the judgment, and the order denying the motion for new trial, this appeal is taken. Respondent moves in this court to dismiss the appeal upon the ground that it was not taken within the time required by the statutes of the state for an appeal to be taken in election contests. The motion is made upon the provisions of section 46 of the Act relating to elections (Gen. Stat. § 1569), which reads as follows: "1569. Sec. 46. Whenever an election shall be annulled and set aside by the judgment of the district court, and no appeal has been taken therefrom within thirty days, such certificate, if any has been issued, shall thereby be rendered void, and the office become vacant." The judgment was rendered February 20, 1895. The motion for new trial was denied upon the 11th day of May,—more than thirty days thereafter. The judgment was to the effect that Lynip was the duly elected district attorney of the county, and, upon his doing the acts required by the statutes to be done in such cases, was entitled to the office, etc. This judgment is not one in which an election has been annulled and set aside. The result of the election has been reversed in this: that Lynip, who was shown by the returns to the board of county commissioners to have been defeated, was declared elected by the judgment of the district court. But the election itself has neither been annulled nor set aside, but, on the contrary, it has been upheld. If it had been annulled, the statute declares, the office becomes vacant, and, if there is a vacancy, it must be filled as required by law. We do not understand counsel to admit that a vacancy does exist, but if the provisions above quoted are applicable to this case, and the election has been annulled, a vacancy in the office must be the result.

Our attention has been called to the meaning of the words "annulled and set aside," as employed in section 1561, Gen. Stat. The section is as follows: "1561. Sec. 88. When any election held for an office exercised in and for a county is contested on account of any malconduct on the part of the board of inspectors of any precinct, or any member thereof, the election shall not be annulled and set aside upon any proof thereof, unless the rejection of the vote of such precinct shall change the result as to such office in the remaining vote of the county." This provision is unimportant to the matter in hand. It states a principle applicable to all election contests; that is to say, that the person officially declared elected shall not be disturbed by vain and fruitless contests, and, unless a different result of the election can be reached, his election shall not be contested.

Respondent also moves the court to strike out all of the record in the case, except the judgment roll, upon the ground that the district court had no jurisdiction of the case

after the entry of the judgment. The statute relating to elections (sections 1524 *et seq.*, Gen. Stat.) confers original jurisdiction upon district courts in this class of cases (sec. 1568), and provides that a certified copy of the judgment of the supreme court may be used as proof in certain cases; but, with these exceptions, it is silent upon the subject. Nothing is said, in direct terms, upon the subject of new trials or appeals; and, under these circumstances, we must look elsewhere for the mode of procedure. The civil practice act was adopted long before the passage of the act relating to elections. It provides a mode for review upon motion for new trial or appeal in all cases tried by district courts, and, in enacting the election law, it was unnecessary to provide for any further mode of procedure than the practice act furnished. The decisions from California to which we have been referred are inapplicable to our statute concerning contested elections.

The motions are denied.

Bigelow, Ch. J., and Bonfield, J., concur.

On the Merits.

Bigelow, Ch. J., delivered the opinion of the court:

The contestant and contestee, whom, for convenience, we shall call plaintiff and defendant, were rival candidates for the office of district attorney of Humboldt county at the election of 1894. Upon the returns, as canvassed by the board of county commissioners, the defendant had a majority of five votes; but, upon the trial of this contest in the district court, it was found that the plaintiff had received three more votes than his opponent, and he was accordingly declared elected. From this judgment, and an order refusing a new trial, defendant appeals.

In Rebel Creek precinct, in that county, it appears that defendant received fifteen votes; the plaintiff, one; and another candidate (H. Warren), twelve. The court rejected all the votes of that precinct, cast under the following circumstances: The ballots were printed, as required by law, with a strip on the left side, intended for a stub, separated from the ballot proper by a perforated line, and with a like strip on the right side, also separated by a perforated line. Upon each of these strips the number of the ticket was printed. By some accident the binding of the stubs into book form had become broken, permitting the ballots to separate into loose sheets. When a voter applied for a blank ballot, the entire sheet was given him by the inspectors, including the stub, which should have been separated from the ballot, and retained by the inspectors. When the ballot was returned to them for deposit in the ballot box, the inspectors removed the strip intended for a stub, but failed to remove the other strip. It is not charged that this was done by the inspectors fraudulently or intentionally, and the evidence is clear and uncontradicted that it was the result of a mistake upon their part; they, and apparently every one connected with the election, sup-

posing that they had removed everything from the ballot that the law required to be removed. It does not appear when the mistake was discovered, but certainly not until after the polls had closed. Our statute, adopting what is popularly known as the "Australian Ballot Law" (Stat. 1891, chap. 40, § 11), provides that the secretary of state shall furnish to the county clerks the paper on which the ballots are to be printed, which is to be watermarked with a design to be chosen by the secretary. The ballots are to be printed under the direction of the county clerks. They are to contain the names of all candidates whose nomination has been certified and filed according to the provisions of the act, and no other name. The names are to be arranged under the designation of the office, and the political designation of each candidate is to be printed opposite his name. When a ballot is handed to a voter, the number of the ballot is to be written on the registry list, opposite his name. He must prepare his ballot by marking with a black lead pencil a cross or X after the name of the person for whom he intends to vote. Upon handing the ballot to the inspector, that officer "shall separate the strip bearing the number from the ballot, and shall deposit the ballot in the ballot box." Sections 24 and 26 of the Act, read as follows:

"Sec. 24. No ballot shall be deposited in the ballot box unless the watermark, as hereinbefore provided, appears thereon, and unless the slip containing the number of the ballot has been removed therefrom by the inspector."

"Sec. 26. In counting the votes any ballot not bearing the watermark as provided in this act shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted. Any ballot upon which appear names, words, or marks written or printed, except as in this act provided, shall not be counted."

Any officer wilfully neglecting or refusing to perform any duty devolved upon him by the act is, upon conviction, to be imprisoned in the state's prison for from one to five years.

It will be noticed that the statute does not expressly direct that a ballot upon which this strip has been left shall not be counted, but these ballots were rejected upon the ground that they came within the latter part of section 26, which inhibits the counting of ballots "upon which appear names, words, or marks written or printed, except as in this act provided;" and this is the point to be determined upon the appeal, so far as they are concerned. It is, perhaps, a close question, and one upon which courts and judges may easily disagree. It is to be observed that the voters of this precinct were themselves in no wise in fault. They possessed every qualification for voting, and had complied with every requirement of the law as to registration, marking their ballots, etc.; and it is earnestly pressed upon us by defend-

ant's counsel that if this law is to be construed as preventing the counting of their votes, either for the wilful fraud or innocent mistake of the inspectors in not removing the slip, it is unconstitutional, within the principles of *Stinson v. Sweeney*, 17 Nev. 309; *Davies v. McKesby*, 5 Nev. 389; *Clayton v. Harris*, 7 Nev. 64, and similar cases. See also *Moyer v. Van De Vanter* (Wash.) 29 L. R. A. 670 (recently decided). As we are, however, of the opinion that that is not the correct interpretation of the act, it is unnecessary to consider this argument any further than as it throws light on the proper construction of the statute. It seems to us that ballots cast under the circumstances existing here should not be rejected, and we will now state, as briefly as possible, the reasons upon which our conclusion is based:

The right of voting, and, of course, of having the vote counted, is one of most transcendent importance,—the highest under our form of government. "That one entitled to vote shall not be deprived of the privilege by the action of the authorities is a fundamental principle." *Cooley, Const. Lim.* 6th ed. 775. We need not go outside the decisions just cited from our own court, to show how jealously this right is guarded. But while the legislature cannot directly deprive the elector of this privilege, section 6, article 2, of the Constitution specially authorizes it to enact laws for the registration of electors, to preserve the purity of elections, and to regulate the manner of holding and making returns of the same. Such laws will necessarily sometimes have the effect of preventing the elector from voting. For instance, a law for the registration of voters, to be effectual, must provide that one not registered shall not vote; and, to guard the purity of the elections, it may require him to mark his ballot in a certain way, and to comply with many other conditions. But in all these matters the voter had the privilege of voting, by a compliance with the law, and his failure to do so is somewhat owing to his own negligence or misfortune. Whether he can also be deprived of it through the fraud, negligence, or mistake of others would involve the constitutional question suggested, and upon which we find it unnecessary to pass in this case. At least, this great constitutional right is not to be taken from him upon any doubtful construction of a statute. Assuming the constitutionality of the law, before it should be construed to work his disfranchisement it must be clear that, under the circumstances then existing, the legislature intended such to be the case. The spirit in which such laws are to be construed is well stated by Andrews, Ch. J., in *Talcott v. Philbrick*, 59 Conn. 485, 10 L. R. A. 150, as follows: "All statutes tending to limit the exercise of the elective franchise by the citizen should be liberally construed in his favor, and unless a ballot comes within the letter of the prohibition against a particular kind of a ballot, it should be counted. A great constitutional privilege—the highest under the government—is not to be taken away on a mere technicality, but the most liberal intentment should be made in support of the elector's

action whenever the application of the common-sense rules which are applied in other cases will enable the courts to understand and render it effectual." "All statutes tending to limit the citizen in his exercise of this right should be liberally construed in his favor. Unless the ticket comes within the letter of the prohibition, it should be counted." *Owens v. State*, 64 Tex. 500, 509. To the same effect are *State v. Saxon*, 30 Fla. 668, 18 L. R. A. 721; *State v. Phillips*, 63 Tex. 890, 51 Am. Rep. 646; *Boyd v. Mills*, 58 Kan. 594, 25 L. R. A. 486; *Kellogg v. Hickman*, 12 Colo. 256; *Bowers v. Smith*, 111 Mo. 61, 16 L. R. A. 764; *Parvin v. Wimberg*, 180 Ind. 561, 15 L. R. A. 775; *State v. Russell*, 84 Neb. 116, 15 L. R. A. 740; *Stackpole v. Hallahan* (Mont.) 28 L. R. A. 503. Laws are also to be construed according to their spirit and meaning, and not merely according to their letter. "It is a familiar canon of construction that a thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers." *Riggs v. Palmer*, 115 N. Y. 506, 5 L. R. A. 840. "It is one of the great maxims of interpretation to keep always in view the general scope, object, and purpose of the law, rather than its mere letter." *Rutledge v. Crawford*, 91 Cal. 583, 18 L. R. A. 761. "A rigid and literal reading would, in many cases, defeat the very object of the statute, and would exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. . . . And the intention is to govern, although such construction may not, in all respects, agree with the letter of the statute." The reason and object of a statute are a clue to its meaning, and the spirit of the law and the intention of its makers are diligently to be sought after, and the letter must bend to these. *Tracy v. Troy & B. R. Co.* 38 N. Y. 433, 437, 98 Am. Dec. 54. This meaning is undoubtedly to be ascertained from the language of the act, viewed in the light of the circumstances under which it is used. If plain and unambiguous, it must be construed as it reads, no matter how unreasonable its operation may be. But as it is not to be presumed that the legislature intended to enact an unreasonable or unjust law, where such would be the result of its operation, if construed in a certain way, and the language is not positive and direct to that effect, it is the duty of the courts to cast about to see if it is not susceptible of some other construction, and in doing this they should consider, not only the language used in some particular section, but the whole scope and purpose of the act, and adopt, if possible, such a construction as will harmonize the various sections with this purpose, and with the demands of justice.

What were the object and purpose of the enactment of the Australian ballot law, the essential features of which have now been adopted by nearly every state in the Union? This question has often been answered by

the courts, and sometimes in language that we shall not attempt to improve upon. In one case the supreme court of Connecticut said: "The object of the Statute of 1889 is obvious. It is to secure an honest vote, correctly expressing public sentiment, by preventing fraud, corruption, and intimidation." After speaking of certain provisions of the Connecticut law, the court resumed: "This would seem to effectually preclude any opportunity for fraud or imposition,—corruption, by making it impossible for any one who would bribe or otherwise corrupt a voter to know that the required vote was actually deposited; intimidation by giving to each voter an opportunity to select and prepare his ballot, and to deposit it free from observation, and in such manner that no one but himself can possibly know how he votes unless he chooses to disclose it." *Talcott v. Philbrick*, 59 Conn. 472, 478, 10 L. R. A. 150. In another case it was said: "A study of the statute upon the subject of elections leaves no doubt that its purpose is to secure a fair expression of the will of the electors of the state, by secret ballot, uninfluenced by bribery, corruption, or fraud. The disfranchisement of whole precincts by reason of an honest mistake on the part of election officers is inconsistent with this purpose." *Parvin v. Wimberg*, 130 Ind. 571, 15 L. R. A. 775. And again: "The evident intent of this provision was to provide against voters marking the individual ballot which they cast, in such manner as to distinguish it." *Lindstrom v. Manistee County Canvassers*, 94 Mich. 471, 19 L. R. A. 171.

This being the object of the law, it should be so construed as to remedy the evil against which its provisions are directed, and, at the same time, not to disfranchise voters further than is necessary to attain that object. It would be almost the work of omniscience to enact a law in such language that it would not, under any circumstances, do more nor less than was intended by the lawmaker. Even words most carefully chosen will, in some unanticipated situation, overrun that intention, and in others fall short of it. It is the duty of the courts to keep that intention, once it is ascertained, steadily in view, and to endeavor to apply the law where it was intended to apply, and to except those cases where it was not. It being, then, the purpose of the law to effectually prohibit and prevent intimidation and vote buying, all its provisions were enacted with that end in view. Where it is forbidden to count ballots containing names, words, or marks other than those provided for in the act, notwithstanding the generality of the language, only such as tend to distinguish the ballots were intended, and such as were, or may have been, placed upon the ticket for that purpose. For instance, all nominations for state offices are to be filed in the office of the secretary of state, and he is to certify them to the various county clerks. It certainly never was intended that if he should, either by inadvertence or design, certify the name of a person who had not been nominated, and which was therefore wrongfully printed upon the ballot, this should invalidate, and require the

rejection of, every vote cast in the state; and yet this would be the result of a strict adherence to the letter of the law, for it would be a name on the ballot not provided for by the act. The same may be said of the wrongful printing of a name on the ballots by order of the county clerk, or the insertion by the printer of a word or mark not provided for by the law, and which would be on all tickets alike. This would in no manner tend to distinguish one ballot from another, and could not be used for a fraudulent purpose. Such a word or mark would not be within the spirit of the law, although within its letter; and in such case the law should be liberally construed in favor of the voter, and not so as to disfranchise a whole county. This simply illustrates the proposition that there are situations in which the legislature could not have intended that ballots with forbidden words or marks upon them should not be counted. They are instances of where the language has overrun the intention. But in the case we have to deal with here the marks upon the ballots (admitting that marks upon the strip attached to the ballot are marks upon the ballot itself, as is doubtless within the intention, if not the letter, of the law), although not placed thereon intentionally, nor with the voters' knowledge or consent, are such as to identify the ballots. Does this alter the case? Under the circumstances existing here, could this fact have been used for the purposes of intimidation or bribery? It is not possible to intimidate a man into voting for men or measures against his will, unless he has reason to believe that if he does not so vote it will become known to the intimidator. Here the voter knew that if the law was complied with no one could ever ascertain how he had voted. It is not shown that any knew that it was not being complied with, and in fact the fair inference from the testimony is that it was not known to any one until after the polls had closed. All supposed that the slips were being removed, and it follows that none could have been intimidated by the fact that they were left on the ballots. But the principal reason for forbidding these distinguishing marks was undoubtedly to defeat bribery. It was believed that the vote buyer would not invest money in the purchase of votes if there was no way by which he could ascertain whether the voter had voted as agreed. The only way in which this could be done by means of marks would be by some mark being placed upon the ballot which had been agreed upon between them; and it must be done either by the voter himself, or by some one else with his knowledge and consent. It is clear that this slip was left on the ballots accidentally, and not for any such purpose as that; and therefore it is not within the spirit or meaning of the law, so far as corruption is concerned. By the blunder of the inspectors, the strips and numbers were left upon the ballots, whereby it was possible to ascertain just how each one had voted. This was done unintentionally, and without the voters' knowledge. Consequently, as we have tried to show, it could not have been made the means of intimidation, nor the agent of cor-

ruption. But by reason of it, without being at all in fault themselves, the voters have incurred all the odium and disadvantage of having the knowledge of how they voted made public. What reason can there be for adding to their punishment that of disfranchisement? To so hold would be like piling Ossa upon Pelion, and, it would seem, was clearly not intended by the law. To hold that it was, would be not to liberally construe the act in favor of the voter, but strictly against him.

In addition to what we have said of the scope and spirit of the ballot law, we think there is that in the letter of the act which strengthens our conclusion very much. By section 24, already quoted, it is provided that no ballot shall be placed in the ballot box upon which the watermark does not appear, nor from which the slip has not been removed. But, while section 26 provides that ballots found in the box not bearing this watermark shall not be counted, it says nothing about the slip being left on. Considering the juxtaposition of those terms in section 24, it is hardly probable that the omission to mention the slip in section 26 was accidental. If not, it clearly indicates an intention that leaving the slip on should not cause the rejection of the ballot. There is reason, too, why such a distinction should be made. If a citizen votes a ballot not bearing the watermark, he is somewhat in fault himself; and, besides, there could be but one purpose for substituting such a ballot for one that was genuine, and that would be fraud. On the other hand, the slip is to be removed by the inspector after the ticket is surrendered to him, and with this the voter has nothing to do; and very often, as in this case, it might be left on the ballot by oversight or accident. In this connection we quote from the recent decision by the supreme court of Washington, already mentioned. Speaking of the decisions that have been rendered under the ballot laws of the different states, the court said: "These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter and those imposed upon election officers. There is a disposition to hold the former valid and mandatory; but where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been in fact an honest expression of the popular will, there is a well-defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them." *Moyer v. Van De Vanter* (Wash.) 29 L. R. A. 670. In that case the law required the inspector, or one of the judges, to write his initials on the ballot before it was delivered to the voter, and directed that any ballot not bearing those initials should be void, and not be counted. But it was held that the law was unconstitutional, and, where the officials had failed to so mark any of the ballots of a precinct, that they should still be counted. There are decisions conflicting with the views we have expressed, but we believe the greater

in number, and the better-considered cases, support our conclusions. We have examined them all, but it would be an endless and unprofitable task to review them, and we shall not attempt it. Our conclusion concerning these ballots renders it unnecessary to pass upon the other ballots objected to by appellant.

Judgment and order refusing a new trial reversed, and cause remanded.

Bonnifield, J., concur.

Belknap, J., dissenting:

The law of 1891 directs that the number of each ballot shall be the same as that of the corresponding stub (sec. 12, chap. 40), and that the number of the ballot shall be written upon the registry list, opposite the name of the voter receiving it (sec. 19, chap. 40). After preparing the ballot, it must be delivered to the inspector, who shall separate the strip bearing the number from the ballot, and deposit the ballot in the ballot box. Section 20, chap. 40. At Rebel Creek precinct, the inspector, through ignorance of the law, and not wilfully, neglected to separate the strip bearing the number from the ballot. The entire vote of the precinct was cast in this way. The act of the inspector was in direct disobedience to the requirements of the law, which, in section 20, chapter 40, declares that the strip and number shall be destroyed before the ballot is cast; and by section 24, chapter 40, that no ballot shall be deposited in the ballot box unless the slip containing the number of the ballot has been removed by the inspector. I refer to these provisions, not as authorizing the canvassers to throw out the ballots, but as illustrating the intention of the legislature in passing the statute providing for a secret ballot. The prohibition against counting ballots is contained in the twenty-sixth section of the act, as follows: "Sec. 26. In counting the votes any ballot not bearing the watermark as provided in this act, shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more names than there are persons to be elected to any office, or if for any reason it is impossible to determine the voter's choice for any office, his vote for such office shall not be counted. Any ballot upon which appear names, words, or marks, written or printed, except as in this act provided, shall not be counted." Under the last sentence of this section these ballots should not be counted. The purpose of the act, as expressed in its title, is "An Act Relating to Elections and to More Fully Secure the Secrecy of the Ballot." No act of the inspectors was so well calculated to expose the vote and defeat the intention of the legislature as their neglect to destroy the number on the slip. Any person, upon inspection of the registry list, could have ascertained the vote of each elector. I admit that if my views are to be adopted the voters of the precinct at that election will be disfranchised, but I am confronted with what I think are clear and imperative provisions of law, incapable of judicial construction. Under the English law of 1872,

the presiding officer at the polling station marked upon the face of the ballot given to each the number of the voter appearing on the burgess roll, which would enable any one, upon inspection, to identify the way in which the party had voted. It was held that these ballots were void, and should not have been counted; but the error did not affect the result of the election; the prevailing candidate having been elected, irrespective of the contested ballots. *Woodward v. Sarsons*, L. R. 10 C. P. 733. In *West v. Ross*, 53 Mo. 850, the law of Missouri required the ballots to be numbered, and provided that any ballot not numbered should not be counted. The judges of election, through inadvertence, neglected to number any of the ballots; but the court held that the statute was mandatory, and all of the ballots were rejected. The court said: "This case may be a hard case

and doubtless is; but the legislative enactment is clear, and although it may deprive a portion of the citizens of the county of their right to be heard in the election of a clerk at one election, it is better that they should suffer this temporary privation, than that the courts should habituate themselves to disregard or ignore the plain law of the land in order to provide for hard cases." In the present case the legislature has provided and required that the ballots shall be numbered, and then provides in express terms that no ballot not numbered shall be counted. Can we say that such ballots shall be counted without an attempt at judicial legislation? I think not, and it would be a misapplication of terms to say that such a statute is only directory." For these reasons I dissent from the judgment.

WISCONSIN SUPREME COURT.

Henry C. GRIGGS, *Reept.*,

v.

Moses DOCTER *et al.*, *Appts.*

(.....Wis.....)

1. Creditors who, having instituted garnishment proceedings in a foreign state to reach wages exempt by the law of the

debtor's domicile, dismiss that garnishment, but take judgment, issue execution, and reach the wages by garnishment on the execution after the issuance by the courts of such domicile of an order restraining them from collecting any exempt wages by "said garnishee proceedings,"—may be compelled to refund to the debtor the exempt amount reached, with interest.

2. A clause in a judgment restraining creditors from prosecuting garnish-

NOTE.—Injunctions against judgments in garnishment proceedings.

I. Necessity of making defense at law.

II. Injunctions for errors and irregularities.

III. Void judgments.

IV. Fraud and mistake.

V. Payment.

VI. Set-off.

VII. Injunctions in behalf of creditors.

The case of *GRIGGS v. DOCTER* holds that where an interlocutory order was made against proceedings by garnishment in a foreign state to subject exempt earnings, and both parties resided in the state where the injunction was granted, and the defendants released their garnishment proceedings but took judgment in their main action, and upon execution issued further garnishment, the interlocutory injunction extends to such subsequent garnishment proceedings.

For an injunction against attachment proceedings of exempt earnings, see *note* to *Thorndike v. Thorndike* (II), 21 L. R. A. 72.

It is generally held that relief will not be granted in equity against judgments in garnishment where there has been a failure to make a defense at law, and this on the ground that equity will not aid a party who has been negligent in asserting his legal rights, and that judgments at law in garnishment cases are erroneous, is not sufficient ground for interference by injunction. So, injunctions will be refused where there is an adequate remedy at law. On the other hand, equity will usually interfere and enjoin judgments in garnishment proceedings that are obtained by fraud or mistake, where complainant has not been guilty of negligence, or the judgments are void, or are paid, or there is an equitable defense, or where the party has been dili-

gent in making his defense and there is no adequate remedy at law, or where there is an equitable or new defense discovered since the judgment.

I. Necessity of making defense at law.

It is the duty of the garnishee to act promptly in making his defense, either when sued by his original creditor, or when sued in garnishment; and an injunction will not be granted when there was a failure on the part of the garnishee to make a defense at law which is not excused, and this on the ground that the party who is negligent in asserting his rights at law is not entitled to the aid of a court of equity. *Paynter v. Evans*, 7 B. Mon. 420; *Carroll v. Parkes*, 1 Bax. 200; *Yarborough v. Thompson*, 3 Smedes & M. 201; *Danaher v. Prentiss*, 22 Wis. 811; *Sanders v. Fisher*, 11 Ala. 812.

Especially where the bill of complaint does not show that the complainant had no effects in his possession belonging to the creditor, and therefore fails to show that the judgment is unjust. *Hair v. Lowe*, 19 Ala. 224.

Where a sale under a judgment was advertised for November, 1871, and in October a garnishment was served against the debtor, and he could have answered in March, 1872, that his property had been sold, and that he owed nothing or that he owed the balance, the failure to defend will prevent an injunction against proceedings under garnishment. *Carr v. Lee*, 44 Ga. 376.

And the negligence of a garnishee in permitting a judgment of garnishment, and also a judgment against him in favor of his creditor in another action, to be taken without filing a bill of interpleader, prevents an injunction against the judgment. *Yarborough v. Thompson*, 3 Smedes & M. 201, 41 Am. Dec. 623.

Where complainant as garnishee was served

ment proceedings against their debtor in another state to reach exempt wages "so long as plaintiff remains a resident of this state." If incorrect, is rendered harmless by a subsequent clause limiting the operation of the judgment to earnings which are exempt.

(January 8, 1893.)

APPEAL by defendants from a judgment of the Circuit Court for Milwaukee County in favor of plaintiff in a proceeding brought to enjoin garnishment proceedings which had been instituted in another state to reach wages which plaintiff claimed to be exempt. *Affirmed.*

Statement by Winslow, J. :

Action in equity to enjoin the prosecution of garnishment proceedings in the state of Iowa. The plaintiff is a married man, with a family dependent upon him, residing in this state, and is in the employ of the Chicago, Milwaukee, & St. Paul Railway Company. The defendants, who are also residents of Wisconsin, brought action against him in Iowa, and garnished his exempt earnings in the hands of the railway company. Pending these proceedings this action was commenced in the circuit court of Milwaukee county, and an interlocutory injunctive order was granted and served on the defend-

with process at the suit of two different attaching creditors, and, failing to disclose the fact of service in the other cases, two judgments were obtained against him for the same debt, an injunction was refused. *Houston v. Wolcott*, 7 Iowa, 178.

So, the injunction will not be granted where the garnishee, having notice, failed to make a defense that the creditor had assigned the debt against him. *Field v. McKinney*, 60 Miss. 763; *Haseltine v. Brickley*, 16 Gratt. 116; *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 543.

And a garnishee cannot have a judgment against him enjoined on the ground that he owed the debt to another party, but was prevented from making a defense by a misunderstanding between himself and his attorney, and negligence of his attorney. *Nevins v. McKee*, 61 Tex. 412.

So, a garnishee allowing a judgment to be taken against him after he had paid out the money to the judgment debtor cannot have an injunction against proceedings on the judgment, where no excuse is offered for failure to defend. *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 390; *Sanders v. Fisher*, 11 Ala. 812.

So, a garnishee who does not answer cannot enjoin the judgment by showing that proof was not heard as to his liability, where the record of the case shows that it was. *Braden v. Reitzenberger*, 18 W. Va. 286.

And the mistake of a garnishee in not showing that the debt he owed is not yet due, will not be relieved against by injunction, on the ground of negligence. *Alleman v. Kight*, 19 W. Va. 201.

So, a mistake of law made by a garnishee in not moving for a stay of proceedings in one suit until another for the same debt was terminated will prevent him from enjoining a judgment, and is not ground for relief. *Danaher v. Prentiss*, 22 Wis. 811.

The failure of a married woman to appear and defend as garnishee will prevent an injunction in her favor, against the judgment of condemnation in attachment, as a married woman is under no disability. *Ahern v. Fink*, 64 Md. 161.

And a judgment of a circuit court holding a garnishee liable on a claim against a husband where he had given the wife of the husband his note is final and conclusive, and will not be enjoined on the ground that the note belongs to the wife. (The injunction was refused for failure to defend.) *Lyday v. Duple*, 17 Md. 188.

A garnishee will not be entitled to an injunction against proceedings upon an execution against him for the same debt in favor of another creditor, where he has adequate remedy by interpleader and does not tender the amount into court. *Hastings v. Cropper*, 3 Del. Ch. 165.

But an injunction will be granted a judgment debtor on an interpleader setting up that he has been garnished by creditors of the plaintiff at law. *Henderson v. Garrett*, 35 Miss. 554.

And a judgment debtor may be held as garnishee

of the judgment creditor, in favor of a creditor of the judgment creditor, where the two actions are in the same court; and in such a case injunction will lie in favor of the judgment debtor to restrain the collection of the judgment pending the garnishment proceedings. *Keith v. Harris*, 9 Kan. 395.

II. Injunctions for errors and irregularities.

The general rule is that injunctions are not granted against judgments for irregularities in the proceedings of garnishment, and are not usually granted on account of erroneous rulings or decisions, as relief may generally be at law.

So, a garnishee summoned by a wrong name, appearing and allowing a judgment against him by his true name, cannot thereafter have the execution enjoined where there is no allegation that he does not owe the debt. *Williams v. Hitzig*, 38 Ind. 303.

And that a garnishee did not understand the English language or the purport of process served on him is not sufficient to enjoin the judgment. *Windwart v. Allen*, 13 Md. 193.

And a judgment against the garnishee will not be enjoined for an irregularity of insufficiency of the bond relating to his creditor, who is a party to the same suit. *Field v. McKinney*, 60 Miss. 763.

And irregularity in rendering a judgment against a garnishee without attachment proceedings against the debtor will not authorize an injunction against proceedings on the judgment by the garnishee, where no defense was made, and there was a remedy by appeal. *Earl v. Mathoney*, 60 Ind. 203.

So, irregularity in rendering a judgment by default against a corporation contrary to statute will not authorize an injunction against the same. *Boyd v. Chesapeake & O. Canal Co.* 17 Md. 195, 79 Am. Dec. 646.

And that an erroneous judgment was rendered on insufficient evidence will not authorize an injunction. *Braden v. Reitzenberger*, 18 W. Va. 286; *Smith v. Bank of Holmes County (Miss.)* 18 So. Rep. 847.

And that the rulings on evidence were erroneous, and that the garnishee's attorney was sick at the time of trial, and the new attorney was unable to do the case justice, was not sufficient to entitle an injunction. (It did not appear what had been done on a motion for a new trial, although there were two judgments against the garnishee for the same debt.) *Gibson v. Cohen*, 35 Ga. 750.

And errors in a judgment in refusing a defense of a garnishee, and a bill of interpleader, will not be grounds for an injunction. *Danaher v. Prentiss*, 22 Wis. 811.

But in *Dobbins v. Wybrants*, 3 Tex. 457, it was said that a garnishee liable in judgment of garnishment may obtain an injunction against a judgment in favor of the original creditor against him for the debt, where he pleaded that the garnishing creditors should be made parties, and pleaded the garnishment in discharge of the debt, which plea

ants, restraining them from collecting any of the exempt wages of the plaintiff by said garnishee proceedings during the pendency of this action. Thereupon the defendants released their garnishment proceedings in Iowa, but took judgment in the main action, and issued execution thereon, and garnished the railway company on the execution. The railway company was adjudged by the Iowa court to pay \$86 (which appeared by their answer to be the amount of their indebtedness to the plaintiff), and the same was applied on the defendants' judgment against

the plaintiff. Of this amount \$60 was exempt under the laws of Wisconsin. Afterwards this action was tried. There is no bill of exceptions. The court made findings in accordance with the facts as above stated, and also found that the Iowa suit and garnishment proceedings were prosecuted with intent to evade the exemption laws of Wisconsin, and that the said \$60 was levied upon and taken by the defendants in disregard of the injunctive order, knowing it to be exempt, and knowing that such taking was contrary to the injunctive order. Judg-

was refused. See also *Freeman v. Miller*, and case following, *infra*, IV.

III. Void judgments.

If the judgment against the garnishee is void for want of jurisdiction, an injunction is generally granted against proceedings thereunder, but if only voidable, or there is adequate remedy in the court rendering judgment, an injunction will not be granted.

So, an injunction was allowed against the enforcement of a judgment on a *scil. fa.* against a garnishee where the justice of the peace had no jurisdiction of the person of the garnishee and the judgment was void. *Rice v. American Nat. Bank*, 3 Colo. App. 81.

And the same was held where a final judgment could not be rendered by a justice of the peace under Kan. Justice Code, § 44, which only provides for an order against the garnishee which cannot be enforced by an execution. *Missouri P. R. Co. v. Reid*, 34 Kan. 410.

So, a judgment in garnishment and levy of execution will be relieved against as a cloud on title, where it was shown that no summons or notice in garnishment was ever served, and that the garnishee did not owe the debtor anything, and had no knowledge of the suit in time to defend. *Cobbe v. Wright*, 34 Neb. 771.

And where the notice to the garnishee was to appear at the pending term, instead of at the next term, as required by statute, and the garnishee appeared at the pending term, but the court had temporarily adjourned, and the garnishee, believing that it had adjourned for the term, made no defense,—judgment rendered at that term was void for want of jurisdiction, and will be enjoined where the garnishee was not indebted. *Padden v. Moore*, 58 Iowa, 708.

A judgment of a justice was enjoined where the debt was not due, as the justice had no power to enter judgment. *Kapp v. Teel*, 33 Tex. 811.

So, an injunction will be granted against the execution of a judgment of a justice of the peace in garnishment that is void for want of jurisdiction on account of venue, where no appeal could be taken, as it would be a waiver, and the constable could not be looked upon for protection because he had no authority to look beyond the execution. And defense to the merits does not have to be shown. *Bornschein v. Finck*, 13 Mo. App. 120.

But a garnishee cannot obtain an injunction against the judgment rendered against him on the ground that he was a member of the city council of Baltimore, and in discharge of his duties, at the time of service, as a judgment against a privileged person is voidable, not void. *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622.

And a garnishee is not entitled to an injunction against proceedings upon an execution for the same debt issued in the name of another person, where, by the terms of the statute, the garnishee is discharged by lapse of time, although it may be necessary to obtain an order from the superior

court for his discharge. *Hastings v. Cropper*, 3 Del. Ch. 165.

IV. Fraud and mistake.

Injunctions will be granted against judgments obtained against the garnishee through fraud or mistake, where he has a good defense to the same.

So, a garnishee may obtain an injunction against a judgment where an agreement was made at the time, which was entered, releasing him from all personal liability, and it was only intended to hold him for what assets he might have belonging to the debtor. *Newman v. Stuart*, 5 Hayw. (Tenn.) 78.

So, where several writs of garnishment against the same defendants were sued out for different plaintiffs at the same term, and it was agreed that an answer need only be filed in one case, and when the one filed fully purged defendants of all liability, it was agreed that no further proceedings would be taken, an injunction was granted against a subsequent judgment taken by default on the ground of surprise or fraud. *Pelham v. Moreland*, 11 Ark. 443.

And a garnishee may obtain an injunction against a judgment of a justice of the peace, where he was prevented from making a defense by the statement made by the justice, and there is a good defense to the action. *Watkins v. Gray*, 5 Mo. App. 562.

After judgment in garnishment subjecting a bond to the payment of a nonresident's debts, the obligor on such bond may obtain an injunction against a judgment obtained in another case on a forged assignment of the bond, where the action is for the use of the assignee, thereby preventing a defense at law. *Jameson v. Deshields*, 3 Gratt. 4.

And where a defendant pleaded that he was not indebted to A, but was indebted to B, whom he had fully paid by reason of a garnishment, and judgment was rendered against him in favor of A, such judgment may be enjoined where it is shown that it is not prosecuted by A, or by attorneys employed by him, and he disavows any connection with the suit,—as it would be grossly inequitable to enforce this judgment and compel payment twice, and the judgment was attempted to be enforced for the benefit of the party who had been paid by garnishment. *Marchman v. Sewell*, 33 Ga. 653.

Where a garnishee made full answers to the inquiries propounded to him by the officer, who wrote out the same and certified them to the court, a judgment taken for failure to answer interrogatories as to effects in his possession will be enjoined where such interrogatories were not propounded, and he was not aware of the judgment until after the term, and owed nothing. *Freeman v. Miller*, 58 Tex. 372.

So, where a garnishee gave a certificate to the sheriff showing that he was indebted to the defendant when in fact he was not, and the mistake was not discovered until after judgment, he is entitled to an injunction against the same, although he had applied to the court at law for relief, which had been refused, presumably because too late. *Oregon R. & Nav. Co. v. Gates*, 10 Or. 514.

ment for the plaintiff was rendered—First, perpetually enjoining the defendants from prosecuting any proceeding against the plaintiff outside this state, so long as the plaintiff remains a resident of this state, whereby the earnings of the plaintiff which are exempt under the laws of this state shall be garnished or levied upon in payment of any judgment against the plaintiff; second, for the recovery of the \$60, with interest, realized by the defendant upon the Iowa garnishment proceedings; third, for the costs of the action. The defendants appeal.

Messrs. Bloodgood, Bloodgood, & Kemper for appellants.

Messrs. Henderson & Williams for respondent.

Winslow, J., delivered the opinion of the court:

There being no bill of exceptions, the only question presented is whether the pleadings and findings sustain the judgment. *Wille v. Bartle*, 88 Wis. 424. This question must be answered in the affirmative. The pleadings and findings show, without dispute

So, an injunction was granted against a judgment of condemnation against a garnishee, rendered by a justice in attachment on a judgment more than three years prior to the issuing of the attachment, where the judgment was rendered by mistake, it having been agreed that no judgment should be entered until the decision of another case. *Weikel v. Cate*, 58 Md. 105.

And where complainant, the maker of a note, had no notice of the indorsement until after judgment was rendered against him as garnishee, and a judgment was also obtained against him by the indorsee, he was entitled to an injunction. *McKinney v. Kuhn*, 59 Miss. 186.

V. Payment.

A garnishee is generally entitled to an injunction against proceedings under a judgment where he has paid the same, but is not entitled to an injunction on the ground of payment by one not a party or privy.

So, a garnishee is entitled to an injunction against a judgment obtained against him by a nonresident plaintiff who had agreed on a valuable consideration to pay the debt due from the garnishee to the defendant; and as such defense is not available in law, it is sufficient to entitle to an injunction. *Matthews v. Robinson*, 33 Ala. 320.

Where garnishees were sued by their creditors, and about the same time were garnished in another state and there admitted the indebtedness, and paid the debt to the garnishing creditors after judgment was taken in the original suit, and the garnishing creditors brought a suit against the original creditors, who pleaded such payment by the garnishee in defense of the action against them,—an injunction was granted. (The recovery and payment in the garnishment might have been pleaded in the original action, but that action had proceeded to judgment, and no plea could be interposed, and there is no other remedy except injunction.) *Allen v. Watt*, 79 Ill. 224.

Where the judgment creditor of the vendor of land garnished the purchaser for the amount of purchase money yet due, and afterwards levied the judgment on the land, he will be enjoined from enforcing the judgment obtained under the garnishment, as he cannot deny the title and at the same time take the fruits of the sale. *Gunn v. Thornton*, 49 Ga. 380.

But a purchaser cannot enjoin the collection of a decree against him for the debt, on the ground that there has been a judgment of garnishment also rendered against him, where he does not allege such judgment has been satisfied. *Dunham v. Collier*, 1 G. Greene, 54.

Where an attachment was levied on land, and three persons were garnished also, the fact that \$1,000 was paid to release the land from attachment by a trustee for creditors will not entitle the garnishee to enjoin the judgment against them, as it is not a satisfaction of their debt, and they did not pay it, but it was paid by a stranger to the attach-

ment suit for a surrender of a right. *Hill v. Cotten*, 54 Miss. 551.

And a garnishee cannot enjoin a judgment against him on the ground that the debtor is entitled to credits on the debt. *Alleman v. Kight*, 19 W. Va. 201.

Where a defendant obtains an injunction on the ground that he has been garnished, and the defendant in the injunction suit shows that the garnishment has been discharged, the injunction should be modified so as to permit the collection of the judgment. *Steiner v. Scholze* (Ala.) 18 So. Rep. 79.

VI. Set-off.

A garnishee is entitled to an injunction against a judgment in garnishment where at the time of such judgment he has a claim of unliquidated damages against his creditor who is insolvent and nonresident, as the rights of the garnisher do not rise above or extend beyond those of his debtor; as insolvency or nonresidence in Illinois is sufficient ground for equitable interference. *North Chicago Rolling Mill Co. v. St. Louis Ore. & S. Co.* 158 U.S. 506, 38 L. ed. 505.

Where a creditor obtained a judgment and execution which was replevied, and then in a court which had no jurisdiction collected by garnishment money due the surety, which judgment was reversed, an injunction in the creditor's behalf was allowed in order to maintain in his favor the set-off of his judgment on the replevin bond in the other court against the order to refund the money garnished. *Smith v. Bohon*, 12 Bush, 448.

VII. Injunctions in behalf of creditors.

Where attachments have been issued against a debtor and garnishment served on the garnishee, the attaching creditors, in order to preserve their priority, are entitled to an injunction against the levy upon, or execution sale of, goods in the hands of the assignee by other creditors. *Northfield Knife Co. v. Shapleigh*, 24 Neb. 635.

But a creditor having a writ of garnishment pending in the Federal court cannot maintain a suit of injunction in a state court against a judgment or order of sale obtained against such garnishee by his creditor, as such garnishee must make his defense in the garnishment if he wishes to prevent the judgment against him, and the creditor by garnishment cannot invoke the aid of injunction in another case against another judgment. *Arthur v. Batte*, 42 Tex. 159.

That the complainant was prevented from paying debts, for which judgment was obtained by reason of a garnishment which the defendant had sued out against a person who held assets of complainant, is not sufficient to entitle an injunction against a judgment; for if the garnishment was sued out wrongfully, he has a complete remedy by a suit on the garnishment bond, and if it was sued out rightfully, he is not entitled to an injunction. *Way v. Brown*, 30 Ga. 806. L. T.

or exception, that the defendants, in order to evade the exemption laws of the state, commenced garnishment proceedings in a foreign state in order to subject the exempt earnings of a resident of this state to their claims as creditors, and, in defiance of the interlocutory order of the court, actually appropriated \$60 of the plaintiff's exempt wages to the payment of their debt. Why the court should not have administered the relief which it did administer, we are at a loss to perceive. The jurisdiction of equity in actions of this nature is well established. High, Inj. 2d ed. § 106. It is said that the judgment is erroneous, because it enjoins the defendants so long as the plaintiff remains a resident of this state, whereas it should be limited to such time as the plaintiff, being a resident of this state, provides for the en-

tire support of a family within the state. If there is anything in this point, the objection is obviated by the subsequent words of the judgment, which limit the operation of the injunction to those earnings which are exempt. That part of the judgment which adjudges the recovery of the \$60 which the defendants collected by their garnishment in the Iowa court, in disobedience to the preliminary injunctive order, was eminently proper. A court of equity would hardly deserve that name if it turned the plaintiff out of court with a bare injunction, and commanded him to seek his remedy by another action for the moneys thus wrongfully converted in contempt of an order of the court made in this very action.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

John J. REIMERS *et al.*, *Plfs. in Err.*,

v.
SEATCO MANUFACTURING COMPANY
et al.

(70 Fed. Rep. 573.)

1. A nonresident creditor cannot have his property in a debt seized in a state to which the debtor may resort merely for the purpose of doing business through agents, when the claim arose on a contract not to be performed within the state, and the debtor does not reside therein.
2. A debt has no situs for the purpose of garnishment in a state of which the plaintiff, defendant, and garnishee are all non-residents, although the garnishee is a foreign corporation which by general provisions of a state statute is subject to garnishment in the state because it assumes to do business there.

(October 3, 1896.)

ERROR to the Circuit Court of the United States for the Eastern District of Michigan to review a judgment dismissing a garnishment proceeding to reach property of the Seatco Manufacturing Company which was alleged to be in the possession of the Michigan-Peninsular Car Company. *Affirmed.*

Before Taft and Lurton, Circuit Judges, and Severens, District Judge.

Statement by Taft, Circuit Judge:

John J. Reimers, doing business as John J. Reimers & Co., is a citizen and resident of Chicago, Ill. The Seatco Manufacturing Company is a corporation organized and existing under the laws of the state of Washington. The Michigan-Peninsular Car Com-

pany is a corporation of the state of Illinois, having an office and doing business in the state of Michigan, at Detroit. This was an action by Reimers against the Seatco Manufacturing Company to recover upon an express contract the sum of \$2,864.64. The suit was begun in the circuit court of Wayne county, Mich., by the affidavit and writ of garnishment filed and served by the sheriff upon the Michigan-Peninsular Car Company. The affidavit averred that the latter company was indebted to the Seatco Manufacturing Company, and had credits of that company in its hands. True copies of the summons, affidavit in garnishment, and writ of garnishment, with return of the service upon the writ, were served upon the Seatco Company at its office in Bucoda, in the state of Washington. The Michigan-Peninsular Car Company filed a disclosure under the garnishee statute of Michigan, in which it admitted that it was indebted in the sum of \$3,135.06 to the Seatco Company; that this indebtedness was created by the purchase from the Seatco Company of certain lumber shipped from Washington; and that the purchase price of the lumber was to be paid by the garnishee defendant to the principal defendant in Bucoda, Wash. The Michigan-Peninsular Car Company moved to quash the writ of garnishment. This motion was overruled in the Wayne circuit court. Thereupon the Seatco Company appeared specially, and moved to set aside the service and process on the ground that the court had no jurisdiction over it or the debt. Before the motion was passed on, the same defendant appeared specially, and filed a petition for removal of the cause to the circuit court of the United States for the eastern district of Michigan. The order of removal was granted and thereupon in the court below the motion to quash the writ and dismiss the suit for want of jurisdiction was heard. The motion was granted, the writ was quashed, and the suit dismissed for want of jurisdiction. The learned judge who presided in the court below

NOTE.—As to garnishment of debt to nonresident, see note to Illinois C. R. Co. v. Smith (Miss.) 19 L. R. A. 577; also Wyeth Hardware & Mfg. Co. v. Lang (Mo.) 27 L. R. A. 651, and cases cited in footnote thereto.

30 L. R. A.

reached this conclusion upon two grounds: First, that the debt sought to be attached was not within the jurisdiction of the Michigan courts, because the creditor, the debtor, and the plaintiff were all nonresidents of Michigan; and, second, that the requirements of the garnishee statute of Michigan as to process in such cases had not been complied with.

Messrs. Bowen, Douglas, & Whiting, for plaintiffs in error:

An ordinary mercantile debt is due everywhere, in whatever country the debtor may be found.

The debts in respect to the liability of the debtor follow him and are subject to the jurisdiction of the law of his domicile, or the place where his property is situated.

Blake v. Williams, 6 Pick. 285; *Lewis v. Bush*, 30 Minn. 247; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Embree v. Hanna*, 5 Johns. 101; *Drake, Attachm.* § 597; *Sturtevant v. Robinson*, 18 Pick. 175; *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 158, affirmed in 127 Mo. 242, 27 L. R. A. 651; *Williams v. Ingersoll*, 89 N. Y. 523; *Neufelder v. German American Ins. Co.* 6 Wash. 386, 22 L. R. A. 287.

The debt may be garnished wherever the debtor may be found.

Local laws may fix the *situs* of the debt at the domicile of the debtor, and under such laws he may be effectually garnished by a nonresident, and compulsory payment will protect the debtor everywhere against a suit for the recovery of the same debt by a creditor.

Nichols v. Hooper, 61 Vt. 295; *Everett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 509; *Hannibal & St. J. R. Co. v. Crane*, 103 Ill. 258, 40 Am. Rep. 531; *Holland v. Mobile & O. R. Co.* 16 Lea. 417; *East Tennessee, V. & G. R. Co. v. Kennedy*, 38 Ala. 464; *Missouri P. R. Co. v. Flannigan*, 47 Ill. App. 822; *Burlington & M. R. R. Co. v. Thompson*, 81 Kan. 196; *Mooney v. Union P. R. Co.* 60 Iowa, 846.

In construing the statute of a state, the United States court must follow the decisions of the courts of that state.

Wilson v. Neal, 28 Fed. Rep. 129; *Raymond v. Terrebonne*, 28 Fed. Rep. 773; *Buford v. Holley*, Id. 680.

This garnishment was proper under the rulings of the supreme court of Michigan.

Shafer Iron Co. v. Stone, 88 Mich. 464; *Newland v. Reilly*, 85 Mich. 151; *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511; *Moore v. Speed*, 55 Mich. 84.

It is within the power of the legislature to make any foreign corporation wishing to do business within the state subject to the service and binding force of the garnishee process, exactly as it might require it, as a condition precedent to its doing business in the state, to be subject to summons in a civil action.

Rainey v. Maas, 51 Fed. Rep. 580 (1892); 8 Am. & Eng. Enc. Law, p. 1181; *Shafer Iron Co. v. Stone*, *supra*; *McAllister v. Pennsylvania Ins. Co.* 28 Mo. 214; *Barr v. King*, 96 Pa. 485; *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Atty. Gen. v. Bay State Min. Co.* 99 Mass. 148, 96 Am. Dec. 717; *Lafayette Ins.* 30 L. R. A.

Co. v. French, 59 U. S. 18 How. 404, 15 L. ed. 451; *Young v. Ross*, 81 N. H. 201; *Harvey v. Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Freeman, Executions*, § 418; *Cousens v. Lovejoy*, 81 Me. 467; *Hamilton v. Rogers*, 67 Mich. 187.

Messrs. Wells, Angell, Boynton, & McMillan, for defendant in error:

The statutes of Michigan do not authorize garnishment in this case.

Milwaukee Bridge & I. Works v. Brecoort, 78 Mich. 157; *Hamilton v. Rogers*, 67 Mich. 135; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168; *Newland v. Reilly*, 85 Mich. 151; *Cofrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511; *Moore v. Speed*, 55 Mich. 84; *Shafer Iron Co. v. Stone*, 88 Mich. 464.

The decisions of the Federal courts and of the best-considered cases in the state courts forbid the maintenance of this suit.

State Tax on Foreign-held Bonds, 82 U. S. 15 Wall. 300, 21 L. ed. 179; *Ogden v. Saunders*, 25 U. S. 12 Wheat. 218, 6 L. ed. 606; *Baldwin v. Hale*, 68 U. S. 1 Wall. 223, 17 L. ed. 531; *Brown v. Smart*, 145 U. S. 454, 36 L. ed. 773; *Moore v. Speed*, 55 Mich. 91.

The *situs* of the debt is the domicile of the creditor. The debt is not a thing garnishable in another state, though the debtor may be found there.

Miller v. Hoos, 2 Cranch, C. C. 622; *Drake, Attachm.* 6th ed. § 474; *Douglass v. Phenix Ins. Co.* 188 N. Y. 209, 20 L. R. A. 118; *Williams v. Ingersoll*, 89 N. Y. 523; *Renier v. Hurlburt*, 81 Wis. 24, 14 L. R. A. 562; *Keerett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 509; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

If it appears that the foreign corporation garnishee, though doing business in the state, does not owe money payable in the state, it is not chargeable in garnishment.

Wright v. Chicago. B. & Q. R. Co. 19 Neb. 175, 56 Am. Rep. 747; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Nys v. Liscombe*, 21 Pick. 268; *American Cent. Ins. Co. v. Hettler*, 87 Neb. 849; *Alabama G. S. R. Co. v. Chumley*, 92 Ala. 317; *Missouri P. R. Co. v. Sharitt*, 48 Kan. 875, 8 L. R. A. 385; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Pieler v. Jessup*, 24 Mo. App. 91; *Grac v. Farmers' & Citizens' Bank*, 25 Conn. 452; *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 179; *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 283; *Baylies v. Houghton*, 15 Vt. 626; *Tingley v. Bateman*, 10 Mass. 848; *Sawyer v. Thompson*, 24 N. H. 510; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630.

Taft, Circuit Judge, delivered the opinion of the court:

The question in this suit is whether, in a suit brought by a resident and citizen of Illinois against a resident and citizen of the state of Washington in the state of Michigan, a court of the latter state can acquire jurisdiction *in rem* to pronounce judgment against the nonresident defendant to the extent of a debt owed to the defendant by a corporation resident and citizen of Illinois doing business in Michigan, and liable by the laws of Michigan to the service of process in garnishment in that state. The question of jurisdiction is raised by the defendant against

whom such a judgment is sought. It may be conceded that under the statutes of Michigan a corporation of another state which assumes to do business in Michigan subjects itself, through its agents in that state, to service of process by garnishment. But this does not determine the question whether a creditor of such a corporation is affected by this fact so that the debt owing is given a locality and *situs* within the state lines of Michigan such as to permit the courts of Michigan, under general principles of international law and the Constitution of the United States, to seize the debt. The debt was not payable in Michigan, but in Washington. We conceive it to be well settled by authority that while, generally speaking, the *situs* of a debt is constructively with the creditor to whom it belongs, it is within the competence of the sovereign of the residence of the debtor, by reason of its control over its own residents, to pass laws subjecting the debt to seizure within its territorial sovereignty. We also conceive it to be well settled that, even if the debtor is not a resident of the sovereignty under which garnishment is attempted, such sovereignty still may subject the debt to its process and constructive seizure if the debtor is personally within the service of its process and the debt is payable within its territory. In either of the cases above mentioned, if a judgment is rendered against a garnishee for the debt thus constructively seized in favor of the plaintiff, the satisfaction of the judgment will be *pro tanto* a bar to a recovery against the garnishee on the original debt in any jurisdiction where the creditor seeks to recover it. But we are of opinion that a nonresident creditor cannot have his property in the debt seized in a state to which the debtor may resort, not for purposes of residence, but merely for the purpose of doing business through agents, when the claim arose on a contract not to be performed within the state, and the debtor does not reside therein. But it is said that, if the debtor is a corporation, and seeks to do business outside of the state of its incorporation, the state to which it may send its agents for this purpose may impose any requirement whatever as a condition precedent to its doing business there, and, therefore, that it may require it to submit to judgment in garnishment for a debt owing by it to a nonresident, on the suit of a nonresident, though payable in another state. The right of a state to impose conditions upon foreign corporations doing business therein is not unlimited. In *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451, Mr. Justice Curtis, speaking for the supreme court, said: "A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 519, 10 L. ed. 274. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other states, and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the juris-

diction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

In *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, it was held that the law which permitted a nonresident corporation to do business within its territory on condition that it should forfeit such permit if it removed a suit brought against it into the court of the United States held within the state was unconstitutional and void, and could give no validity and effect to any agreement or action of the corporation in obedience to its provisions, because it thereby was compelled to surrender a right and privilege secured to it by the Constitution and laws of the United States; citing *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445, 23 L. ed. 865, and *Barron v. Burnside*, 121 U. S. 186, 30 L. ed. 915. If, as we have already found, the debt to be garnished was not brought within the state by presence of the debtor corporation through its agent, then a condition that the corporation must be subject to garnishment process as if the debt were within the state's jurisdiction would have one of two results: It would either subject the corporation to the probability of a double recovery for the same debt, or it would compel the creditor, a nonresident, whose person and property are both out of the jurisdiction of the state, to submit to a judgment against him, rendered without notice of any kind to him. Either result would seem to be inconsistent with the rules of public law securing the jurisdiction and authority of each state from encroachment by all the others, and with that principle of natural justice forbidding condemnation without opportunity for defense. At all events, there is nothing in the garnishee statute of Michigan expressly requiring a foreign corporation to submit to a judgment in garnishment in such a case. And the mere provision that such a corporation shall be generally subject to garnishment is not to be interpreted as imposing a liability, power to impose which is rendered doubtful by the considerations already stated. It is easy to conceive of many cases where a foreign corporation may be garnished, in which, by all the rules of public law, the debt thus sought to be seized is within the territorial jurisdiction of the state in which process is issued. Such cases may well satisfy the provision of the Michigan law for garnishment against foreign corporations. The latest case on the subject, and one which has close application to the case at bar, is that of *Douglas v. Phenix Ins. Co.* 138 N. Y. 209, 30 L. R. A. 118. The action there was upon a policy of fire insurance issued by the defendant, a domestic corporation, and a plea in abatement was entered stating, in substance, that it was carrying on business and maintained an agency in the state of Massachusetts; that in pursuance to the laws in that state it had an attorney upon whom process could be served; that action was brought by one residing in Massachusetts against plaintiffs, in which the defendant corporation was made a party defendant, as trustee of the plaintiff, and the attach-

ment was issued against the credits of the plaintiff in the hands of the defendant; that the action was still pending, and by virtue of the laws of Massachusetts its courts had acquired full jurisdiction over the parties. It was held that the debt due from the plaintiff to the defendant was not within the jurisdiction of the courts of Massachusetts; that the defendant corporation was a resident of New York and that the plaintiff was a resident of New York; and that the fact that the defendant corporation had an agent in the state of Massachusetts did not carry the corporation into that state, and did not affect the locality of the debt owing by the defendant to the plaintiff, both residents of New York, it having been contracted in New York, and being payable therein. Said the court of appeals, by Andrews, Ch. J.: "But, we repeat, no court can acquire jurisdiction in attachment proceedings unless the *res* is either actually or constructively within the jurisdiction, and we are of opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company, by serving upon the agent of the corporation there, and without having acquired jurisdiction of the plaintiff, must fail for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts and had no domicile there, and was not the agent of the plaintiff, and that, in contemplation of law, the company and the debt were, at the time of the issuing of the attachment, in the state of New York, and not in the state of Massachusetts. This court has had occasion heretofore to consider the effect of the act of a foreign corporation constituting an agent in another state, upon whom proceedings may be served, done in compliance with the laws of such state in pursuance of a condition imposed, and to enable the corporation to do business in such state. It has been held by such act the corporation does not change its domicile of origin or its residence. It becomes bound by judgments rendered upon service on the designated agent, because it has consented so to be bound, but it remains as before, a resident of the state where it is incorporated. *Gibbs v. Queen Ins. Co.* 63 N. Y. 114, 20 Am. Rep. 513; *Plimpton v. Bigelow*, 93 N. Y. 593. If in this case the insurance company could be regarded as residing or having its domicile in Massachusetts for the purpose of attachment proceedings, it likewise has a domicile in every state where it may have appointed an agent under similar laws, and so constructively, upon the theory upon which the Massachusetts attachment is defended, the corporation is present as debtor to the plaintiff in every state where such agency exists, and the credit is also present at the same time in each of such jurisdictions. The admission of such a principle would give rise to most embarrassing conflicts of jurisdiction, and subject creditors of domestic corporations to great prejudice. We think the rule is that a domestic corporation at all times has its exclusive residence and domicile in the jurisdiction of origin, and that it cannot be garnished in another jurisdiction for

debts owing by it to home creditors, so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over the person of such creditor."

The same principle is laid down in *Louisville & N. R. Co. v. Dooley*, 78 Ala. 524; *Missouri P. R. Co. v. Malby*, 34 Kan. 125; *Wright v. Chicago, B. & Q. R. Co.* 19 Neb. 175, 56 Am. Rep. 747; *Missouri P. R. Co. v. Sharitt*, 43 Kan. 375, 8 L. R. A. 385; *Keating v. American Refrigerator Co.* 32 Mo. App. 293; *Pielder v. Jessup*, 24 Mo. App. 91; *Green v. Farmers' & Citizens' Bank*, 25 Conn. 452; *Lawrence v. Smith*, 45 N. H. 533, 86 Am. Dec. 183; *Nye v. Lacombe*, 21 Pick. 263; *Pierce v. Chicago & N. W. R. Co.* 36 Wis. 283; *Renier v. Hurlbut*, 81 Wis. 24, 14 L. R. A. 562; *Boerett v. Connecticut Mut. L. Ins. Co.* 4 Colo. App. 509; *Baylies v. Houghton*, 15 Vt. 626; *Tingley v. Bateman*, 10 Mass. 348; *Sawyer v. Thompson*, 24 N. H. 510; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630.

It is abundantly established by the decisions of the Supreme Court of the United States that, no matter what business a corporation does in another state, its residence is exclusively in the state of its creation. *Shaw v. Quincy Min. Co.* 145 U. S. 444, 86 L. ed. 768; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 374; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404, 15 L. ed. 451, and a number of other cases holding the same principle cited in the learned opinion of Mr. Justice Gray first above named.

Nor are the cases in Michigan opposed to the view we have taken. The case most relied upon is that of *Newland v. Reilly*, 85 Mich. 151. In that case residents of Boston brought an action in assumpsit in a state court of Michigan against residents of New York as principal defendants, and served a writ of garnishment upon residents of Detroit within that state. Though the contract of indebtedness was not to be performed within the state of Michigan, the court held that, as the debt was owing by the residents of Michigan, the *res* was within the jurisdiction of the courts of that state. Certainly there is nothing here to conflict with our holding that, where neither the plaintiff nor the defendant nor the garnishee are residents of the state of Michigan, and the debt is not to be paid within the state of Michigan, the debt sought to be garnished has no *situs* in that state. In *Coffrode v. Gartner*, 79 Mich. 332, 7 L. R. A. 511, the supreme court held that the plaintiffs, who were nonresidents of the state, might bring their action against a non-resident, and proceed to judgment in the courts of the state for the purpose of subjecting credits in the hands of three persons, residents of the state, to the payment of such debt, although no personal service could be made upon the principal defendant within the state. In this case the debtor owing the debt was a resident of Michigan, and the control of its payment would therefore seem to have been within Michigan's sovereign power. In *Drake v. Lake Shore & M. S. R. Co.* 69 Mich. 168, plaintiff was a resident of Michigan, who had acquired the claim by assignment from a resident of Indiana.

the defendant was a citizen of Indiana, and the garnishee defendant was a corporation organized under the laws of Indiana and Michigan, and doing business in each state. The contract was made between the defendant and the garnishee in Indiana, and payment was to be there made. No service was made upon the defendant. It appeared that the debt in Indiana was exempted from attachment, and some of the reasoning of the court proceeds on this as a premise; but the whole tenor of the opinion is to the effect

that the facts that the original creditor and the original debtor were residents of Indiana, and that the debt was contracted in Indiana, and was made payable in that state, prevented the exercise of jurisdiction over the debt in Michigan without personal service upon the principal defendant. We do not find anything in any of the other cases cited from the Michigan courts holding a different conclusion.

The judgment of the Circuit Court is affirmed.

MICHIGAN SUPREME COURT.

John B. SMITH, Treasurer of Eaton County,
v.
GERMAN INSURANCE COMPANY, of
Freeport, Illinois, *Plff. in Err.*

(.....Mich.....)

1. The legislature may lawfully provide that interest as a taxpayer of a county shall not disqualify a person from acting as juror in a suit in which the county is a party.
2. Painters employed in repainting a building are not "mechanics" within the provision of an insurance policy respecting the employment of mechanics on the building.
3. An insurer waives a cause of forfeiture of a policy by failing to mention it when it undertakes to state definitely its reasons for denying liability thereon.
4. Gasoline is not "kept, used, or allowed" on the premises insured within the meaning of a provision for avoiding the policy, by leaving a five-gallon can containing gasoline in the building for a number of days for use in burning off old paint preparatory to repainting the building.
5. The increase of hazard by using gasoline to burn old paint from a brick and stone building is a question for the jury, where there is some testimony to show that this was the custom of painters.

(Grant, J., dissents).

(December 10, 1895.)

ERROR to the Circuit Court for Eaton County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas Bates, with **Messrs. Howard & Roos**, for plaintiff in error:

It tends to bring the law itself into disrepute when by astute and subtle distinctions a plain case is attempted to be taken without the operation of a clear, reasonable, and natural obligation of the contract.

Mack v. Rochester German Ins. Co. 106 N. Y. 500.

NOTE.—For a similar case, see *First Cong. Church v. Holyoke Mut. F. Ins. Co.* (Mass.) 19 L. R. A. 587. 30 L. R. A.

If the assured allows any building or repairing operations to go on for more than the limited time without a permit, he will of course vitiate his policy.

Richards, Ins. 2d ed. 182.

Gasoline was used and was kept and was allowed here in such a way as would avoid this policy of insurance.

Daniels v. Equitable F. Ins. Co. 48 Conn. 105; *Appleby v. Astor F. Ins. Co.* 54 N. Y. 253; *Pindar v. Continental Ins. Co.* 83 N. Y. 364, 97 Am. Dec. 795; *Lee v. Howard F. Ins. Co.* 3 Gray, 592; *Whitmarsh v. Charter Oak F. Ins. Co.* 3 Allen, 581; *Richards v. Protection Ins. Co.* 80 Me. 273.

The hazard was increased a thousand fold, and ordinary common sense would abash a man out of saying that this risk was not increased.

Williams v. People's F. Ins. Co. 57 N. Y. 274; *Kyle v. Commercial Union Assur. Co.* 149 Mass. 116, 3 L. R. A. 508; *Imperial F. Ins. Co. v. Code County*, 151 U. S. 452, 88 L. ed. 331; *Richards, Ins.* p. 67; *First Cong. Ch. v. Holyoke Mut. F. Ins. Co.* 158 Mass. 476, 19 L. R. A. 587 (1895); *Liverpool & L. & G. Ins. Co. v. Gunther*, 116 U. S. 118, 29 L. ed. 575.

As bearing upon the question whether the use of a naphtha torch would increase the risk, the defendants might show, if they could, by an expert, in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use.

Webber v. Eastern B. Co. 3 Met. 147; *Lucas v. Dorchester Mut. F. Ins. Co.* 105 Mass. 297, 7 Am. Rep. 522; *Cornish v. Farm Bldgs. F. Ins. Co.* 74 N. Y. 295; *Hartman v. Keytons Ins. Co.* 21 Pa. 466; *Planters' Mut. Ins. Co. v. Rowland*, 66 Md. 236.

The contract is that if the gasoline be kept, used, or allowed on the premises, the policy shall be void, etc. Under this provision of the policy, it makes no difference whether the fire originated from the gasoline or not. If it be kept, used, or allowed on the premises, it makes void the policy, and no recovery can be had under a void contract.

Mead v. Northwestern Ins. Co. 7 N. Y. 530; *Kyle v. Commercial Union Assur. Co.* 149 Mass. 116, 3 L. R. A. 508; *Imperial F. Ins. Co. v. Code County*, 151 U. S. 452, 88 L. ed. 281.

Messrs. Lyman H. McCall and George Huggott, for defendant in error:

Insurers may impose any lawful condition upon the insured, as a basis upon which the risk will be carried; but it must use language that leaves no doubt as to the meaning of the condition.

Wood, Fire Ins. pp. 166, 168, 144; *Utter v. Travelers' Ins. Co.* 65 Mich. 546; *Residence F. Ins. Co. v. Hannawold*, 87 Mich. 105; *Hoffman v. Aetna F. Ins. Co.* 82 N. Y. 405, 88 Am. Dec. 387.

The term "mechanics" does not comprehend common painters.

Morse v. Buffalo F. & M. Ins. Co. 30 Wis. 539, 11 Am. Rep. 687; *Mason v. Perrott*, 17 Mich. 336, 97 Am. Dec. 191; *Berks County v. Bertolet*, 13 Pa. 525; *Story v. Walker*, 11 Lea, 515.

Defendant had waived any breach of this condition of the policy, if any had ever occurred as claimed.

Toule v. Ionia, E. & B. F. Mut. F. Ins. Co. 91 Mich. 227; *Castner v. Farmers' Mut. F. Ins. Co.* 60 Mich. 275; *Richards v. Washington F. & M. Ins. Co.* 60 Mich. 420; *Brink v. Hanover F. Ins. Co.* 80 N. Y. 108; *Prentice v. Knickerbocker L. Ins. Co.* 77 N. Y. 483, 88 Am. Rep. 651; *Goodwin v. Massachusetts Mut. L. Ins. Co.* 78 N. Y. 488.

When the defendant charged that gasoline had been stored in the building, it asserted, in effect, that it had been put there for safe keeping, to be taken out in the same condition.

Anderson, Law Dict. title *Stored*; *New York Equitable Ins. Co. v. Langdon*, 6 Wend. 628; *O'Neil v. Buffalo F. Ins. Co.* 8 N. Y. 127; *Dobson v. Solteby*, Moody & M. 90; *Mears v. Humboldt Ins. Co.* 92 Pa. 15, 87 Am. Rep. 647; 1 Wood, Fire Ins. 2d ed. § 253; *Hall v. Insurance Co. of North America*, 58 N. Y. 292, 17 Am. Rep. 255.

General prohibitory provisions in a policy are not intended to prevent the making of necessary repairs, and the using of such means as are reasonably required for that purpose.

1 Wood, Fire Ins. 2d ed. 259; *First Cong. Ch. v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, 19 L. R. A. 589.

The strict rule claimed by defendants would prevent the assured from painting his house or cleaning his furniture, as it would be difficult to do either without using some of the prohibited articles.

Mears v. Humboldt Ins. Co. 92 Pa. 15, 87 Am. Rep. 647; *Au Sable Lumber Co. v. Detroit Manufacturers' Mut. F. Ins. Co.* 89 Mich. 407; 1 Wood, Fire Ins. 2d ed. § 260.

Long, J., delivered the opinion of the court:

On October 28, 1893, the defendant issued to the treasurer of Eaton county its policy of insurance, covering \$3,000 on the Eaton county court-house, for three years. The policy was the Michigan standard form, and contained the following conditions: "This policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the hazard be increased by any means within the control or knowledge of the insured, or if mechanics be employed in building, altering, or repairing the within-

described premises for more than fifteen days at any one time, or if there be kept, used, or allowed on the above-described premises benzine, naphtha, or other explosives." It appears that on October 12, 1893, some two weeks before this policy was issued, the board of supervisors provided by resolution for the appointment of a committee to repaint the court-house. This committee, on June 1, 1894, entered into a written contract with S. H. Sleater to have such work performed. Sleater and his employees commenced this repainting three weeks and three days previous to the fire, and continued the work, with the exception of one or two days, up to that time. For the purpose of removing the old paint, preparatory to repainting, gasoline torches were used to blister or loosen it. The court-house was a brick and stone structure, with metal roof and tower. The framework of the roof, tower, and cornice was wood, the tower and cornice being covered with galvanized iron, and the roof with tin. The iron work of the building, except the roof, had been previously painted and sanded to imitate stone, and this sanded paint, at the time the policy was issued, was peeling off; and it is claimed that, in order to make a good job of painting, it was necessary that it be scraped off the iron work. Some contention is made on the part of the defendant that, during the time these torches were being used, the season was very dry; while, on the other hand, plaintiff's testimony showed that from the 16th to the 24th of June of that year there was considerable rain, and that on the 28th it rained nearly all day. It does appear that by the 4th of July most of the paint had been removed from the cornice by the use of these torches, and that Mr. Horn, who had done most of the work on the cornice, had worked some portion of that day thereon, when, about half-past 5 in the afternoon, the court-house was discovered to be on fire. The fire seems to have originated some 15 feet distant from where Mr. Horn last used his torch on that day. After the fire, the part of the cornice where he last worked was found to be intact. Defendant contends that the torch had come in contact with some straw and other substance carried into the cornice by the birds, and that the iron work of the cornice in various places had become loosened, so that, by the use of the torches, the fire, penetrating through such crevices, communicated with the wood work. But we think this statement hardly borne out by the record; and Mr. Horn testifies that he found only two places where the galvanized iron was clear off; that one of the little panels had come off, but he had passed over that, and that there was one other bad place on the west end, but he had not reached that when the fire occurred; that all the balance of the cornice was in good condition, and he found no place where the seams had opened. There is little contention, however, but that the fire was in some way communicated by the use of this torch. It also appears in the case that the gasoline used in these torches was carried into the tower of the court-house in a five-gallon can; and, in order to supply the torches, the men passed over the roof of the building into the tower

and filled them from the can; and, up to the time of the fire, Mr. Horn had used from one half to a gallon per day, and the others something more than that. The torches were so constructed that, by pumping in air, a gas would be generated, which, if ignited, would create a very hot flame. As some of the witnesses express it, it was upon the same principle as the blow pump used by jewelers in welding their jewelry. Replying to the letter of plaintiff, inclosing proofs of loss, the defendant, under date of October 1, 1894, wrote as follows: "We have to say that we have given the matter prompt attention, and thoroughly investigated as to the origin of this fire, and as to the condition of the property at the time of the fire, and find there was employed at the time of the fire, and previous thereto, one or more men who were using gasoline torches for the purpose of burning off paint on the cornices and other portions of the court-house, and there was stored in the court-house gasoline for this use and purpose in considerable quantities, and in such quantities as would be a large increase of the hazard; and, further, the use of gasoline in gasoline burning torches for burning off paint is a very great increase of hazard, so much so that it is a violation of the conditions of the contract; and, with the information we now have as to the use of this gasoline and its storage in the building,—all within the knowledge and control of yourself, as treasurer, and of the county commissioners of your county, having charge of the county property,—this company must conclude that such act on the part of the proper officials of Eaton county was a voidance of the contract, and that by this serious increase of hazard the policy was voided before the fire. Hence we call your attention to these facts to explain to you the position which this company would be obliged to take in this case: If, as we understand from the reports we have received, these conditions existed, clearly the policy was void and of no effect, and there could be no liability under it after the use and storage of gasoline in and on the premises. And, further, that you may not be misled as to the position of this company, we again repeat, if these conditions as to the use and storage of gasoline existed, the policy was absolutely void, and there is no liability thereunder." Upon the trial, before a jury, in Eaton county, the plaintiff had verdict and judgment for the amount of the policy, with interest.

The first objection to the proceedings relates to the trial of the cause in Eaton county. Before the trial came on, the defendant moved for a change of venue, based upon the affidavit of one of its counsel, which states "that in each of said causes [there were four suits pending upon separate insurance policies] there will be an issue of fact as well as issue of law to be determined, in the opinion and judgment of the deponent, and deponent has thoroughly examined into said cases, and believes he understands the issue involved thereunder. Deponent further states that, in his judgment, it will be impossible to get an impartial jury to try said causes, or either of them, in said county, from the fact that

the jurymen, being taxpayers, would be directly and financially interested in having the plaintiff recover judgment." This motion was overruled. At the commencement of the trial, before the jury were sworn, counsel for defendant, in order to again raise the question, challenged each juror on the ground that he was a taxpayer of the county, and therefore incompetent to sit in the case. These challenges were overruled. Section 7555, 2 How. Anno. Stat., provides that the list of jurymen shall be taken from the assessment roll, and each regular juror was presumably a taxpayer of that county; but section 466, 1 How. Anno. Stat., provides: "On the trial of every action in which a county shall be interested, the electors and inhabitants of such county shall be competent witnesses and jurors." The contention is that this act is unconstitutional, as it seeks to deprive a party of the right to a trial by an impartial jury. We think there is no force in this contention. It is competent for the legislature to provide that, where the interest of a person is merely that of a taxpayer of a municipal corporation, it shall constitute no disqualification of him as a juror, judge, or commissioner in the case where a corporation is a party. As was said in *Minneapolis v. Wilkin*, 30 Minn. 142: "This does not infringe upon the constitutional right of a party to an impartial tribunal to hear his cause. Public policy and the necessities of the case require that this should be so. The ground upon which the ruling is usually placed is that such an interest is so remote, indirect, and insignificant that it may be fairly supposed to be incapable of affecting the judgment or influencing the conduct." This same rule is laid down by Judge Cooley in his work on *Constitutional Limitations*, 6th ed. p. 508.

The principal contention arises over the charge of the court, which is as follows: "No. 1. I instruct you that there is no foundation for the claim in this cause on the part of the defendant that the policy in question was rendered void by reason of mechanics having been employed in repairing the building for more than fifteen days without any agreement indorsed upon the policy or added thereto permitting the same. The evidence clearly shows that only painters were employed in repainting the building. Painters are not 'mechanics' in the sense of this term as used in this policy; and neither the painters employed nor the work they did is embraced in this provision. And, further, I instruct you that, were such employees and their work comprehended within the meaning of this provision, still that the defendant has waived any breach thereof, if any ever occurred, and is now estopped from raising this question. You will therefore not consider this objection as constituting any defense whatever to this action. No. 2. You are further instructed that the third objection of defendant—that is, that gasoline or naphtha was stored in the court-house in violation of the provisions of the policy prohibiting the keeping, using, or allowing on the premises of benzine, gasoline, naphtha, or other explosive—is also without force or foundation.

This condition in the policy must be understood as prohibiting only the habitual keeping, using, or allowing of any of these articles on the premises, and not the occasional introduction thereof for some temporary purpose connected with their occupation, such as making ordinary or necessary repairs, and the like. I therefore charge you that there is no evidence in this cause tending to show a violation of this condition, and hence a recovery by the plaintiff cannot be defeated by reason of this objection. No. 8. As to whether there has been an increase of hazard or violation of the terms of the policy within the meaning of its terms as understood and contemplated by the parties, I instruct you that, in determining whether or not there has been an increase of risk, it is essential to ascertain what the parties must be presumed to have contemplated when the insurance was made. And this involves the consideration of the usages and incidents of the risk, because where any change is warranted by the usage or usual incidents of the risk, although it in fact increased the risk, it does not come within the prohibition, because it is presumed to have been contemplated. No. 4. The well-settled doctrine seems to be that that which is necessary for the protection of the property or its preservation, such as ordinary repairs, by way of painting or otherwise, or that which is usual or incident to it for the purpose for which it is employed, when insured, must be regarded as within the contemplation of the parties, and excepted from the operation of any stipulation apparently to the contrary. No. 5. You are further instructed that the right to repair buildings is incident to the ownership and use of the property, and alterations which do not increase the risk under an insurance policy, as well as all ordinary repairs, may be made without affecting the validity of the policy. And hence, although, in making any such repairs, hazardous articles are introduced into the building, such as gasoline, oils, turpentine, paints, etc., the insurer is not relieved from liability if such articles are necessary incidents to the repairs in progress. No. 6. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in proper condition by making repairs upon it; and although the making of ordinary or necessary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of articles whose use in a business carried on in the building is prohibited by the policy, still the insurer would not be relieved from liability by reason of such repairs or such temporary increase of risk. No. 7. You are further instructed that, in the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like those we are now considering in the policy in question should not be deemed to apply to an increase of risk caused by reason of any such repairs, or to the use of an article necessary therefor or for the preservation of the property. And I instruct you that if it was reasonably nec-

essary to remove the old paint from the building, as shown in this cause, for the purpose of properly repairing it, and that the use of the gasoline burner was reasonable and proper for that purpose, having reference to the nature of the building, the danger of fire, as well as to other considerations properly connected with the transaction, the policy would not be rendered void by reason of such use, and such use would constitute no defense to this action."

The question first presented by the charge is whether the painters employed were "mechanics" within the meaning of the policy, so that the insured was bound to obtain the indorsement of the company upon the policy permitting the repairs, inasmuch as these workmen were engaged for more than fifteen days. Plaintiff contends, (1) that they were not such mechanics; (2) that, if they were, the defendant waived any breach of that condition by its letter of October 1, 1894.

Webster defines the word "mechanic" as "one skilled or employed in shaping and uniting materials, such as wood, metals, etc., into any kind of structure, machine, or other object requiring the use of tools or instruments." The American Encyclopedia Dictionary defines the term as "one who is employed or skilled in the construction of materials, as wood, metal, etc., into any kind of structure or machine; one who is skilled in the use of tools or instruments; one who follows a mechanical trade for a living." In Anderson's Law Dictionary the term is defined as "a workman employed in shaping and uniting materials, such as wood, metal, into some kind of structure, machine, or other object requiring the use of tools." In Crabb's English Synonyms the distinction between a mechanic and a painter is drawn as follows: "The mechanic is a species of artisan who works at arts purely mechanical, in distinction from those who contribute to completion and embellishment of any objects. On this ground the shoemaker is a mechanic, and a common painter is a simple artisan." It is apparent that the common acceptance of the term "mechanic" does not include painters, and that painting was not intended by the terms of this policy to be included in those repairs which required the assent of the company to be indorsed upon the policy. To make the case more certain upon this point, when Mr. Rowe, who was called by the defendant as an expert upon insurance matters, was cross-examined, he testified: "The company I represent issues a permit for repairs. Never was called upon to issue a permit for painting alone. We never regarded painting alone as the kind of repairs that was contemplated by the policy."

We think the court was also right in stating to the jury that, if the painters were included within the term "mechanic" as used in the policy, clearly there was a waiver of any such claim by the letter of October 1, 1894. In the letter the company admits thoroughly examining the loss, the origin of the fire and attendant circumstances, and undertakes to state definitely its reasons for denying liability on the policy. It is apparent that the ground, and the only ground,

and filled them from the can; and, up to the time of the fire, Mr. Hora had used from one half to a gallon per day, and the others something more than that. The torches were so constructed that, by pumping in air, a gas would be generated, which, if ignited, would create a very hot flame. As some of the witnesses express it, it was upon the same principle as the blow pump used by jewelers in welding their jewelry. Replying to the letter of plaintiff, inclosing proofs of loss, the defendant, under date of October 1, 1894, wrote as follows: "We have to say that we have given the matter prompt attention, and thoroughly investigated as to the origin of this fire, and as to the condition of the property at the time of the fire, and find there was employed at the time of the fire, and previous thereto, one or more men who were using gasoline torches for the purpose of burning off paint on the cornices and other portions of the court-house, and there was stored in the court-house gasoline for this use and purpose in considerable quantities, and in such quantities as would be a large increase of the hazard; and, further, the use of gasoline in gasoline burning torches for burning off paint is a very great increase of hazard, so much so that it is a violation of the conditions of the contract; and, with the information we now have as to the use of this gasoline and its storage in the building,—all within the knowledge and control of yourself, as treasurer, and of the county commissioners of your county, having charge of the county property,—this company must conclude that such act on the part of the proper officials of Eaton county was a voidance of the contract, and that by this serious increase of hazard the policy was voided before the fire. Hence we call your attention to these facts to explain to you the position which this company would be obliged to take in this case: If, as we understand from the reports we have received, these conditions existed, clearly the policy was void and of no effect, and there could be no liability under it after the use and storage of gasoline in and on the premises. And, further, that you may not be misled as to the position of this company, we again repeat, if these conditions as to the use and storage of gasoline existed, the policy was absolutely void, and there is no liability thereunder." Upon the trial, before a jury, in Eaton county, the plaintiff had verdict and judgment for the amount of the policy, with interest.

The first objection to the proceedings relates to the trial of the cause in Eaton county. Before the trial came on, the defendant moved for a change of venue, based upon the affidavit of one of its counsel, which states "that in each of said causes [there were four suits pending upon separate insurance policies] there will be an issue of fact as well as issue of law to be determined, in the opinion and judgment of the deponent, and deponent has thoroughly examined into said cases, and believes he understands the issue involved thereunder. Deponent further states that, in his judgment, it will be impossible to get an impartial jury to try said causes, or either of them, in said county, from the fact that

the jurymen, being taxpayers, would be directly and financially interested in having the plaintiff recover judgment." This motion was overruled. At the commencement of the trial, before the jury were sworn, counsel for defendant, in order to again raise the question, challenged each juror on the ground that he was a taxpayer of the county, and therefore incompetent to sit in the case. These challenges were overruled. Section 7555, 2 How. Anno. Stat., provides that the list of jurymen shall be taken from the assessment roll, and each regular juror was presumably a taxpayer of that county; but section 466, 1 How. Anno. Stat., provides: "On the trial of every action in which a county shall be interested, the electors and inhabitants of such county shall be competent witnesses and jurors." The contention is that this act is unconstitutional, as it seeks to deprive a party of the right to a trial by an impartial jury. We think there is no force in this contention. It is competent for the legislature to provide that, where the interest of a person is merely that of a taxpayer of a municipal corporation, it shall constitute no disqualification of him as a juror, judge, or commissioner in the case where a corporation is a party. As was said in *Minneapolis v. Wilkin*, 80 Minn. 142: "This does not infringe upon the constitutional right of a party to an impartial tribunal to hear his cause. Public policy and the necessities of the case require that this should be so. The ground upon which the ruling is usually placed is that such an interest is so remote, indirect, and insignificant that it may be fairly supposed to be incapable of affecting the judgment or influencing the conduct." This same rule is laid down by Judge Cooley in his work on Constitutional Limitations, 6th ed. p. 508.

The principal contention arises over the charge of the court, which is as follows: "No. 1. I instruct you that there is no foundation for the claim in this cause on the part of the defendant that the policy in question was rendered void by reason of mechanics having been employed in repairing the building for more than fifteen days without any agreement indorsed upon the policy or added thereto permitting the same. The evidence clearly shows that only painters were employed in repainting the building. Painters are not 'mechanics' in the sense of this term as used in this policy; and neither the painters employed nor the work they did is embraced in this provision. And, further, I instruct you that, were such employees and their work comprehended within the meaning of this provision, still that the defendant has waived any breach thereof, if any ever occurred, and is now estopped from raising this question. You will therefore not consider this objection as constituting any defense whatever to this action. No. 2. You are further instructed that the third objection of defendant—that is, that gasoline or naphtha was stored in the court-house in violation of the provisions of the policy prohibiting the keeping, using, or allowing on the premises of benzine, gasoline, naphtha, or other explosive—is also without force or foundation.

This condition in the policy must be understood as prohibiting only the habitual keeping, using, or allowing of any of these articles on the premises, and not the occasional introduction thereof for some temporary purpose connected with their occupation, such as making ordinary or necessary repairs, and the like. I therefore charge you that there is no evidence in this cause tending to show a violation of this condition, and hence a recovery by the plaintiff cannot be defeated by reason of this objection. No. 8. As to whether there has been an increase of hazard or violation of the terms of the policy within the meaning of its terms as understood and contemplated by the parties, I instruct you that, in determining whether or not there has been an increase of risk, it is essential to ascertain what the parties must be presumed to have contemplated when the insurance was made. And this involves the consideration of the usages and incidents of the risk, because where any change is warranted by the usage or usual incidents of the risk, although it in fact increased the risk, it does not come within the prohibition, because it is presumed to have been contemplated. No. 4. The well-settled doctrine seems to be that that which is necessary for the protection of the property or its preservation, such as ordinary repairs, by way of painting or otherwise, or that which is usual or incident to it for the purpose for which it is employed, when insured, must be regarded as within the contemplation of the parties, and excepted from the operation of any stipulation apparently to the contrary. No. 5. You are further instructed that the right to repair buildings is incident to the ownership and use of the property, and alterations which do not increase the risk under an insurance policy, as well as all ordinary repairs, may be made without affecting the validity of the policy. And hence, although, in making any such repairs, hazardous articles are introduced into the building, such as gasoline, oils, turpentine, paints, etc., the insurer is not relieved from liability if such articles are necessary incidents to the repairs in progress. No. 6. Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in proper condition by making repairs upon it; and although the making of ordinary or necessary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of articles whose use in a business carried on in the building is prohibited by the policy, still the insurer would not be relieved from liability by reason of such repairs or such temporary increase of risk. No. 7. You are further instructed that, in the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like those we are now considering in the policy in question should not be deemed to apply to an increase of risk caused by reason of any such repairs, or to the use of an article necessary therefor or for the preservation of the property. And I instruct you that if it was reasonably nec-

essary to remove the old paint from the building, as shown in this cause, for the purpose of properly repairing it, and that the use of the gasoline burner was reasonable and proper for that purpose, having reference to the nature of the building, the danger of fire, as well as to other considerations properly connected with the transaction, the policy would not be rendered void by reason of such use, and such use would constitute no defense to this action."

The question first presented by the charge is whether the painters employed were "mechanics" within the meaning of the policy, so that the insured was bound to obtain the indorsement of the company upon the policy permitting the repairs, inasmuch as these workmen were engaged for more than fifteen days. Plaintiff contends, (1) that they were not such mechanics; (2) that, if they were, the defendant waived any breach of that condition by its letter of October 1, 1894.

Webster defines the word "mechanic" as "one skilled or employed in shaping and uniting materials, such as wood, metals, etc., into any kind of structure, machine, or other object requiring the use of tools or instruments." The American Encyclopedia Dictionary defines the term as "one who is employed or skilled in the construction of materials, as wood, metal, etc., into any kind of structure or machine; one who is skilled in the use of tools or instruments; one who follows a mechanical trade for a living." In Anderson's Law Dictionary the term is defined as "a workman employed in shaping and uniting materials, such as wood, metal, into some kind of structure, machine, or other object requiring the use of tools." In Crabb's English Synonyms the distinction between a mechanic and a painter is drawn as follows: "The mechanic is a species of artisan who works at arts purely mechanical, in distinction from those who contribute to completion and embellishment of any objects. On this ground the shoemaker is a mechanic, and a common painter is a simple artisan." It is apparent that the common acceptance of the term "mechanic" does not include painters, and that painting was not intended by the terms of this policy to be included in those repairs which required the assent of the company to be indorsed upon the policy. To make the case more certain upon this point, when Mr. Rowe, who was called by the defendant as an expert upon insurance matters, was cross-examined, he testified: "The company I represent issues a permit for repairs. Never was called upon to issue a permit for painting alone. We never regarded painting alone as the kind of repairs that was contemplated by the policy."

We think the court was also right in stating to the jury that, if the painters were included within the term "mechanic" as used in the policy, clearly there was a waiver of any such claim by the letter of October 1, 1894. In the letter the company admits thoroughly examining the loss, the origin of the fire and attendant circumstances, and undertakes to state definitely its reasons for denying liability on the policy. It is apparent that the ground, and the only ground,

upon which all liability was denied, was the storage of gasoline, though in the former part of it mention was made that men had been employed to burn off this paint. Good faith required that the company should apprise the plaintiff fully of its position; and, failing to do this, it estops itself from asserting any defense other than that brought to the notice of plaintiff. *Towle v. Ionia, E. & B. R. Mut. F. Ins. Co.* 91 Mich. 227, and cases there cited. The defendant having specifically called the attention of the insured to its objections to paying the policy, reiterating the claim made, it limited its complaint to the use and storage of gasoline. No more definite statement could have been made, and it operated as a waiver of other causes of complaint and defenses to the action.

The next objection is to the charge of the court upon the question of the use and storage of gasoline upon the premises. In the notice attached to the plea, the defendant sets out the manner in which the policy was voided under three heads: the first referring to the increased hazard to the property by the use of gasoline torches; the second referring to the employment of mechanics for more than fifteen days without the written assent of the company. The third matter of defense is set up as follows: "The gasoline or naphtha was stored in the court-house building covered by this policy at the time of said fire continuously for several days immediately preceding said fire, and that no agreement was indorsed on said policy or added thereto permitting such storage; and by reason thereof, within the true intent and meaning of the provisions of said policy, said policy became null and void." The defense then set up by this notice relates to the storage of gasoline contrary to the terms of the policy, and not to the use made of it by the workmen in removing the paint. The court construed this condition to mean only the habitual keeping, using, or allowing of any of these articles on the premises, and not the occasional introduction thereof for some temporary purpose connected with their occupation, such as making ordinary and necessary repairs or the like. While it is apparent that, under the notice, the defense upon that branch of the case was limited to the storage within the building, yet the inquiry need not be so restricted. The question is fairly presented by the charge whether the storing for the purpose for which the gasoline was used was a violation of the terms of the policy; and the court, we think, properly charged the jury on that point. In *Dobson v. Southby, Moody & M.* 90, the terms of the policy required that no fire should be kept in the building on which the rate of insurance in that case specified was paid. A tar barrel had been taken into the barn which had been insured against fire, for the purpose of repairing the building by tarring it. No fire was ordinarily kept or made there, but a fire was lighted inside to boil the tar; and, by the negligence of a servant, the building took fire, and was consumed. The insured recovered. Lord Tenterden said that the condition in the policy must be understood as forbidding

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only the habitual use of the fire, and not its occasional introduction, as, in that case, for the temporary purpose connected with the occupation of the premises. In *O'Neil v. Buffalo F. Ins. Co.* 3 N. Y. 123, the policy provided that "the true intent and meaning of the parties hereto, that in case the above-mentioned buildings, or either of them, shall at any time after the making, and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated 'hazardous' or 'extra hazardous' . . . or for the purpose of storing therein any of the articles, goods, or merchandise in the same conditions, denominated 'hazardous' or 'extra hazardous' or included in the special rates, then . . . these presents shall cease and be of no force or effect." In the conditions annexed to the policy, oil and turpentine are denominated "hazardous" goods, and spirits of turpentine "extra hazardous;" and house building or repairing is included within the memorandum of "Special Rates of Premium." In the suit upon the policy it was held that painting of the inside of this house was not an application of the house to the purpose of carrying on the trade of house repairing, and that the oil and turpentine brought into the house for the purpose of painting it were not "stored" therein within the meaning of the clauses of the policy; and the court said: "The object of that clause was to prevent the house from being used for the ordinary deposit of hazardous goods, and not for their occasional introduction for a temporary purpose necessary to make the house tenantable as a dwelling." In *New York Equitable Ins. Co. v. Langdon*, 6 Wend. 623-628, under a somewhat similar clause, it was said: "The only question then is, whether the keeping of oil and spirituous liquors in the store, under the circumstances disclosed in the case, was appropriating or using the building for the purpose of storing those articles within the meaning of the policy. Everything that was kept, either in the store or cellar, was kept for the purpose of being retailed. The smaller vessels in the store were replenished from the larger ones in the cellar, which consisted at the time of the fire of one cask of oil, one barrel of rum, one cask of Jamaica spirits, and one pipe of gin, from all of which more or less had been drawn for the use of the store. It appears to me that the word 'storing' was used by the parties in this case in the sense contended for by the plaintiff, viz., a keeping for safe custody, to be delivered out in the same condition; substantially, as when received, and applies only where the storing or safe keeping is the sole or principal object of the deposit, and not where it is merely incidental, and the keeping is only for the purpose of consumption. If I send a cask of wine to a warehouse to be kept for me, that is a storing of it; but if I put it into my cellar or my garret to be drawn off and drank, I apprehend the term would not be considered as applying." Anderson's Law Dictionary defines the term "to store" as to keep merchandise for safe custody, to be delivered in the same condi-

tion as when received. In *Mears v. Humboldt Ins. Co.* 92 Pa. 15, 87 Am. Rep. 647, the policy on a distillery forbade the insured to keep or have on the premises petroleum, naphtha, benzine, benzole, gasoline, varnish, etc., or to keep, have, or use camphene, spirit gas, or any burning fluids or chemical oils, etc. In an action on the policy it was held that this did not prohibit the temporary taking of benzine on the premises for the cleaning of machinery and the use of the same therefor. See also *Faust v. American F. Ins. Co.* (Wis.) 64 N. W. Rep. 883; *Fraim v. National F. Ins. Co.* 170 Pa. 166. We think it is clear that there was not such a storing of gasoline within the building as to avoid the policy, and the court was correct in its charge.

Defendant's counsel insist, further, that the use made of this gasoline in burning off the paint was a violation of the condition of the policy which provides: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the hazard be increased by any means within the control or knowledge of the insured." Considerable testimony was introduced tending strongly to show that it was the custom of painters, and had been for many years prior to the issuing of the policy in suit, to use these torches in removing paint; and the court submitted that question fairly to the jury. In *Wood on Fire Insurance*, 2d ed. § 253, the rule is stated: "In determining as to whether or not there has been an increase of risk, it is essential to ascertain what the parties must be presumed to have contemplated when the insurance was made, and this involves a consideration of the usages and incidents of the risk, because if the change was one warranted by the usages or usual incidents of the risk, although it in fact increased the risk, it does not come within the prohibition, because it is presumed to have been contemplated by the parties." In *First Cong. Ch. v. Holyoke Mut. F. Ins. Co.* 158 Mass. 475, and also reported in 19 L. R. A. 587, it appeared that the church edifice was being repainted on the outside. It was built of wood, and had been painted and sanded. The paint had peeled and curled at the time of the fire, and for some time prior thereto the old paint was being taken off by the use of naphtha in torches similar to the ones in the present suit. The building was destroyed by fire after the workmen had been thus employed for nearly a month, and when the work was nearly completed. The policy provided as follows:

"This policy shall be void if . . . without the assent in writing or in print of the company . . . the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; . . . or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The court said: "On the undisputed facts as stated in the bill of 30 L. R. A.

exceptions, the only ground on which the plaintiff could fairly ask to present a question to the jury is upon its contention that the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policy there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose." The court further said: "The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to prohibit the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. We are therefore of opinion that if the use of naphtha at the time and in the manner in which it was used was "reasonable and proper in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void."

Some question is raised in reference to the admission and rejection of the testimony of witnesses, which we have carefully examined, but find no error in the record. The only question of fact in the case was fairly submitted to the jury, and we think the charge of the court contained a correct statement of the principles of law involved.

The judgment will be affirmed.

Hooker, J., took no part in the decision. **McGrath, Ch. J.**, and **Montgomery, J.**, concurred with **Long, J.**

Grant, J., dissenting:

The contract of insurance in this case provided that it should "be void if the hazard be increased by any means within the control or knowledge of the insured, unless otherwise provided by agreement indorsed thereon or added thereto; or if, any usage, custom of trade or manufacture to the contrary notwithstanding, there be kept, used, or allowed on the premises, benzine, gasoline, naphtha, or other explosives." The rate of insurance was very low. The property insured was a court-house, standing in the center of a block with no other buildings on it.

1. It is conclusively established by the evidence, and is in fact conceded, that gasoline was kept, used, and allowed in the tower of the court-house for twenty-four days; that the floor of this tower was of pine, that the timbers were of pine, and that they were as dry as tinder; that three torches or blowpipes were used to burn the paint off from the cornice, which was constructed of pine timber on the inside and covered with galvanized iron on the outside; that these

torches did set the building on fire, and cause its destruction; that the defendant was not informed that this was to be done; that its assent was not obtained; and that the proper county authorities contemplated and permitted it, and had full knowledge of the method employed while it was being done. The sole claim of the plaintiff is that this method was customary and reasonably safe, that it was a proper way of making repairs, and was contemplated by the contract of insurance. Can the above language be reasonably construed to mean that these parties contracted that plaintiff might keep, or permit to be kept, within this building, for weeks, one of the most volatile and inflammable of substances, to be used by its painters, not upon the inside, but upon the outside, of the building? There was no necessity for storing it there. It could as well have been kept outside the building. It was, possibly, a little more convenient for the painters to keep it in the tower; but convenience is not the test, but reasonable necessity. Where the insured seeks to avoid the plain terms of his policy upon the ground of repairs, it certainly is incumbent upon him to show some necessity for the methods employed. The following authorities are relied on by the plaintiff: *Dobson v. Sotheby*, Moody & M. 90; *O'Neil v. Buffalo F. Ins. Co.* 8 N. Y. 123; *New York Equitable Ins. Co. v. Langdon*, 6 Wend. 628; *Mears v. Humboldt Ins. Co.* 92 Pa. 15, 87 Am. Rep. 647. In neither of these cases was the language of the policy like that in the present case. In *Dobson v. Sotheby* it appears that there was no agreement in the policy, but the rate of premium was the lowest rate, and only payable for buildings of a certain description wherein "no fire is kept." The court held that this language applied to habitual fires, but said: "If the company intended to stipulate, not merely that no fire should habitually be kept on the premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect."

Is there any difference in meaning between the terms "allowed" and "introduced?" As used in this contract, "to allow," as defined by Webster, means "to permit; suffer; tolerate." Will it be contended that if, in that case, the policy had provided that no fire should be kept, used, or allowed in the building, the court would have held, as it did, that it was proper to make a fire to heat tar? In *O'Neil v. Buffalo F. Ins. Co.* the policy forbade the storing of hazardous or extra hazardous goods. The property insured was a private dwelling. Painters were painting the inside of the house, and brought into it, and kept there while the work was going on, the necessary material,—paints, oil, and turpentine. It was held that the object of that clause was to prevent the house from being used for the ordinary deposit of hazardous goods. In *Mears v. Humboldt Ins. Co.* the provision in the policy was as follows: That "if the assured shall keep or have, in any place on the insured premises where this policy may apply, petroleum, naphtha, benzole, gasoline, benzine, varnish, or

any product, in whole or in part, of either; or gunpowder, fireworks, nitro-glycerine, phosphorus, saltpetre, nitrate of soda; or keep, have, or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy,—then and in every such case, this policy shall be void." The plaintiff purchased eight or ten gallons of benzine and a small quantity of carbon oil, and stored them in his bonded warehouse, situated some 40 or 50 yards distant from the insured premises. His workmen carried the benzine in a small tin can from the warehouse to the distillery, and used it in cleaning the machinery. The court held that the words, "keep or have," were intended to prevent a storage either permanently or habitually, and that bringing a prohibited article upon the premises upon a single occasion, and for the sole purpose of cleaning machinery, was not keeping or having it there, within the meaning of the policy. Stress was laid upon the fact that the benzine was not kept on the insured premises during the period of its use, but was stored in the bonded warehouse. Upon the other point the court said: "The use of benzine is not prohibited in terms. If prohibited at all it must be because benzine comes within the description of burning fluid or chemical oils, which, in their nature, were like camphene or spirit gas, and there was no proof that it was of like nature." In *New York Equitable Ins. Co. v. Langdon* the two defenses were that the business of a grocer was hazardous because he kept liquor and oil, and because he kept these articles for the purpose of retailing. It was held that the term "storing" meant a keeping for safe custody, and not where the grocer kept them for retail. We are cited to no authorities, nor have I been able to find any, where the provision that these articles shall not be "used, kept, or allowed" upon the premises has been construed to cover a case like the present. If the plaintiff had permitted these painters to keep gasoline in the court-house for three weeks, while they were painting the property of some other person near by, or some other county building, it would, under all the authorities, have rendered the policy void. The danger would have been no greater in those cases than in this, and apparently no greater necessity for such keeping. The language of this contract is clear and unequivocal. It clearly forbids certain acts, to which the plaintiff agreed, under the penalty of the forfeiture of his policy. To hold that they were not forbidden is, in my judgment, directly contrary to the plainest and most unequivocal language, and imposes a contract upon the parties which they never made.

2. It requires no testimony to inform any one that the application of an intense flame to dry pine wood is dangerous and hazardous. A thin coat of galvanized iron was placed over the woodwork upon this cornice. Upon this iron was blown a flame of intense heat. It is common knowledge that, if there was a hole or open seam in this sheet iron the flame would penetrate, and set fire to the wood inside, and also that it would quickly heat the thin iron sufficiently to ignite the

wood with which it was in contact. There is no testimony that this flame was not applied with due care, upon the assumption that it was proper to apply it at all. It is conceded that it set fire to the building, and that it was thereby destroyed. Either there was some hole or defective seam through which the flame entered, or else the iron was so heated by the application of the flame that it set fire to the woodwork. It is therefore established that, notwithstanding the care used by the painters, the use of the flame was dangerous, increased the hazard, and destroyed the building. It is insisted, however, that this is a customary and proper method of removing old paint from buildings, and this brings us to an examination of the testimony. On account of the importance of the case in the construction of insurance contracts, and the—to me—strange claim of the plaintiff, I give the substance of the entire testimony on the use of these torches.

Mr. Samuel H. Row, who was commissioner of insurance of this state for twelve years, and has been the general agent for an insurance company in this state for ten years, testified that he never knew paint to be burned off a building before, did not know that it was customary to do so, and that no company would write insurance knowing that it was to be done, and that the increase of hazard was so great that his company would at once have canceled the policy had it known what was to be done, and that in his judgment it was a material increase of hazard. Mr. Cornell and Mr. Tillotson, both of whom have been state agents for eighteen to twenty years, gave similar testimony. No one, experienced or inexperienced in the insurance business, has given any testimony tending to show that insurers have ever voluntarily assumed such a risk.

Mr. Sleater, who had the contract to paint the building, testified that he could not tell whether or not any seams were open in the cornice. He never made an examination. That this was a proper way to remove the paint, and it could not have been done in any other way in ten years. He couldn't tell exactly how long it was necessary to direct the blaze upon the paint in order to blister it up. It was very soon,—“according to how much you could turn off. You could rig that lamp so that it would take up one-half hour or a quarter of a minute. The ordinary way, we worked right along with it, using it in one hand and taking the knife in the other, and passed right along. I got one of these torches of Mr. Hill, and one of Mr. Woodbury. Mr. Woodbury is a plumber in this city, and Mr. Hill is a painter. I had none of my own. I have been painting twenty-two years, and never owned a torch,—not that kind of a torch. I never used this one before I used it on this building,—not that kind of a torch. In my profession or trade as a painter, I never used a gasoline torch in painting before. In my twenty-two years' experience, this was the first time I had occasion to use a gasoline torch, and I guess it is not very common to use such torches in small towns. I have heard of them

being used in Charlotte before. I have never seen them in use, until I was shown this one, and how to use it. I was never called upon, in my twenty-two years' practice, to take off that kind of paint before. I presume that kind of a torch would be more liable to set fire to a building than if the torch had not been used. Yes, sir; likely it would. The flame went with a good deal of force. With some force. If it got in back of the—through the joints, and got in back of the galvanized iron, it would be right on the tinder box, I presume. I have burned the paint off two buildings in Charlotte; off two buildings in my twenty-two years' experience. Two buildings, and this was one of them; one other beside this building. I burned off what there was, just a small portion of it. It was in front of a store where it had scaled. With the exception of one front of a store and this building, I had never done anything of that sort in twenty-two years.” The front of this store was of solid iron.

Francis Horn was a painter, and worked for Mr. Sleater on this building, and was working on it when it took fire. He testified: “In this lamp, when full, I had a quart of gasoline. We put in a quart, and this air pump would force the air under the gasoline, and around in some way, so as to force it out the top. That would generate the gas, and it would be this gas that would burn. It would be hard to tell how long a flame that would make. We might pump it full, or as full as you could, and force through a flame 5 or 6 inches. The flame would depend upon how hard you work the pump. I suppose it is a good deal upon the same principle of the blow pump used by jewelers in welding their jewelry. It creates a hot flame. In order to remove the paint, you would have to make this hot enough to blister the paint. I had been using the torch around the cornice from the beginning. Had been using it something over three weeks at the time of the fire. I found a place on the cornice where this galvanized iron was broken off. I found no places where the seams had opened; only where it came clear off. There were two places, I believe, where it came clear off. That was in behind the wood. I noticed places there where the sparrows had taken up trash or straw in the cornice. I found it there. I didn't notice other places until after the fire. In the eagle, I believe, there was some which I discovered after the fire. I did not burn the paint off from those. There were three torches used on the job. They were all gasoline torches. We used a gallon, or a little over, per day. We averaged a gallon per day during all the time. We kept the gasoline in the tower at the court-house. We kept a five-gallon can of it. When we would use up five gallons, we would go and get it filled again, and bring it up there, and put it in the tower of the court-house, and use out of it until it was all gone. One of these lamps took two people to use it. It didn't pump air in the same way as the one I used. They used a rubber pump, and I used a metal. It took one to hold, and the other to scrape off. They didn't have to pump it. They pumped it full, and let it

go. Would have to fill them very often; about four times a day." Philip Wareham was walking along the street just before the fire, saw Mr. Horn working with the blow lamp, and could hear the noise of it upon the street.

Plaintiff introduced as a witness one Michael Wolf, a painter from Grand Rapids, who testified that they used these lamps "on any kind of a building,—on wooden buildings. Been in the habit of using them for the last fifteen years, that I can remember. We keep them as a part of our outfit for work. We have got half a dozen in our store now for that purpose. I know of no other way of removing the paint from cornice work of a building, where it is sanded, and it is flaky. This is the only proper way to do it as I know of, or anybody else that I heard of. Used them right along for fifteen years every summer and spring. Generally carry a lamp right along with us. That is, the outside work. Sometimes use them on the inside, where there is paint to be burned off. I never heard of an accident occurring from the use of these lamps. I never had one, and I never heard of one. I don't see any danger in them. They cannot explode. I would consider it perfectly safe to use one of those lamps for the purpose of removing paint. I know of no other way to remove it, unless they tear the cornice down and put on a new one. There would be no such thing as scraping it off, not in a building of this kind. It would take a man all his lifetime, and then he could not do it proper. By the use of these lamps, we do not heat the paint very hot. You have got to hold the lamp until the paint kind of bubbles, and you follow right along with the scraper, and take the paint off as you go along. You can go in carriage shops, or in any shops, and you will find them burning lamps. They use them in carriage shops for burning off old paint,—when the buggies crack and chip off, to blister it." On cross-examination, he testified: "I burned all the paint off a wooden building, and didn't set it on fire. I did not think that a bit remarkable. A man has got to be careful. There is no more danger in burning it off than if you do not burn it off, unless a man is careless. That depends on the man, on a wooden building. Of course, we do not use an inexperienced man to burn off paint. If a man works alone, and nobody else around him, there might be danger, then, if he leaves the lamp on one spot, maybe ten or fifteen minutes. That makes it dangerous. It is dangerous if a man is inexperienced, and is using it on a wooden building. I will admit that it is dangerous on any building where the flame is liable to come in contact with the wood, or liable to come in contact with trash or straw, or anything of that kind. There is danger, if you hold the torch ten or fifteen minutes. It is liable to set fire on a frame house. You can throw a flame 8 inches out of the nozzle. It makes a roaring sound. During the last year I have burned paint off from about five houses. This last summer, in Grand Rapids. I have no idea how many houses I have painted during last summer,—a good many. We burned the paint off one

house last year on Madison avenue, that belongs to Mr. Alexander Kennedy. We burned off some paint on the inside. Burned the paint off four rooms. That is the only house we burned off last summer. It is a common thing to burn off the paint where it is necessary. It is necessary a good many times, but the people do not want to pay for doing it. They like to have it done, all right, if we do it for nothing. Only burn the paint off one out of a hundred. I remember using these gasoline torches fourteen years ago. That is the first I knew about them. I do not know how they removed the paint before that. They burned it off before I ever started to burn off. They removed it, before that, by setting it afire by turpentine, soaking it up. Used to use lye in taking paint off then, rubbing the lye over it, and scraped it off. You could not use lye on the cornices, because the lye gets into your eyes."

One H. Bower, a witness for the plaintiff, testified that he had assisted in painting the court-house, and that he saw the lamp described as having been used by Mr. Horn. "I know when it was ordered; I guess, the first time it was filled. Fred Hill ordered it. I told him where to order it, and he sent and got it. It was the time they burned off Jerry Mikesell's front, or Lamb & Spencer's now. I do not know whether three or four years ago,—two or three years ago; I could not say. That was an iron front. It was not galvanized iron. I had some experience here in the city myself burning off paint when I went away. I burned off buggies, and some furniture and doors. We used the lamp for that purpose. We used the hot iron some, too,—blistered the paint. I worked in Chicago for four years. Q. Do you know of any way they employ for the purpose of removing paint off cornice work, and off buildings, where it is peeling, and it becomes necessary to remove the paint, except by the use of these lamps? A. No, sir; not successfully. They are used there among those painters almost constantly. Burning it off is the only practical way. We have taken it off with lye and varnish, and sometimes with naphtha and benzine. They are not using that as much at present; not as much as they are burning it off. That is the only proper way for taking it off. I do not think you could use lye effectually on the cornice of this building. Taking that paint off in order to repaint it, by the use of one of these lamps, is the only way that I know of taking it off, and, in my opinion, it was a safe way to do it. I never knew of an accident occurring from the use of those lamps and removing paint in that way." On cross-examination he testified: "I have used these torches to burn off paint in Chicago on Ex-Mayor Roche's house. I think the fore part of last spring. There were six or eight men in the shop that were to work there. I used the burner myself, some of the time. There were slide doors—folding doors—in the house, that had been painted a good many times; some of the front doors; and one of the front doors was burned off. We burned the iron railing of the steps off. We burned off the barn doors. We took them out of the build-

ing. They were removed, and they were made over, and made into smaller doors. We burned them off inside the building. We took them inside, and burned them off. They were not hung in the building. They were off from the building. In addition to that, we burned off some from the wooden casing around the door or rope molding. Treated a number of houses in the city in that way. I couldn't name the houses we have treated in that way. It is very seldom we know the names of the people. I could take you right to the house if I was there, but I couldn't tell you the number. When in Chicago the last time, I worked for Mr. Widden. He does the work for insurance companies. He does work for the Aetna and the Merchants' Insurance Company in Chicago, and he does a good deal of fire work that way. Where the curtains, lots of times, a gas jet, where there was two windows together, or there was one window, where the gas jet was pretty close to the window, the window raised, and the curtains swings around, and catches fire, and burns the finish off from the casing, part of the casing would be charred; so you would have to put in a piece, and the other part, to make it like, have to take the finish off, and make it all alike; and we use a burner of naphtha or benzine, or something or other, to take that finish off, to make like the new part. I could not give you any idea of the number I have treated in that way. I think we done a dozen jobs last summer that was burning a piece of work of the kind, and also papering. I have burned buggies off here in Charlotte. I cannot remember how many houses here. I think there is more risk where there is fire around building than as though there was not. There is some risk in burning paint off from a building; that is, more than there would be if you did not burn it off."

Mr. Sleater was recalled as a witness for the plaintiff, and testified that he used, in removing paint, a heating apparatus of some kind,—sometimes a torch, and sometimes a charcoal box. On cross-examination, he testified: "During all my twenty-five years' experience I never removed paint from the outside of a building in Charlotte by gasoline torches. I have removed it off from doors on the outside of a building. Just doors taken off from a building. There is always more or less danger of fire. I know that gasoline is very explosive and exceedingly inflammable. It is about as dangerous as anything, as far as explosives is concerned. I do not know about the intensity of heat, but I presume it is about as hot as any. It is volatile, and it generates gas very rapidly. The gas which it generates is exceedingly inflammable, and burns very rapidly. I have removed paint from buggy boxes and tires with gasoline torches, while the buggy was standing in the shop. Put it in the shop, and applied the gasoline torch there."

It conclusively appears that no such custom existed in Charlotte, nor do I think it can be called a custom in Grand Rapids, where Mr. Wolf admits he does not use it upon one house in a hundred. He is the only witness

who testifies to its use upon wooden buildings, and he does not say whether such buildings upon which he used it were isolated or not. It may be entirely safe to use it upon buggies, doors, solid iron and brick buildings, or upon window and door frames set in solid brick walls or fences, where there is nothing back of them for the flames to reach; but to say that it is reasonable to use it upon wooden buildings, and upon dry timber covered with galvanized iron, is, in my judgment, contrary to reason. We know, from common experience, that shingles, clapboards, boards, and timbers will shrink and crack, and leave spaces through which a flame of this kind would instantly penetrate, and set fire to the cobwebs, dust, and dry material within. From the garrets of many houses daylight can be seen through these cracks and crevices, under the eaves and around the cornice. It appears to me past belief that the municipality of Grand Rapids, or Chicago, or any city, would permit the use of this flame upon wooden buildings, or those covered, in whole or in part, with thin sheets of tin or iron, in thickly settled localities. The danger of conflagration is too great. Such use is dangerous *per se*, and no amount of expert testimony can, in my judgment, justify a finding by court or jury that it is reasonably safe. Mr. Wolf, plaintiff's principal witness, says: "It is dangerous on any building where the flame is liable to come in contact with the wood." Was not the flame liable to come in contact with the wood in this case? Even in the *Church Case*, hereinafter cited, a bucket of water was kept at hand to put out any fire which might be kindled by the flame. This, however, would be of little use if the fire was kindled within the walls. In this case not even this precaution was taken. All the witnesses admit that it was dangerous, and increased the hazard from fire, and, even if it were customary, the unambiguous language of this contract is that the insured should not permit it. Not a single witness says that it did not increase the hazard. Is it reasonable to even suppose that the parties to this contract contemplated that the insurer should assume the risk of a flame—so hot that it would heat metal—being thrown upon the sides of this building, the interior of which was a mere tinder box? Such holding, it seems to me, is in clear violation of the terms of a contract in which there is no ambiguity and which absolutely prohibits using, allowing, or keeping gasoline. Yet, courts are asked to declare that this contract contemplated using it in its most dangerous form. The only case cited, and we presume the only one that can be found, involving this method of removing paint, is that of the *First Cong. Ch. v. Holyoke Mut. F. Ins. Co.* 19 L. R. A. 587, 158 Mass. 475. The provision of the policy involved in that case was that these inflammable articles should not be "kept or used by the insured on the premises insured." The result in that case was the same as in this. The building was destroyed. In so far as that case appears to hold, even under the terms of that policy, that it was a question for the jury to determine, I cannot yield

it my assent. The language of that policy, however, is not as strong as that of the policy here involved, since it did not contain the word "allowed." I concur in the following language there used: "Was a change of this kind increasing the risk with the knowledge, agency, and consent of the insured, an alteration of 'the situation or circumstances affecting the risk,' within the meaning of those words in the policies? Those words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision. But this change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by the fire. We are of opinion that the change of the condition was sufficiently long continued to be deemed a change in 'the situation or circumstances affecting the risk.' In the case of *Lyman v. State Mut. F. Ins. Co.* 14 Allen, 329, it was held that an alteration of a building which increased the risk for three weeks was enough to render the policy void under a similar clause." The editor of the *Lawyers' Reports Annotated*, in a note to this case, says: "The facts of the above case are unusual and the decision an important one in the law of fire insurance. The interpretation of the clause as to the use of naphtha 'on the premises' establishes a precedent where there seems to have been none before."

All the essential facts in the present case are undisputed, and the question was one of law for the court, and not of fact for the jury. In this connection I quote, with approval, the language of the court of appeals of New York, in *Appleby v. Astor F. Ins. Co.* 54 N. Y. 260, where, under somewhat similar circumstances, it was strenuously insisted that the question was one of fact for the jury: "As much as we venerate and respect the right of trial by jury, we are of opinion that the judges of the courts, while they may be supposed to have more learning in the law, are still able to comprehend an undisputed state of facts with as much intelligence as any jury that can ordinarily be impaneled." The court held that the facts in that case were, in law, a plain violation of the terms of the policy. So, in *Maack v. Rochester German Ins. Co.* 106 N. Y. 564, the court says: "We have no difficulty in agreeing with the rules of law laid down by that court, but we are quite unable to concur in the view taken by it of the evidence. The provision of the policy governing the case is framed in plain, unambiguous language, and its object and design are reasonable and free from any doubt. Certain conditions are very generally regarded by underwriters as largely increasing the hazards of insurance, and they, unless corresponding premiums are paid for the extra risks, are usually intended to be excluded from the obligation of the policy. Such are the conditions in reference to unoccupied houses, changes in the occupation from one kind of business to another more hazardous, the use of inflammable substances in buildings, and their occupation by carpenters, roofers, etc., for the purpose of making changes and alterations. These conditions, when plainly expressed in a pol-

30 L. R. A.

icy, are binding upon the parties and should be enforced by courts, if the evidence brings the case clearly within their meaning and intent." In *Liverpool & L. & G. Ins. Co. v. Gunther*, 116 U. S. 128, 29 L. ed. 580, it is said: "One of the conditions of the policy is, that if the assured shall keep or use any of the prohibited articles without written permission, it shall be void; another is that the articles named 'are not to be stored, used, kept; or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with written permission indorsed on the policy,' etc. A violation of these prohibitions by any one permitted by the assured to occupy the premises, is a violation by the assured himself. The company stipulates that it will not assume the risk arising from the presence of the articles prohibited, and if they are brought upon the premises in violation of the policy by one in whose possession and control the latter have been placed by the insured, he assumes the risk which the company has refused to accept." The plaintiff does not claim that the agents of the company were ignorant of any of the terms of this policy. They were fully aware of them. This the law presumes. Yet they chose to permit the application of this intense flame, the natural result of which was the destruction of their property, without even an examination, to determine whether it was probably safe to do so, without notice to their insurers, or any attempt to obtain their assent. The inside was a tinder box, and there were holes in the iron covering. I think this case is squarely within *Liverpool & L. & G. Ins. Co. v. Gunther*, *supra*.

8. I am of the opinion that a very damaging error was committed in admitting certain questions on the cross-examination of Mr. Row. The following will serve as illustrations: "Q. Then if I, for any purpose, carry a bottle of benzine into my house to use for some family use, and leave it there, or keep it there for that use, my policy is absolutely void, under that clause, is it?" "Q. Would you consider that a policy issued by your company, with this clause, that no benzine shall be kept or used on the premises, that if a person shall take a pint of benzine into their house, covered by such a policy, for the purpose of cleaning grease spots out of his clothing, would that void the policy?" These questions involved pure conclusions of law. The last question did not correctly state the terms of the policy, because it left out the important term "allowed." Furthermore, it allowed the jury to compare the occasional use of these articles, and a very common use, too, with the facts of the present case, a very unusual one, and to naturally say that, if the former one would not vitiate the policy, neither would the latter. Mr. Row had not been asked his opinion as to whether this policy was rendered void by the conduct of the insured. Certainly, no one would claim that his opinion would have been competent, and yet he is required to give his opinion upon other issues not involved, and having no connection with the case upon trial. The judgment should be reversed, and a new trial ordered.

Heman HAND

v.

Edmund OSGOOD, *Plff. in Err.*

(.....Mich.....)

An oral lease of land for one year, with the privilege of three, at an annual rent, is for a longer period than a year within the statute of frauds, notwithstanding the lessee's option, since he cannot compel the execution of the lease for a year because the contract contemplates the exercise of the option after the execution of the lease.

(November 5, 1895.)

ERROR to the Circuit Court for Lenawee County to review a judgment in favor of plaintiff in an action brought to recover damages for breach of an agreement to lease. *Reversed.*

The facts are stated in the opinion.

Messrs. Patterson & Flynn, for plaintiff in error:

This lease was to be for three years, hence the verbal contract would not constitute a valid lease for more than one year, even if the plaintiff had gone into possession, and inasmuch as he did not go into possession the lease is void.

Carney v. Mosher, 97 Mich. 554; *Evans v. Winona Lumber Co.* 80 Minn. 518; *McDonald v. Maltz*, 78 Mich. 685; *Tillman v. Fuller*, 18 Mich. 118; *Taylor, Land. & T.* 25, and note.

A contract void under the statute of frauds is a mere nullity and cannot be used for any purpose whatever.

Chamberlain v. Dow, 10 Mich. 819; *Hall v. Soule*, 11 Mich. 494; *Holland v. Hoyt*, 14 Mich. 238; *Grimes v. Van Vechten*, 20 Mich. 410.

The statute making the parol contract absolutely void furnishes no ground of action in favor of the plaintiff.

Bath v. Campbell, 65 Wis. 405.

The measure of damages in such a case is the fair average value of the use of the land less the rent.

Taylor v. Cooper (Mich.) 63 N. W. Rep. 157.

The plaintiff's right to recover is based upon his damages suffered growing out of being deprived of his contract. If he has not suffered any damages he certainly is not entitled to recover anything.

Tufts v. Weinfeld, 88 Wis. 647.

Messrs. Wood & Bird and Walter C. Burridge for defendant in error.

Grant, J., delivered the opinion of the court:

Plaintiff instituted this suit to recover damages for the violation of an executory parol agreement that defendant would execute a lease to him of certain lands for one year, with the privilege of three, at the annual

rental of \$100 per year. The court instructed the jury that, if they found such to be the contract, the plaintiff was entitled to recover as damages the difference between the market value of the lease and what he agreed to pay for it. It is conceded that, if this was a contract for a lease for a longer period than a year, it is void under the statute of frauds. 2 How. Anno. Stat. § 6181. It is settled that such a contract, unexecuted, cannot form the basis of an action or of a defense. *Sabb v. Campbell*, 65 Wis. 405; *Carney v. Mosher*, 97 Mich. 554; *Grimes v. Van Vechten*, 20 Mich. 410; *Hall v. Soule*, 11 Mich. 494. The contention of the plaintiff is that the contract may be performed within one year, and is therefore good for that period, in support of which he cites *Barton v. Gray*, 57 Mich. 634; *Whiting v. Ohlert*, 53 Mich. 463, 50 Am. Rep. 265; *Blake v. Voight*, 184 N. Y. 69. In *Whiting v. Ohlert* the sole question decided was that a parol agreement for a year's lease, to begin in the future, is valid. *Barton v. Gray* goes no further than to hold that the statute of frauds does not apply to contracts which leave it uncertain whether they may or may not be performed within a year, or which depend upon a contingency that may happen within the year. *Blake v. Voight* holds that a verbal contract which contains an option allowing either party to terminate it within a year is not within the statute, although without the option it would be within the statute. Neither of these cases is like the present, or affords any light in construing this contract. Counsel for the defendant do not argue the question, but assume that the lease was to be for three years. We have been unable, after considerable search, to find any case involving such a contract, or one which affords us any light. We think, however, upon principle, that it is within the mischief which the statute is designed to prevent. The contract contemplated a lease for three years, and, so far as the defendant is concerned, it is absolute. Plaintiff has not exercised his option, and asked for a contract for a year. He comes into court relying upon a parol contract by which he was entitled to a lease for three years. His case appears to have been tried upon that theory, for his damages were not limited to one year. The defendant could not have complied with the contract by tendering a lease for a year, nor could the plaintiff compel the execution of a lease for a year, because such contracts contemplate the exercise of the option after the execution of the lease. It follows that the agreement is void under the statute, and cannot, therefore, be made the basis for a recovery for a breach of contract.

Judgment reversed, and new trial ordered.

The other Justices concur.

NOTE.—A peculiar case under the statute of frauds is decided above. As to contracts not to be performed in one year, see generally *notes to Seddon v. Rosenbaum* (Va.) 3 L. R. A. 337; *Lowman v. Sheets* (Ind.) 7 L. R. A. 785; *Woolridge v.* 30 L. R. A.

Stern (C. C. W. D. Mo.) 9 L. R. A. 129; *Arkansas Midland R. Co. v. Whitley* (Ark.) 11 L. R. A. 621.

As to lease for not more than three years, see also *Childers v. Lee* (N. M.) 12 L. R. A. 67, and *note*.

ILLINOIS SUPREME COURT.

LEVY BROTHERS, *Appts.*
v.
CHICAGO NATIONAL BANK.

(188 ILL. 88.)

1. A secured creditor of one who becomes insolvent is entitled to prove his claim and to participate in dividends only for the amount remaining after deducting sums realized upon collaterals up to the date of filing his claim and making the preliminary proofs, and not upon the claim as it exists at the date of the assignment, especially in view of the provisions of the Illinois assignment act, that creditors must assent to the assignment by proving their claims within a certain time, and for discontinuance of the proceeding by assent of a majority of creditors, as a creditor acquires no vested interest in the assigned estate until his assent is so signified.
2. A party excepting to a claim filed in insolvency proceedings has the burden of showing what payments have been made thereon.
3. A payment upon collaterals held to secure a claim against an insolvent estate, shown to have been made merely upon the same day that the claim was proved, should not be deducted from the amount of such claim as made before the proving, as acts done upon the same day will generally be regarded in law as done at the same time.
4. An appeal from the Illinois county court upon the question of the amount for which a claim against an insolvent estate should be allowed is properly taken to the appellate court.

(October 11, 1895.)

APPEAL by objectors from a judgment of the Appellate Court, First District, affirming a judgment of the Cook County Court overruling their objections to the allowance of the claim of the Chicago National Bank against the insolvent estate of Herman Schaffner & Co. *Reversed.*

Statement by **Magruder, J.:**

Herman Schaffner & Co., by A. G. Becker, the surviving partner, made an assignment June 3, 1893. Their indebtedness exceeded at that time \$2,000,000. Their assets were such that, up to the present time, a 10 per cent dividend has been declared, and the prospects for more than 5 per cent additional dividend are exceedingly slight. At the date of the assignment the insolvents were indebted to the Chicago National Bank in the sum of \$100,000. The bank held as collateral security to this indebtedness certain promissory notes of the customers of Herman Schaffner & Co., owned by the insolvents, and pledged by them to the bank in accordance with the contract embodied in the collateral notes. These collateral notes had been partially paid. Prior to September 9, 1893,—

the day on which the Chicago National Bank filed its claim against the estate of Herman Schaffner & Co.,—it had collected upon these collaterals \$86,012.88. On September 9th (but whether before or after the filing of its claim does not appear) it collected \$5,000; and at the time of the hearing of this cause in the county court it had collected in all \$90,000.88. The court allowed the bank to participate in the dividends on the basis of its claim as it stood on the day of assignment. Appellants, creditors of the estate, who had filed objections in due time, insisted that the claim should be allowed only for the balance due at the date of the hearing, after deducting all sums collected on the collaterals prior thereto. The order or judgment of the county court has been affirmed by the appellate court.

Messrs. Hofheimer, Zeisler, & Mack for appellants.

Messrs. Tatham & Webster for appellee.

Magruder, J., delivered the opinion of the court:

When appellee filed its claim on September 9, 1893, against the assigned estate in the county court, there had been paid upon the notes, which had been pledged to it as collateral security for its debt, the sum of \$86,012.88. This sum consisted of various amounts paid by the makers of the collateral notes at different times between June 3, 1893, the date of the assignment, and September 9, 1893, the date of the filing of the claim. Certificates of deposit for the respective sums so paid were issued by appellee to the order of its cashier, and by him deposited in an envelope in lieu of the notes paid, for the purpose of keeping a record of such payments. None of these collections were indorsed on the principal note of the insolvents, Herman Schaffner & Co., or entered on the books of appellee to the credit of the insolvents. But appellee received the money so paid to it, and mingled it with its own funds, and so had the use and benefit of it. In addition to this, the principal indebtedness was overdue at the date of the assignment. Such principal indebtedness was evidenced by a note for \$100,000, dated April 15, 1893, payable on demand, to the order of appellee, bearing interest at the rate of 6 per cent per annum, and signed by Herman Schaffner & Co. This note recited that there had been delivered to appellee, to secure its payment, certain collaterals in the shape of notes, etc., and provided that appellee or its assigns might, at any time after the maturity of the note, sell such collaterals, or any part thereof, at public or private sale, with or without notice, and apply the proceeds upon the note. Nothing had been paid upon the

NOTE.—The very difficult and much-disputed question decided in the above case, as to deductions for collections made from collateral securities after an insolvency assignment, is decided differently in *Chemical Nat. Bank v. Armstrong* (C. C. 80 L. R. A.

App. 6th C.) 23 L. R. A. 231. These two conflicting cases very extensively review the authorities upon the subject. The extreme doctrine of the Maryland authorities is shown in *National Union Bank v. National Mechanics' Bank* (Md.) 27 L. R. A. 678.

notes held as collateral when the assignment was made, but appellee had then, and before that time, the right to sell the collaterals and apply the proceeds upon the note for \$100,000. If, instead of selling the collaterals, it voluntarily received payments upon them from the makers of them, it is difficult to see why it was not their duty to apply such payments upon the principal note. The amount of their claim, on September 9, 1893, would then have been the difference between \$100,000 and \$66,012.88, or \$33,987.12 instead of the sum of \$100,000 for which their claim was filed on that day. The general rule is that a creditor should credit upon the principal debt whatever he may collect upon the collateral security. *Jones, Pledges*, § 678. A pledgee who holds commercial paper as collateral security for the payment of his debt has no authority, in the absence of a special power for that purpose, to sell the securities, upon default of payment, at public or private sale. He is bound to hold and collect the same as they become due, and apply the net proceeds to the payment of the debt so secured. *Joliet Iron & S. Co. v. Scioto Fire Brick Co.* 82 Ill. 548, 25 Am. Rep. 341; *Union Trust Co. v. Rigdon*, 98 Ill. 458; *Schouler*, Bailm. 2d ed. §§ 206, 236. It is true that here a special power was given to sell the collateral notes at public or private sale, but, as that power was not exercised, the duty of applying the money collected from the collaterals to the payment of the principal debt arose out of the fact of the pledge of the commercial paper, independently of the power. Under such circumstances, when payments are made on the notes held as collateral, the law makes the application of such payments to the principal debt, even if the creditor himself does not do so. *Hunt v. News*, 15 Pick. 500, 26 Am. Dec. 618.

Where a creditor holding collateral security files his claim in the county court against the estate of an insolvent who has made an assignment, or in the probate court against the estate of a deceased insolvent debtor he should credit upon his claim such payments as have been received by him upon his collaterals up to the time of filing proof of his claim, or filing and proving his claim. By "proof" is meant the preliminary proofs which accompany the presentation of the claim, and not the additional proofs made necessary by the filing of objections or exceptions. The amount of the claim, as thus filed by the creditor and supported by his oath or affidavit, is the amount upon which the creditor is entitled to receive dividends from the insolvent estate, irrespective of what may be collected from the collaterals thereafter. Such was the decision of this court in *Furness v. Union Nat. Bank*, 147 Ill. 570. In that case we said: "The creditor has a right to prosecute his claim for the full amount against the estate of the deceased debtor in the hands of the administrator, as he had a right to prosecute it for the full amount against the debtor when alive. Of course, this right is subject to the condition that the whole amount of his claim is due to him when he files and proves it.

30 L. R. A.

If he has realized upon his collateral before filing and proving his claim, he voluntarily parts with the double right secured to him by the law, and can only proceed for what is actually due to him, that is to say, for what remains of his claim after deducting the amount realized from the collaterals.

But if a creditor, who has filed and proved his claim for the full amount in the probate court can only be allowed the difference between such amount and the sum thereafter realized by disposing of his collaterals, there will be a temptation to prolong the litigation and delay the allowance in order that he may be forced to dispose of his collaterals, so that the dividends coming to him may be calculated upon a reduced claim. By such a course of proceeding the secured creditor may be deprived of his right, under the law, to proceed both against the estate and the security, until he gets payment in full." The assignment act requires the assignee to give notice of the assignment by publication, and to notify the creditors, by mail, "to present their claims under oath or affirmation to him within three months," etc. At the expiration of three months from the time of first publishing notice, he shall report and file with the clerk of the county court a sworn list "of all such creditors of the assignor . . . as shall have claimed to be such, with a true statement of their respective claims. . . . Any person interested as creditor or otherwise" may appear within thirty days after the filing of such report, and file with said clerk "any exceptions to the claim or demand of any creditor's exhibit as aforesaid." The clerk is required to give notice thereof to the creditor, and the court shall proceed to hear the proofs and render judgment. 1 Starr & C. Anno. Stat. pp. 1804, 1805. It is manifest, from the foregoing provisions, that the exceptions are to be filed to the claim as presented under oath to the assignee and reported by him. The question is whether the amount so claimed is due at the time when the claim is presented and sworn to. The trial is not merely a trial between the creditor and debtor, but between the claimant and any other creditor or interested party, as to the amount to be allowed as a basis for the calculation of dividends. This necessarily follows from the fact that any person interested as creditor or otherwise may except. If the trial should disclose that the claim as presented and sworn to was unjust, as between the creditor and his insolvent debtor, either wholly or in part, then, of course, it would be either wholly or partially disallowed. But, as to collections realized upon collaterals securing it after its original presentation under oath, there should be no reduction thereof from it, for the reason, among other reasons, that other creditors or interested parties would file exceptions for the mere purpose of delay, and so as to secure reductions by crediting collections made from collaterals during the delay. Somewhat similar provisions are set forth in the administration act (Rev. Stat. 1893, chap. 8, § 60) in regard to the proof of claims against the estates of deceased debtors, where, when the claimant produces his claim

in writing, and swears to its correctness, it will be allowed by the court if no objection is made; but, if objection is made by the administrator, widow, heirs, "or others interested in said estate," other evidence must be produced before allowance.

There is a conflict among the authorities as to the time when payments on collateral securities or money realized from collateral securities, should be applied; so as to operate as a reduction of a claim on which dividends are to be paid. The relation of debt and credit, for the purpose of distribution, is fixed by the decisions at three different periods, respectively: First, the time of making the assignment, or adjudication of bankruptcy, or death of the insolvent; second, time of filing proof of claim; third, time of dividend or distribution. The precise question here involved did not arise and was not considered in the case of *Re Bates*, 118 Ill. 524, 59 Am. Rep. 383. In that case a creditor holding notes secured by a mortgage, executed by the debtor upon his own property, filed her notes as a claim in the county court against the insolvent estate of the debtor who had made an assignment for the benefit of creditors. The claim, as evidenced by the notes, was reported by the assignee, and no exceptions were filed to it. Nothing had been realized upon the mortgage security when the claim was filed and proved. The question there was whether the creditor was entitled to a dividend upon the whole amount of her claim as filed and proved, or whether the value of the mortgage security should be deducted from the amount of the claim, and the dividend should be allowed upon the difference only; and it was held that the creditor was entitled to a dividend upon the claim in full, without deducting the value of the security. In other words, the *Bates Case* declined to follow the rule known as the bankruptcy rule. That rule requires the creditor to give up his security, in order to be entitled to prove his whole debt, or, if he retains it, to prove only for the balance of the debt after deducting the value of the security held. This rule has its foundation in statutory enactments. It has not been uniformly applied in distributions under general assignments, or under state insolvent laws. The preponderance of authority is in favor of the view that the creditor has the right to prove and have dividends upon his entire debt irrespective of the collateral security; and, as an authority for this general view, the doctrine of the *Bates Case* has been indorsed in the following cases: *People v. Remington*, 131 N. Y. 328, 8 L. R. A. 458; *Re Meyer*, 78 Wis. 615, 11 L. R. A. 841; *Allen v. Danielson*, 15 R. I. 480; *Chemical Nat. Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. Rep. 878, 23 L. R. A. 231, 16 U. S. App. 465; *Tod v. Kentucky Union Land Co.* 57 Fed. Rep. 47; *People v. Remington*, 54 Hun, 505. See also *Lewis v. United States*, 92 U. S. 618, 23 L. ed. 513; *Bishop, Insolvent Debtors*, § 427. But the question still remains, whether the entire debt upon which the dividend may be declared is the debt as it exists at the date of the assignment, or at the time of filing proof of the claim, or at the time of the distribution. The theory that

the creditor is only entitled to share *pro rata* upon his debt as it exists at the time of distribution requires his claim to be reduced by the collections realized from his collaterals before the declaration of each dividend, and after his claim has been proved and allowed. This seems to be the rule in Maryland, but is not generally accepted as correct. We are not inclined to adopt it. It is not contended for, as we understand it, by either counsel in the case at bar. It is opposed to the decision in *Furness v. Union Nat. Bank*, *supra*. Its enforcement would require a readjustment of the basis of distribution at the time of declaring each dividend, whereas there should be a fixed sum as a basis for representation in the declaration of dividends, and as a measure of the creditor's right and interest in the assets of the insolvent estate. The theory that the creditor is entitled to dividends upon his claim as it exists at the date of the assignment, without reference to collections on collaterals thereafter, is founded on the doctrine that, by the deed of assignment, each creditor is an equitable owner in the assigned estate to the extent of the claim held by him when the assignment is made. But, under recent decisions of this court, construing the assignment act of this state, it cannot be said that each creditor acquires a fixed, equitable ownership in the assigned estate at the time of the assignment. If such were the fact, such interest could not be taken away from him by an act of the legislature. A legislative enactment which transfers the property of one man to another without his consent is not a constitutional exercise of legislative power, because, if effectual, it operates to deprive a man of his property without "due process of law." *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Rohn v. Harris*, 130 Ill. 525; *Ervine's Appeal*, 16 Pa. 256, 55 Am. Dec. 499; *Hoke v. Henderson*, 4 Dev. L. 1, 25 Am. Dec. 677. But the case of *Hove v. Warren*, 154 Ill. 237, holds that, under section 15 of the assignment act, the assignment may be revoked by the assent of a majority in number and amount of the creditors who may have proved their claims in accordance with the provisions of the act, irrespective of the wishes of the minority, and that the effect of the discontinuance provided for by that section is to destroy the trust upon which the property was held. This being so, each creditor does not have a fixed ownership in the assigned estate at the date of the assignment; and the reason for fixing upon the amount of the claim held by him at that date as the basis for the distribution of dividends is without force in this state, however it may be elsewhere. The provisions of the assignment act would seem to lead to the conclusion that the revocable interest of each creditor in the assigned estate only vests in him when he signifies his assent to the assignment by filing his claim with the assignee. *Gibson v. Rees*, 50 Ill. 388; 2 Pom. Eq. Jur. § 994; 2 Lewin, Tr. 515. This appears from the provisions requiring the creditor to present his claim within a specified time, and from the further provision that creditors who do not exhibit

their claims within three months from the publication of the notice shall not participate in the dividends until after the payment in full of all claims presented within said time and allowed by the court. 1 Starr & C. Anno. Stat. p. 1806, § 10. The object of the latter provision is to fix a time at which the estate of the assignor shall be placed in process of final settlement, and after which distributions may be made without risk of uncertainty arising from the allowance of subsequently presented claims. The reason of the provision is the same as that requiring creditors of deceased persons to exhibit claims within two years after the grant of letters of administration. *Suppiger v. Seydt*, 23 Ill. App. 468.

Whatever may be the fact in other jurisdictions, it cannot be known here whether the creditor intends to participate in the distribution of the assets of the assigned estate, under the orders of the county court, until he manifests his assent by filing his claim under oath. As his interest in the estate cannot be said to accrue until he does so file his claim, it is the amount of his claim at that date which should be taken as the basis of representation in future dividends, irrespective of collections from collateral securities after that date. The learned judge who wrote the exhaustive opinion in *Chemical Nat. Bank v. Armstrong*, *supra*, states that there is no logical basis for any distinction between the effect of collections made from collaterals after insolvency and before filing proof, and of those made after filing proof. We are unable to concur in the view that there is no logical basis for such distinction. Even in the *Armstrong Case*, the opinion, after stating that the great weight of authority in England and in this country is strongly opposed to the view that a creditor with collaterals shall be thereby deprived of the right to prove for his full claim against an insolvent estate, and after referring to numerous authorities sustaining such view, says: "The exact point which is common to all the foregoing authorities, and which they all sustain, is that a creditor who has proved his claim against an insolvent estate under administration can collect his dividends without any deduction from his claim as proven, for collections made from collateral after his proof of claim is filed." And, after expressing the view (which, for the reasons already stated, cannot prevail in this state, that such deduction should be made from the claim as it exists at the date of the assignment, subject always to the limitation that the amount to be received from all sources shall not exceed the original debt and interest, the opinion further proceeds as follows: "The cases we have already cited fully confirm the foregoing view as to credits after the filing of the proof of claim;" that is to say, that no collections made from collaterals after the filing of the proof of claim shall be applied to reduce the amount of the claim as so filed. This we regard as the correct rule; and it is sustained by the English authorities. In *Kellock's Case*, L. R. 8 Ch. 769, the court of chancery appeals adopted the rule that collections on collaterals before filing proofs of

claim in proceedings to wind up an insolvent company should be deducted, but that subsequent collections should not be deducted. In that case Lord Justice Wood said: "There remains the question as to the time with reference to which the amount provable is to be ascertained; and as to this there is a little more difficulty. I think, however, that the true rule is, that the debt is to be taken as it stands at the time when the claim is put in. . . . Where the demand of the creditor was large, and the securities held by him considerable, the official liquidator might dispute the claim for the very purpose of obliging the creditor to realize some of his securities before the time for making his affidavit arrived. . . . It appears to me that it would be leaving a great deal too much open to the caprice or arbitrary discretion of the liquidator if we were to fix upon any time except the time when the claim which is to be adjudicated upon was sent in." In the same case Lord Justice Selwyn also said: "I think, therefore, that the balance of convenience and inconvenience inclines strongly to the view which my learned brother has expressed, which is, that the debt is to be taken as it stood when the creditor sent in his claim." In *Re Barnard's Bkq. Co., Fortwood's Claim*, L. R. 5 Ch. 18, it was held—First, that the rule in bankruptcy, as to proof by secured creditors, does not apply in the winding up of insolvent estates, but that the rule that a creditor holding security may, if he chooses, prove for the whole of his debt and retain his security, does apply; second, that the time when the claim is put in is the date after which the creditor may realize his security, and not be bound to give credit for the proceeds of the realization. It was also there held that the putting in of the claim in winding-up cases is "equivalent to the proof against a testator's estate where an affidavit is made." To the same effect is *Ex parte Bank of England*, 39 L. J. Ch. 769. In *Eastman v. Bank of Montreal*, 10 Ont. Rep. 79, after approving of the rule in chancery that the creditor is entitled to prove for the whole amount of his debt and to take a dividend upon the whole without prejudice to his rights against securities he may hold, and after stating that "to hold otherwise would be virtually to deprive the secured creditor of any advantage from his security," the court adopts the rule in *Kellock's Case*, as above stated, and says: "The state of the accounts at the time the claim is put in is that which forms the basis of the dividend sheet. . . . Any moneys received prior to that from collaterals are to be credited. Those received after that from such sources need not be taken into account, unless they, with the dividend as to that part of the claim to which such securities are referable, bring up the amount received by the creditor to 100 cents on the dollar." In *Fottrell v. Kavanagh*, 10 Ir. Eq. Rep. 256, the doctrine and the rule are thus clearly stated by the vice chancellor: "The question . . . is whether the plaintiff, who is a mortgagee of certain lands of the deceased whose assets are under administration, can be admitted to prove as a creditor against the general assets on foot of his mort-

gages, and to be paid ratably with the other creditors upon the full amount of his debt, or whether he must first realize as much as he can out of the premises comprised in his mortgages, and claim only upon the balance then remaining unpaid. It is the right of a mortgagee in this court [court of chancery] to proceed for the recovery of his debt upon all, or one or more, of his securities, and either simultaneously, or in any order he thinks fit.

Accordingly, it is now settled that the rule in bankruptcy does not prevail in this court, and that a mortgagee may prove in an administration suit, or a proceeding for winding up under the companies' acts, for the full amount of his debt, realize what he can in any such proceeding, and afterwards resort to the premises mortgaged to him to obtain payment of any deficiency. . . . I shall therefore rule that the plaintiff is entitled to prove his claim for the full amount against the general assets without being bound first to realize his mortgage securities. The time at which the plaintiff's debt is to be ascertained is, as settled by *Kellock's Case*, that at which his claim was brought in under the posting for creditors. I shall therefore direct that the amount due to the plaintiff be ascertained as of that date, and in doing so he must be charged with all sums theretofore received by him, whether out of the mortgaged premises or otherwise, but not with any sums subsequently received. On this sum he will be entitled to a ratable dividend, the estate being insolvent." To the same effect are *Ex parte Wildman*, 1 Atk. 109; *Re Hamilton*, 1 Fed. Rep. 800; *Sohier v. Loring*, 6 Cush. 537; *Re Hicks*, 19 N. B. R. 299, Fed. Cas. No. 6,456; *Re Meyer*, 78 Wis. 615, 11 L. R. A. 841.

Our conclusion is that the amount upon which the secured creditor is entitled to receive dividends from the assets of the insolvent estate is the amount actually due to the creditor when he files his proof of claim or presents his claim under oath; that the subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date; that the amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals or otherwise, but that amounts realized from collaterals after that date are not to be deducted;

subject always to the qualification that the dividends received from the general assets and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim. It follows that the county court erred in not deducting from appellee's claim the amounts collected from the collateral notes prior to the day on which the proof of claim was filed, to wit, September 9, 1893. We are, however, unable to concur in the contention of appellants that payments collected upon the collateral notes after that date should be deducted in fixing the allowance to be awarded to appellee as a basis for the declaration of dividends. In regard to the payment made on September 9, 1893, the burden of proof was upon the party excepting to the claim as filed to show what payments were made, as the fact of payment is matter of defense. Although the law will look into the fractions of a day when it becomes important to the ends of justice to do so, or in order to decide upon conflicting interests, yet the general rule is that the law knows no fractions of a day. *Grosvenor v. Magill*, 37 Ill. 289. The effect is to render a day a sort of indivisible point, so that any act done in the compass of it is no more referable to any one portion of it than to any other portion of it; and where two acts are done upon the same day, they will, as a general thing, be regarded in law as done at the same time. It follows that, where a case turns on the question as to which of two things was done first, the party having the burden of proof fails in merely showing that both were done on the same day. 5 Am. & Eng. Enc. Law, pp. 89-91, and cases in notes. Hence, the appellant has not shown that the payment made on September 9, 1893, was made before the filing of the proof of claim on that day, and consequently such payment should not be deducted.

A motion is made by appellee to dismiss the appeal. The motion is overruled. The appeal was properly taken from the county court to the appellate court upon the authority of *Union Trust Co. v. Trumbull*, 137 Ill. 146, and *Heinzelman Bros. v. Schrader*, 150 Ill. 227.

The judgments of the Appellate Court and the County Court are reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views herein expressed.

CALIFORNIA SUPREME COURT.

William McGUIRE, *Resp't.*,

v.

Marcellus BROWN, *App't.*

(106 Cal. 680.)

1. The prior appropriator of water has no right to enter upon the homestead

NOTE.—Change of use or channel of water appropriated.

The limitation upon the right of an appropriator of water upon the public domain to change the 80 L. R. A.

claim of a settler for the purpose of materially changing the point of diversion and constructing new waterways through the land, although the settler has not made final proof of residence and cultivation or obtained a patent to the land, but has made an entry and has actual possession.

2. The privilege of changing the point

place or manner of use of the water seems to be simply that he must not by so doing prejudice other rights which have been acquired subsequently to the acquisition of his rights. Subject to

of diversion of water to which a right has been obtained by prior appropriation under Civ. Code, § 1412, does not extend to materially changing the point of diversion and making new ditches on land lawfully held under a homestead claim.

3. The provision in the act of Congress of July 26, 1866, that a party committing injury or damage, in the construction of a ditch or canal, to the possession of any settler on the public domain, shall be liable to the party injured, does not grant any rights to enter on the possession of a homestead claimant for the purpose of materially changing the point of diversion of water already appropriated.

(April 2, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Ventura County in favor of plaintiff in an action brought to enjoin defendant from interfering with certain alleged water rights of the complainant. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. H. L. Poplin, for appellant:

As soon as the land was entered as a homestead and the certificate of such entry was executed and delivered, the equitable title vested in the homesteader, and attached to the land, and was absolute as against every person except the United States, and absolute against the government dependent only on his complying with the requirements of the laws relative to homesteads.

Sturr v. Beck, 138 U. S. 541, 88 L. ed. 761.

In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained.

Witherspoon v. Duncan, 71 U. S. 4 Wall. 310, 18 L. ed. 339.

Entry means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim.

Ohotard v. Pope, 25 U. S. 12 Wheat. 586, 6 L. ed. 787; *Shepley v. Qwan*, 91 U. S. 330, 23 L. ed. 424; *Farley v. Spring Valley Min. & I. Co.* 58 Cal. 143; *Western P. R. Co. v. Tevis*, 41 Cal. 489; *Hutton v. Frisbie*, 87 Cal. 476.

An appropriator may change the place of diversion if no one be injured by such change.

Ramelli v. Irish, 96 Cal. 217; *Jacob v. Lorens*, 96 Cal. 840.

But in the case at bar it would diminish the amount defendant is entitled to, both as a riparian proprietor and as an appropriator; and such damage is clearly within the provision of § 1412, Civil Code, "when others are not injured by such change," and within the equity and right of defendant to the relief demanded in this action.

such limitation, the point of diversion and manner of use may be changed. *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Junkans v. Bergin*, 67 Cal. 207.

An appropriator can extend his ditch at any time and use the water to the extent of his appropriation at any other point for the same or a different purpose. *Woolman v. Garringer*, 1 Mont. 585.

After the claim for which the water was appropriated has been worked out the ditch may be

Messrs. W. E. Shepherd and Orestes Orr, for respondent:

In so far as the construction of the new ditch is concerned, Crawford under the United States statute might do this, and the measure of relief to which Brown was bound was the compensation for any damage he might suffer by way of injury to his possession.

U. S. Rev. Stat. § 2339; *Knoth v. Barclay*, 8 Colo. 300.

The fact that he used it upon lands riparian to the stream did not lessen his rights, and the rights of the defendant, a subsequent settler upon the land and appropriator of the water of the stream, were subject to plaintiff's rights to such water.

Healy v. Woodruff, 97 Cal. 467; *Deneochea v. Curtis*, 80 Cal. 403; *Southern P. Co. v. Burr*, 86 Cal. 279; *Western P. R. Co. v. Tevis*, 41 Cal. 489; *Farley v. Spring Valley Min. & I. Co.* 58 Cal. 143; *Osgood v. El Dorado Water & D. G. Min. Co.* 56 Cal. 571; *Luz v. Haggin*, 69 Cal. 438.

A homestead claimant has no riparian right as against an appropriator of water who is prior to him in point of time.

South Yuba Water & Min. Co. v. Rosa, 80 Cal. 333; *Burrows v. Burrows*, 82 Cal. 564; *Ramelli v. Irish*, 96 Cal. 214.

Britt, C., filed the following opinion:

The controversy which resulted in this action arose between plaintiff and defendant concerning the right to the use of water flowing in Cuyama creek, in the county of Ventura. One W. A. Dorn was permitted to intervene, he asserting an interest in the water superior to that of both the original parties; but, as the court below found against his pretensions, and dismissed his complaint "without prejudice," and he has not appealed, his claims are eliminated from the case.

It appears from the record that in January, 1885, one Beekman took possession of the N. W. $\frac{1}{4}$ of a certain section 20, the same being unappropriated lands of the United States, and shortly afterwards filed his declaratory statement as a pre-emption claimant thereon, paid the purchase price, and obtained the receiver's final receipt some time in the year 1886, and in June, 1891, the United States patent for the same was issued to him. At the time Beekman entered upon said land there was a ditch thereon, constructed by a former occupant, leading from a point on Cuyama creek, within the boundaries of the N. E. $\frac{1}{4}$ of said section 20, and thence westerly across a part of such N. E. $\frac{1}{4}$ and upon said N. W. $\frac{1}{4}$, by means of which ditch water was diverted from said creek, and made to flow upon the latter quar-

extended and the water used at other points. *Davis v. Gale*, 33 Cal. 26, 91 Am. Dec. 554.

The original appropriator may construct a new ditch if the amount which it carries is not greater than the amount originally appropriated. *Higgins v. Barker*, 42 Cal. 233.

The first appropriator may change the place of diversion, or the place where the water is used, or the use to which it was first applied, if others are not injured by the change. *Ramelli v. Irish*, 96

ter section. This ditch was repaired by Beekman in the spring of 1885, and was thenceforward used by him to divert said water for irrigation and other purposes on his said land,—it having a capacity, the court finds, of 90 inches, which was filled when the creek afforded sufficient water, and exhausted the flow of the creek at the point of diversion when the supply was less than that amount.

In December, 1888, Beekman conveyed the land covered by his pre-emption claim,—said N. W. $\frac{1}{4}$ of section 20,—together with its appurtenances, to one Crawford, who entered into possession. Crawford then, in May, 1889, changed the point of diversion of the ditch to a place about $\frac{1}{4}$ of a mile farther up the creek, eastward from the head of the old ditch, and dug a new ditch across the said N. E. $\frac{1}{4}$, and upon the N. W. $\frac{1}{4}$ of said section 20, connecting with the old ditch near the west line of said N. W. $\frac{1}{4}$. The new ditch had a capacity of 90 inches, as the court also found, and was used by Crawford on his lands from 1889 to 1891, inclusive, for the same purposes that the former ditch had been used by Beekman. January 20, 1892, Crawford conveyed to plaintiff by deed of grant said N. W. $\frac{1}{4}$ of section 20, together with all water rights possessed or acquired by the grantor "either by use, purchase, or appropriation." But in August, 1888, Brown, the defendant and appellant, a person qualified to acquire land under the homestead laws, settled upon said N. E. $\frac{1}{4}$ of section 20, it being then public land of the United States, and in October of the same year he filed his homestead application therefor in the proper land office, paying the fees of the receiver upon such entry and obtaining his receipt therefor. Ever since his settlement he has resided on the land, cultivating and improving considerable portions of it, but has not made final proof, nor received a patent for the same. When Crawford constructed the new ditch across defendant's homestead claim in 1889, defendant was temporarily absent therefrom, and gave no consent to the change; but on his return, soon afterwards, he made no complaint or claim of damage, and permitted the use thereof by Crawford and his successor, the plaintiff, until the month of October, 1892, when he filled up such new ditch at a point on his homestead claim, and stopped the further flow of the water, and by force prevented plaintiff from repairing the ditch. In November, 1889, defendant constructed a ditch tapping Reyes creek, a tributary of said Cuyama creek, on land in section 16, belonging to the state of California, at or near the point of confluence of the two streams, about $\frac{1}{4}$ mile above the

head of the new ditch dug by Crawford in May of the same year, and thence leading to his (defendant's) homestead claim, said N. E. $\frac{1}{4}$ of section 20. By means of this ditch defendant diverted water from Reyes creek during the years 1890, 1891, and 1892, and used the same for irrigation and other purposes on his claim, not interfering with the flow of water to plaintiff's ditch during the first two of those years, but increasing the amount diverted during 1892 so as to materially lessen the quantity descending to plaintiff. Plaintiff then, in September, 1892, filled up defendant's ditch on said section 16, so that no water could pass into it from the creek. All the lands above mentioned lie in the same township and range, and are riparian to Cuyama creek.

Plaintiff commenced this action May 4, 1898, to restrain defendant from interfering with the ditch and water rights acquired by plaintiff from Crawford, and for damages. Defendant answered, and also filed a cross complaint, setting up his claims to the water and to damages for plaintiff's invasion of his rights, and praying that plaintiff be restrained from interference with his use of the water, etc. After trial, the court rendered judgment determining that plaintiff has the paramount right to 90 inches of the water in Cuyama creek for all useful and beneficial purposes, to be diverted through the ditch constructed by Crawford in 1889, and is the owner of such ditch, with the right to maintain it across the homestead claim of appellant, and enjoining defendant from disturbing plaintiff's enjoyment of such rights. Also that defendant is entitled to take 90 inches of water flowing at the head of his ditch in section 16 so long as the diversion of that quantity does not reduce the flow at the head of plaintiff's ditch below the same amount; that defendant has the right to maintain and use his said ditch to convey the water to which he is so entitled, and plaintiff is restrained from interference therewith. Plaintiff is awarded the entire flow of water at and above the head of the Crawford (new) ditch when the quantity falls below 90 inches; also judgment for nominal damages and his costs.

1. The first and most important question arising on this record relates to the right of Crawford, plaintiff's predecessor in interest, to enter upon the land claimed by and in the possession of defendant, and, in the exercise of the right to change the point of diversion, there construct a new aqueduct, and lead the water through the same. For, if he had not the right to effect the change in this manner, then the defendant was not in the wrong when he obstructed the flow of the water in

Cal. 214; Gallaber v. Montecito Valley Water Co. 101 Cal. 242.

A person entitled to divert a given quantity of water from a stream may take the same at any point on the stream and may change the point of deviation at pleasure if the rights of others are not injuriously affected by the change. Kidd v. Laird, 15 Cal. 161, 76 Am. Dec. 472.

If the water is appropriated for the purpose of placer mining and irrigation the fact that it is used at first at a place where the surplus will flow back
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into the river above the head of another ditch does not prevent a subsequent change of place, although the effect is to carry it further down so that it is lost to the owner of such ditch. Wimer v. Simmons (Or.) 89 Pac. Rep. 6.

Rights subsequently vested cannot be infringed.

The point of diversion cannot be changed to the detriment of subsequent appropriators. Cole v. Logan, 24 Or. 304; Butte Table Mountain Ditch Co. v. Morgan, 19 Cal. 608.

the new ditch, and the judgment restraining him in that behalf, and establishing the right of plaintiff "to have, maintain, keep, and use" such new ditch for diverting and conveying the water upon his (plaintiff's) land is erroneous. The claim that Crawford, the former ditch owner, was justified in shifting the point of diversion and the line of his ditch in the manner here disclosed is based mainly on the familiar provisions of the legislation of Congress (U. S. Rev. Stat. §§ 2339, 2340)* concerning the rights of appropriators of water on the public lands, and the saving of those rights in patents for such lands granted by the government; on section 1412 of the Civil Code of this state: "The person entitled to the use may change the place of diversion if others are not injured by such change;" and on certain cases in this court, which will be noticed farther on.

We do not think that the right of the settler under the Federal homestead laws on public land through which water flows is of the unsubstantial character which the contention of the respondent implies. Of course, if a valid appropriation of the water, whether on the particular tract or off it, has been made, the settler must take the land subject to that qualification of his right and of the title which he may ultimately acquire; but it should not be held that such qualification involves the indefinite extension of the right of the prior appropriator, unless the law is thus plainly written. It is of the highest importance to the bona fide settler on riparian lands to know the extent to which he must subordinate his claims to those of prior appropriators of the water; to know, in short, what easements and servitudes his land is subject to in favor of the previous appropriation. Has the prior appropriator license to enter upon the homestead claim of such a settler for the purpose of materially changing thereon the point of diversion and construct-

ing new waterways through the land? Is such a license among the servitudes to which the land must be submitted? We think not. "In no just sense can lands be said to be public lands after they have been entered at the land office, and a certificate of entry obtained. If public lands before the entry, after it they are private property." *Witherspoon v. Duncan*, 71 U. S. 4 Wall. 218, 18 L. ed. 342. The term "entry," as applied to appropriations of land within the scope of the language just quoted, has been held to mean "that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim." *Sturr v. Beck*, 183 U. S. 547-549, 38 L. ed. 764; citing *Chotard v. Pope*, 25 U. S. 13 Wheat. 588, 6 L. ed. 788; *Hastings & D. R. Co. v. Whitney*, 182 U. S. 357, 33 L. ed. 363. It appears from the evidence in this case that on (October 23, 1888, the defendant made entry (within the meaning of the authorities referred to) of the land in question in the proper United States land office, and that his entry remains intact.

Crawford, a witness for plaintiff, testified: "When I went there in 1883, Brown was on the northeast $\frac{1}{4}$ of section 20, and, I think, had a house. . . . When I made the change in my ditch, Mr. Brown was in possession of his land. We had a fence between us, so I ran with my new ditch through his fence." Here was an entry, and here was an actual possession of the land by defendant. In course of time, and on compliance with the law relative to continuous residence and cultivation, he will be entitled to a patent which will invest him with the legal title. Now, it cannot be that, pending proceedings for the consummation of his interest thus initiated, any other person may rightfully invade his possession for the purpose of making an original appropriation of water, and so possibly divesting the land of its chief element of value, any more than for the purpose of cutting off its timber or committing other trespass. This proposition is substantially adjudged in *Sturr v. Beck*, 183 U. S. 541, 38 L. ed. 761, where the Supreme Court of the United States affirmed the doctrine that the plaintiff in that case had "no right to enter upon the prior possession of the defendant under his homestead entry for the purpose of appropriating any portion of the running streams and creeks thereon." But what is the difference in the legal wrong to the defendant between an entry on his homestead, with a view to appropriating for the first time the water there flowing, and an entry having for its object the material shifting of the place of a previous diversion, and the construction

*Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

*Sec. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section."

The point of diversion cannot be changed so as to cut off the flow to a mill which has been established after the first appropriation. *Columbia Min. Co. v. Holter*, 1 Mont. 296.

Persons who have appropriated the water for a mill cannot after other persons have appropriated what flows past the mill change the use so as to consume all the water. *Ortman v. Dixon*, 13 Cal. 33.

After other claims have been located the owner of a dam cannot raise it to their prejudice although 30 L. R. A.

by changes in the bed of the stream it has become impossible to obtain the original quantity of water through the ditch without raising the dam. *Nevada Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685.

An appropriator cannot control the surplus that was not originally appropriated by him. *Edgar v. Stevenson*, 70 Cal. 226.

If the appropriation is for a certain ranch, whatever is not wanted for irrigation and household purposes thereon may be appropriated by another person, and the first appropriator cannot after-

of new waterways to make the diversion effectual? Either purpose, if carried out, must interrupt the quiet of his enjoyment, and deprive him of the use and control of some portion of his property.

If it be said that by the 9th section of the act of Congress of July 26, 1866, now embodied in section 2839 of the Revised Statutes of the United States vested and accrued rights to the use of water for beneficial purposes, acquired by priority of possession thereof on the public lands, are to be maintained and protected as against homestead settlers on those lands, and that the right of way for the construction of ditches for such purposes is acknowledged so long as they are in any sense "public lands," and before a patent has issued for the same, and hence that defendant took up his land subject to those reservations in favor of the prior appropriator, and the consequent right of the latter to change his system of works at will, it may be replied—Firstly. That the argument, if good for anything, proves too much; for by the terms of section 2840 of the Revised Statutes of the United States,—a re-enactment of section 17 of the act of July 9, 1870, upon this subject,—the same exceptions and reservations are declared to qualify all patents granted as well as all homesteads allowed; so that the right of the prior appropriator of the water to make such use of the land of the homestead claimant would not cease with the issue of a patent to the latter, but must continue indefinitely,—a result which even the cases relied on by respondent discountenance. *Osgood v. El Dorado Water & D. G. Min. Co.* 58 Cal. 571; *Farley v. Spring Valley Min. & I. Co.* 58 Cal. 142. Secondly. It is only "vested and accrued" rights to the use of water which are reserved by the operation of the acts of Congress above referred to from the interest that without those provisions would vest in the homestead claimant; and the only vested and accrued right which Crawford had in the land at the time defendant made his homestead entry was the right to the continued flow of the water into his existing canal to the extent of his prior appropriation, including, of course, the right to maintain and improve such canal. True, he had the privilege of changing the point of diversion if he could do so without injury to others (Civ. Code, § 1412; *Ramelli v. Irish*, 96 Cal. 217); but such privilege is a different thing from the "vested and accrued" right to the use of the water. It is not a part of that right; and the condition upon which it can be exercised to any material extent becomes impossible when another person has made a lawful settlement on the land affected, and is pro-

ceeding in good faith under the homestead laws to perfect his title,—impossible, that is, without the consent of such settler. This court, speaking through Mr. Justice Harrison, said recently: "That section [U. S. Rev. Stat. § 2839] does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water, even though the person seeking so to enter had at some previous time manifested his intention to secure a water right thereon." *Taylor v. Abbott*, 108 Cal. 424. As little does it, in our opinion, confer the right to enter upon the possession of another for the purpose of materially changing the point of diversion of water already appropriated; certainly not for the purpose of constructing new aqueducts where none existed before.

By the terms of the proviso found in section 9 of said act of July, 1866, it is declared "that whenever after the passage of this act any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage;" and respondent claims that such provision authorized the construction of the new ditch by plaintiff's predecessor, and that defendant's right is limited to compensation for the damage therein mentioned. This is not the proper construction of the proviso. It does not grant rights of way where none existed before, nor confer additional rights upon owners of ditches subsequently constructed. *Jennison v. Kirk*, 98 U. S. 460, 25 L. ed. 243; *Robertson v. Smith*, 1 Mont. 411.

Does the fact that defendant has not made final proof of residence and cultivation, or obtained a patent, affect the case? In *Sturr v. Beck*, *supra*, the court quotes with approval this language of Attorney General MacVeagh in an opinion rendered by him in 1891: "Upon the entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts to an equitable interest in the land subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and until forfeited by failure to perform the conditions, it must prevail, not only against individuals, but against the government." And in the course of the same decision the court says further: "When, however, the government ceases to be the sole proprietor, the right of the riparian owner attaches, and can-

wards increase his use so as to deprive the latter of the benefit of his appropriation. *Byrne v. Crafts*, 78 Cal. 641.

The first appropriator has a right to all water appropriated by him as against subsequent appropriators, and has a right to erect dams and divert water before any subsequent appropriation, but not to make any new dams or diversion of water after a subsequent appropriation. *Lobdell v. Simpson*, 2 Nev. 274, 40 Am. Dec. 537.

A second appropriator acquires a right to all the surplus left by the first appropriator, and the first 80 L. R. A.

cannot afterwards change or extend his use to the prejudice of the other. *Proctor v. Jennings*, 6 Nev. 83, 3 Am. Rep. 240.

Where a person has acquired by appropriation a limited right of diversion of water and has lost further claim to an appropriation by failure to complete his work within a reasonable time, he cannot increase the amount of his diversion thereafter to correspond with his notice of appropriation to the prejudice of the rights of a riparian owner. *Conkling v. Pacific Imp. Co.* 5 Cal. 296.

The appropriator of water to be used at a speci-

not be subsequently invaded. As . . . no subsequent attempt to take the water only can override the prior appropriation of both land and water, it would seem reasonable that lawful riparian occupancy with intent to appropriate the land should have the same effect." 133 U. S. 549, 551, 33 L. ed. 764. We see no reason to hold that defendant's rights for the purposes of this case would have been enlarged by the issue of a patent to him. How could they have been augmented by that means in view of the provision (U. S. Rev. Stat. § 2340) that such a patent must be subject to all "vested and accrued" water rights? It must be remembered that the appropriator is not the owner of the "very body of the water" until it passes into the appliances he has provided for its reception. Before he is thus possessed of it he has a mere right to its continued flow, so that he may impound it; but the stream itself, flowing in its natural course, is a part of the land over which it flows. *Parks Canal & Min. Co. v. Hoyt*, 57 Cal. 46; *Nevada County & P. Canal Co. v. Kidd*, 37 Cal. 310, 311. And it follows that, after the land where the diversion is made has ceased, by reason of a lawful private appropriation thereof, to be public land, and passed into private occupancy, the occupant of the land—in this case the homestead claimant—is the owner of the stream, in the same sense that he is the owner of the land, until it comes into the possession of the appropriator, and may justly repel any attempt to interfere with such ownership at any place except that where the diversion was effected when his rights to the land attached. Nor is this necessarily a mere empty abstract right. The stream may add beauty to the landscape, or afford valuable fishing privileges, or furnish useful mechanical power, any of which elements of value would be liable to destruction if the prior appropriator may remove his point of diversion wheresoever he will after the inception of private title to the land in another person.

Our conclusion is supported by analogy, also, with the rule for many years enforced both in the Federal courts and in the courts of this state, that the right of property which the laws of Congress allow to be acquired on the public domain shall not be initiated by trespass and intrusion on the actual possession of a prior occupant. *McBrown v. Morris*, 59 Cal. 64; *Goodwin v. McCabe*, 75 Cal. 588, and cases cited. In *McBrown v. Morris* this court, quoting with approval the language of Mr. Justice Miller in *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 733, concerning the acquisition of pre-emption rights, said: "The right to make a settlement was to be exercised on unsettled

land. . . . It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude." We regard this just and forcible statement as equally cogent in the present case. The new ditch over defendant's claim, established as a legal right of plaintiff by the judgment appealed from, was constructed in virtue of an intrusion on defendant's possession during the latter's temporary absence from his home, and through artificial barriers erected by him. Such acts, if tolerated at all, must certainly tend to the promotion of the evils prefigured in the language of the court just cited.

We have treated this subject somewhat at large because of its practical importance in the constantly expanding scheme of water development in this state, and because the result at which we have arrived seems to be at variance with parts of the argument, at least, on which rest some former decisions of this court (*Osgood v. El Dorado Water & D. G. Min. Co.* 56 Cal. 571; *Farley v. Spring Valley Min. & I. Co.* 58 Cal. 142), in so far as those cases seem to hold that, by reason of the legislation of Congress, the interest of the settler on government land with respect to appropriators of water on land claimed by him must be held to attach only at the time of the issuance of his patent, or at the earliest when he makes final proof and payment. The judgments announced in those cases may have been correct on their special facts. We do not pass on that question. But to the extent that they must find support in the proposition that the interest of a settler on the public lands under the pre-emption or homestead laws attaches as against the appropriators of water rights on his tract only as of the time of his final proof or obtaining a patent, they appear to be in conflict with the decision of the Federal supreme court in *Sturr v. Beck*, 133 U. S. 541, 552, 33 L. ed. 761-765; and the views of that court, as those of the tribunal of last resort in cases of this impression, must, of course, prevail. See also *Faull v. Cooke*, 19 Or. 455; *Black's Pom. Water Rights*, §§ 40-42; *Kinney, Irrigation*, §§ 212-220. It follows that the defendant had the right to obstruct the flow of water across his claim in plaintiff's new ditch, and the court below erred in restraining him from so doing. And, since the plaintiff insisted on taking and did take

fixed place for the purpose of operating machinery and other works after so using and returning it to its original channel cannot change the place of use to the damage of a subsequent appropriator lower down on the stream. Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co. 40 Fed. Rep. 480.

But it has been held that one who acquires the privilege of using the waste water of a prior appropriator can be deprived of the same at any time unless the water has been returned to the original channel without any intention of recapture. *Woolman v. Garringer*, 1 Mont. 535.

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Priority not lost by change.

The question of abandonment of water rights in general is treated in the *note* to *Hewitt v. Story*, *ante*, 265, but it may be stated here that a mere change in the use of the water from one mining locality to another does not forfeit the right. *Maeris v. Bicknell*, 7 Cal. 261, 68 Am. Dec. 257.

A different use of the water subsequently to its appropriation does not affect the right; that is subject to the same limitations whatever the use. *Atchison v. Peterson*, 37 U. S. 20 Wall. 507, 22 L. ed. 414.

the water by means and at a place unwarranted by his rights as a prior appropriator, it results further that the defendant, as entitled to the flow of the water after supplying the lawful requirements only of the plaintiff, had the right to use the same, and should recover the damages, if any, which he sustained by reason of the destruction of his dam and the filling of his ditch by plaintiff, and his consequent deprivation of the water.

2. But the plaintiff had the prior right to the use of the water to the extent of the appropriation made by his predecessors, Beekman and Crawford, through the old ditch, prior to defendant's settlement, together with the right to maintain such ditch. Brown's claims as a homestead settler were subordinate to those interests, and his land was subject to a servitude for the support of the same. *De Necochea v. Curtis*, 80 Cal. 397; *Wells v. Mantee*, 99 Cal. 588. It would be inflicting a severe penalty for the trespass committed by Crawford on the land of Brown, and the attempt to shift the location of the ditch, to hold that by that circumstance alone Crawford lost for himself and his successor, the plaintiff, all prior right to the flow of the water itself. He certainly did not intend to abandon his interest in the water. Whether he abandoned his property in the former ditch, and the right to lead water through the same, is a question which has not been argued here or apparently litigated below, and ought not to be now decided; but the parties should be allowed, if they so desire, to amend or supplement their pleadings, and to have determined in the trial court the issue just suggested, and any other necessary to the adjustment of their relative rights under the law as stated in this opinion. It seems to us doubtful whether the finding to the effect that the first ditch, after its repair by Beekman in 1885, was of a capacity to carry 90 inches of water, is sustained by the evidence in the record; but, as the question is not important to the present decision, we mention it merely that the parties may have the matter in mind if it should become of moment upon another trial. We recommend that the judgment against the defendant and the order appealed from be reversed, and the cause remanded for a new trial and other proceedings not inconsistent with this opinion; both parties to the appeal having leave to amend their pleadings as they may be advised.

We concur: Belcher, C.; Searls, C.

The point of deviation and place of use may be changed without losing the right to priority where the rights of others are not injuriously affected. *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12; *Strickler v. Colorado Springs*, 16 Colo. 61; *Knowles v. Clear Creek*, P. R. Mill & D. Co. 18 Colo. 209.

A change in the point of diversion does not affect the priority provided the quantity of water diverted remains the same and no intervening appropriator is injured. *Sieber v. Frink*, 7 Colo. 148.

Right may be sold.

The right to change the place of use has been held to extend to the transfer of it to a third person.

So that the prior right may be sold and trans-

Per Curiam:

For the reasons given in the foregoing opinion, the judgment against the defendant and the order appealed from are reversed, and the cause remanded for a new trial and other proceedings not inconsistent with such opinion; both parties having leave to amend their pleadings as they may be advised.

E. P. HARGRAVE *et al.*, App'ts.,

v.

D. C. COOK *et al.*, Resp'ts.

(108 Cal. 72.)

1. An appropriator of water upon the public domain acquires, under the confirmatory acts of Congress, no rights superior to the riparian rights which have attached to land held at the time of the appropriation in private ownership.
2. A riparian owner does not lose his right to the use of water for irrigating purposes by mere nonuser, as against a lower appropriator.
3. A riparian owner is not estopped to use the water for irrigating purposes by failing to object to the diversion of water by a lower appropriator.
4. An appropriator of water may change the place and purpose of use as against subsequent appropriators, so long as the water is used for proper objects and the change does not injuriously affect the rights of such other appropriators.
5. Although an appropriator of water upon government lands retains his right when the land passes into private ownership under 14 U. S. Stat. at L. 253, 16 U. S. Stat. at L. 218, and may change the point of diversion to another place, he cannot make such change arbitrarily, but only when required to enable him to take the amount of water to which he is entitled, and then, under Civ. Code, § 1412, only when others are not injured by the change.

(July 11, 1895.)

APPEAL by plaintiffs from an order of the Superior Court for Ventura County granting a new trial after verdict in their favor in an action brought to recover damages for the alleged wrongful diversion of water which should have been permitted to descend to plaintiff's ditch. *Affirmed*.

The facts are stated in the opinion.

Messrs. Blackstock & Ewing for appellants.

ferred separately from the land in connection with which the right was acquired. *Strickler v. Colorado Springs*, *supra*; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558.

Right to change mill location.

Under the Massachusetts mill acts after the upper proprietor has finished his appropriation a lower proprietor may appropriate the surplus water, although the effect is to prevent the upper proprietor from lowering his wheel so as to make use of such surplus water which he might have appropriated in the first instance. *Dean v. Colt*, 99 Mass. 486; *Gleason v. Assabet Mfg. Co.*, 101 Mass. 72. H. P. F.

Messrs. Chapman & Hendrick, Barnes & Selby, and Del Valle & Munday for respondents.

Henshaw, J., delivered the opinion of the court:

Appeal from the order granting a new trial. Plaintiffs claim ownership in common with some of the named defendants in a certain described ditch, flume, water right, and right of way, by means of which they diverted the waters of Piru river to their nonriparian lands. The ditch was known as the "Hargrave & Comfort Ditch." They averred the adverse claims of defendants, and asked for a decree settling their rights and enjoining defendants from further assertion of such or any claims. The defendants answered in accordance with their various claims; some asserting ownership in the ditch and water rights, others declaring upon superior rights by prescription. But in particular the defendant Cook claimed the rights of a riparian owner to the water of the creek, which rights are pleaded as superior to those of the ditch owners.

Stripped of matters unnecessary to this consideration, the following are the essential facts: Defendant Cook is the owner of the Temescal rancho under United States patent issued in 1871. Piru river flows through this ranch, and thence across the northwest quarter of section 20. About the year 1875, section 20 being public land of the United States, plaintiffs' predecessors in interest constructed the ditch, and diverted part of the waters of the river, with the acquiescence of the then occupant of the land; and, as the court found, plaintiffs and their grantors, "for more than fourteen years next preceding the commencement of this suit, have been in the quiet, peaceable, open, adverse, notorious, uninterrupted, and exclusive possession, claiming right and title of said water ditch, with the right to divert and use the waters of said Piru river to the extent of 271 inches, measured under 4-inch pressure." The court further found that the predecessors in interest of the defendant Cook in the Temescal rancho did not use any of the waters of said stream except at rare and irregular intervals, and in small quantities; and that they at all times knew that the said Hargrave & Comfort ditch was being continuously used, and that the waters of the stream were being diverted and conducted to lands not riparian to the stream; and that such use, "with their full knowledge and acquiescence," had been continuous for a period exceeding ten years before Cook acquired title to the Temescal rancho and the northwest quarter of section 20. Also it is found that when Cook acquired title he knew of the use of the water by defendants, and "did not object to such use, but fully acquiesced therein, until about the commencement of this suit; and that the rights of plaintiffs were not disputed until long after they had fully acquired a prescriptive right with their co-owners to a part of the waters of the said stream." The waters of Piru river had in the past been little used by the owners of the Temescal rancho but upon Cook's acquisition of it he began the planting of extensive orchards of fruit-bearing trees, until, as he pleads, there were at the commencement of

the suit over two millions of orchard and nursery trees dependent upon the waters of the Piru river for irrigation. This use of the water by Cook naturally lessened the flow of the stream to plaintiffs' ditch, decreased the supply available for their purposes, and led to this action. The Piru Water Company, another of the defendants, took water from the Piru river by means of a ditch higher up the stream than the ditch of plaintiffs. Its ditch, at the time of the action, tapped the river upon the land of the Temescal rancho and carried the water over and across it to other nonriparian lands. Its right by prescription was claimed to be prior and superior to the right of the owners of the Hargrave & Comfort ditch, and this seems to have been conceded; though the precise extent of the right is a matter of controversy which will be considered hereafter.

The court, by its judgment and decree, awarded: (1) The right to Cook to use the waters flowing over the Temescal rancho for domestic uses and purposes and the watering of stock; (2) the right to Cook to 100 inches of water, under 4-inch pressure, drawn off in the Esperanza ditch; (3) the right to the Piru Water Company to an amount not in excess of 285 inches, or so much thereof as may be necessary for the uses accustomed to be made upon certain nonriparian lands; (4) the right to the owners of the Hargrave & Comfort ditch to an amount not in excess of 271 inches, or so much thereof as may be necessary for the uses accustomed to be made, and in accordance with the amounts by the owners respectively accustomed to be used, upon certain described nonriparian lands; and (5) the right to Cook, "after the wants and necessities of the above prior owners have been fully and reasonably supplied," to use the surplus waters for irrigation on the lands of his ranch. By this decree the right of an upper riparian owner to the use of the water for irrigating purposes is made subordinate to the right of a lower appropriator, because at the time the right of appropriation vested the riparian owner was not actually using the water for the designated purpose. This view, appellants contend, is sound. It is the view taken by the court upon trial and expressed by the judge in the following language: "I think the law is well settled in this state that a person diverting and appropriating to a useful purpose the waters of a running stream may acquire an ownership in the right to the use of such waters to the amount he has appropriated to such useful purpose, by operation of the statute of limitation, even against an upper riparian owner, although the point of diversion is without the limits of the lands of such riparian owner, except as against any lawful use to which the riparian owner had or was making of the waters during the time of the creation of the right in the appropriator by operation of statute of limitation." Upon the hearing of the motion for a new trial the court receded from this position, after the consideration of authorities not before called to its attention, and ordered a new trial. Other grounds were urged in support of the motion. Such of them as are deemed necessary will receive attention, but the principal point inviting consideration is the one above set forth.

The right of a riparian proprietor in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right,—a right amongst others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. If his needs do not prompt him to make any use of them, he still has the right to have them flow onto and along and over his land in their usual way, excepting as the accustomed flow may be changed by the act of God, or as the amount of it may be decreased by the reasonable use of upper owners and riparian proprietors. But none of his rights to put the water to legitimate uses is lost by mere nonuser. His rights are not easements, nor appurtenances to his holding. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil, and pass with it (*Luz v. Haggin*, 69 Cal. 255), and may be lost only by grant, condemnation, or prescription. With any use or diversion of the water after it has passed his land the upper riparian proprietor, having no ownership in, and no longer any rights to, it, would have no concern. (The right to forbid the lower owner from backing the water and flooding his land not being here under consideration.) None of his rights would or could be impaired thereby, and without such an impairment he would be without injury, and, consequently, without cause for complaint or redress. "His right extends no further than the boundary of his own estate. He cannot complain of the mere fact of the diversion of the watercourse either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel." *Luz v. Haggin*, *supra*. The Rancho Temescal was never public land, within the meaning of the United States statutes affecting appropriations of water. The riparian rights of the owners of private land are fully protected by section 1423 of the Civil Code. One who bases his right solely upon appropriation made of waters flowing over land which at the time of the appropriation was part of the public domain acquires thereby no right superior to or in derogation of those attaching to lands riparian to the same stream, which, at the time of the appropriation, were held in private ownership.

The "acquiescence" of Cook and his predecessors in interest in the acts of the owners of the Hargrave & Comfort ditch, as declared by the findings, receives this support from the evidence, and no more: With knowledge of these acts, they never attempted to interfere with them. But before one can acquire a right to the doing of an act in which another so acquiesces, the act itself must amount to an invasion of that other's rights, and the doing must either have been so long-continued as that a prescriptive claim can be supported upon the theory that the acquiescence presupposes a grant, or under such circumstances as will raise an estoppel against the objecting party. But, as the upper riparian proprietor's right to object to any use or diversion of the water below ceased when it had flowed past his boundary, any such use could not work an invasion of his

rights, and he was not called upon to protest against it. Thus in *Hanson v. McCue*, 42 Cal. 808, 10 Am. Rep. 299, the waters of a spring had been appropriated below by plaintiff. The time arrived when defendant, upon whose land the spring was situated, desired to make use of the waters which fed it. A prescriptive right in plaintiff was urged by reason of defendant's long acquiescence in the use, but this court said: "It will be seen at once that McCue, or those from whom he purchased, could, in the nature of things, have no right to complain that the water in the artificial channel, after leaving the spring, was appropriated below by the owners of the Hanson lot. If they had no right to complain in the first instance we are not driven to the presumption of the grant of an easement to account for why they did not complain." The same principle is announced in *Lakeside Ditch Co. v. Orans*, 80 Cal. 181, where a lower appropriator claimed a right to a certain amount of water against an appropriator whose ditch was higher up the stream. The finding was that plaintiff diverted his ditch full of water "whenever there was water in the stream to fill it," and a right superior and adverse to that of defendant was predicated upon this. But the court said: "If the plaintiff's ditch was simply diverting water which the defendants allowed to pass down the stream while the head-gate of their ditch was closed, the act of the plaintiff in diverting the water thus permitted to pass down the stream could not, in the nature of things, be adverse to the right of the defendants. The latter could not complain, and title by prescription cannot be acquired unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom those acts are performed." To like effect are the cases of *Anaheim Water Co. v. Semi-Tropic Water Co.* 64 Cal. 192, and *Alta Land & W. Co. v. Hancock*, 85 Cal. 219. No estoppel is pleaded or found, nor would the facts warrant such a finding. The motion for a new trial was properly granted upon the ground considered.

In contemplation of the new trial it is proper to say that the rights of defendant Cook, and of defendant the Piru Water Company, of which Cook is a stockholder, are in issue in this action only to the extent that their rights affect or are affected by the rights of the plaintiffs. As between themselves, their rights are not subject here to determination, excepting as far as may be necessary to do complete justice to plaintiffs, and excepting so far, as between themselves, they have tendered and joined hostile issues. The limitation upon the use of the water appropriated by the Piru Water Company is not warranted by the evidence. So far as as plaintiffs are concerned, the Piru Water Company is prior in time and superior in location, and had acquired the ownership of a given amount of water while that water was used for proper objects, with the right to change the place and purpose of use so long as the change did not injuriously affect the rights of the subsequent appropriators and claimants. *Ramell v. Irish*, 96 Cal. 214; *Jacob v. Lorenz*, 98 Cal. 382; *Davis v. Gale*, 82 Cal. 26, 91 Am. Dec. 554; *Pom. Water Rights*, § 69.

Upon the question of the right of the owners

of the Hargrave & Comfort ditch to extend it 500 or 600 feet over the northwest quarter of section 20, now the land of Cook, the better to facilitate the obtaining of their water, we do not deem it proper, upon this appeal, to do more than point out that, while an appropriator of water upon government land retains his rights when the land passes into private ownership, by virtue of the confirmatory statutes of the United States (14 Stat. at L. 253; 16 Stat. at L. 218), and while in the exercise of these rights he may change the point of diversion to another place upon the servient tenement, he is nevertheless limited in so doing to the exigencies of the situation, and has no right to make such change arbitrarily and at will. He may do so when, under certain circumstances, it is required to enable him to take the amount

of water to which he has ownership, but then only when "others are not injured by the change." Civ. Code, § 1412. His rights are the rights of the grantee of an easement, and extend, in the matter of changing the point of diversion, no further than the boundaries of the servient tenement; and even when entering upon this he is under obligation only to make reasonable changes with reasonable care, and also to repair, so far as possible, whatever damage his labors may have occasioned. *Gale & W. Easem.* 235. As to lands other than those subject to his easement, and as to other claimants and owners, he can make no change at all which injuriously affects them or their rights. *The order appealed from is affirmed.*

We concur: Temple, J.; McFarland, J.

PENNSYLVANIA SUPREME COURT.

City of WILKES BARRE

v.

F. V. ROCKAFELLOW

and

John Welles HOLLENBACK *et al.*, Appts.

(171 Pa. 177.)

(October 7, 1895.)

APPEAL by defendants Hollenback *et al.* from a judgment of the Court of Common Pleas for Luzerne County in favor of plaintiff in an action brought to enforce the alleged liability of the parties to the bond of Rockafellow as city treasurer. *Reversed.*

The facts are stated in the opinion.

Messrs. F. W. Wheaton, S. J. Strauss, G. R. Bedford, and H. W. Palmer, for appellants:

Any course of dealing between the party guaranteed and the principal in a bond entered upon, either before the bond is executed or afterwards, which changes the contract or the relations which the sureties suppose themselves to guarantee, relieves the sureties if they are not parties to the alteration.

American Teleg. Co. v. Lennig, 189 Pa. 594; *Bensinger v. Wren*, 100 Pa. 500; *Nashitt v. Turner*, 155 Pa. 429.

Mere noncommunication of circumstances affecting the situation of the parties, material for the surety to be acquainted with and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional or with a view to any advantage to himself.

Railton v. Mathews, 10 Clark & F. 984; *Owen v. Homan*, 3 Macn. & G. 878; *Wayne v. Commercial Nat. Bank*, 53 Pa. 848; *Franklin Bank v. Cooper*, 86 Me. 179, 89 Me. 542; *Lancaster County Bank v. Albright*, 21 Pa. 228; 2 Am. Lead. Cas. Hare & W.'s notes, 478-480.

The same rules of contract are applicable where the sovereign is a party, as between individuals.

Hunter v. United States, 80 U.S. 5 Pet. 185, 8 L. ed. 91.

These principles apply to official bonds.

Lafayette v. James, 93 Ind. 240, 47 Am. Rep. 140; *Berkis County Comrs. v. Ross*, 3 Binn. 520; *Sharp v. United States*, 4 Watts, 21,

1. A city treasurer who borrows money in his custody from sinking fund commissioners who have the power to invest it holds the money as a debtor, rather than as an officer; and the sureties on his bond are not liable for his repayment of the money, but only for his care of the security held by him.

2. An offer to prove that a city treasurer borrowed money in his custody from the officers who had power to invest it, and that he paid interest upon it, and that the city council approved reports showing the receipt of such interest, should not be rejected in an action against his sureties because it does not undertake to set forth what action was taken before loaning the money.

3. Interest paid to himself as city treasurer by such officer, on money which he had borrowed from a fund in his custody, is held by him as treasurer, and his failure to pay it over to his successor is a breach of his official bond.

4. The promise to pay interest on balances in favor of the city, made by a banker to induce his election by the council as city treasurer, is against public policy and is incapable of enforcement.

5. Money is not loaned to a city treasurer who is also a banker, so as to relieve his sureties from liability for it, by his invalid promise, made to induce his election, that he will pay interest on the balances in favor of the city.

6. Transcripts showing entries by a treasurer upon his books are not conclusive, but only prima facie evidence, against his sureties, that he is liable for the sums with which he has charged himself.

NOTE.—While previous cases may have in some degree involved the questions here presented, it is believed that the above case is the first that clearly presents them.

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As to liability of officers for interest, see *People v. Walsen* (Colo.) 15 L. R. A. 456, and note; also *State v. McFetridge* (Wis.) 20 L. R. A. 233.

28 Am. Dec. 676; *Fertig v. Bucher*, 3 Pa. 308; *Grim v. Jackson Twp. School Directors*, 51 Pa. 219; *Com. v. Toms*, 45 Pa. 408; *Com. v. West*, 1 Rawle, 81.

Sureties on official bonds are presumed to undertake only for performance as prescribed by law.

Cannell v. Crawford County, 59 Pa. 194; *Com. v. West*, 1 Rawle, 81; *United States v. Boyd*, 40 U. S. 15 Pet. 187, 10 L. ed. 706; *United States v. Tingley*, 30 U. S. 5 Pet. 115, 8 L. ed. 66; *United States v. Giles*, 13 U. S. 9 Cranch, 212, 3 L. ed. 708; *Smith v. United States*, 69 U. S. 2 Wall. 219, 17 L. ed. 788; *Pickering v. Day*, 3 Houst. (Del.) 474, 95 Am. Dec. 291; *Litchfield Union Guardians of the Poor v. Greene*, 1 Hurlst. & N. 884.

Where a creditor does an act injurious to the surety, the latter is discharged.

2 Am. Lead. Cas. Hare & W.'s notes, 378; Brandt, Suretyship, § 845.

The duty of the treasurer was to keep the city's money separate and distinct from all other funds. So long as the fund was in his hands, he was bailee to the government.

Farrar v. United States, 30 U. S. 5 Pet. 373, 8 L. ed. 159.

One who has enjoyed the advantage of a contract cannot repudiate it as *ultra vires*.

Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co. 88 Pa. 160; 2 Dill. Mun. Corp. 3d ed. § 986.

The performance of an illegal agreement may nevertheless give rise to a contract which the law will enforce, and the creditor may consequently exonerate the surety by receiving the consideration for a promise which was made on Sunday, and therefore void.

Usher v. Applegate, 26 Pa. 140; 2 White & Tudor, Lead. Cas. in Eq. 1913.

The fact that the investment may have been unlawful does not change the fact that the investment was made; and as the investment was made, and continued, this money was not in the city treasurer's hands as such at the beginning of the bond year in suit, nor during that year. The fact may be shown in relief of sureties.

Com. v. Reitzel, 9 Watts & S. 109; *Manufacturers' & M. Sav. & L. Co. v. Odd Fellows' Hall Assn.* 48 Pa. 446; *Porter v. Stanley*, 47 Me. 515; *Ohning v. Evansville*, 66 Ind. 63.

Where one of two persons must suffer, he who gave the opportunity for wrongdoing, who connived at it, or who accepted the benefit knowingly, must accept the disadvantage.

Story, Eq. § 887.

Money that did not come into the treasurer's custody during the bond year is not chargeable against the sureties.

Farrar v. United States, 30 U. S. 5 Pet. 373, 8 L. ed. 159; *United States v. Boyd*, 40 U. S. 15 Pet. 187, 10 L. ed. 706; *United States v. Giles*, 13 U. S. 9 Cranch, 212, 3 L. ed. 708; *Com. v. Reitzel*, *supra*; *Mutual Bldg. & L. Assn. v. McMullen*, 1 Pennyp. 431; *Manufacturers' & M. Sav. & L. Co. v. Odd Fellows' Hall Assn.* *supra*; *Com. v. Baynton*, 4 U. S. 4 Dall. 282, 1 L. ed. 834.

That the treasurer in his reports charges himself with it and with interest allowed by him upon it, is not conclusive on the sureties.

Stephen, Ev. art. 17; 1 Greenl. Ev. § 187; *Com. v. Reitzel*, *supra*.

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Where the matter complained of is an independent and positive alteration of the course of official duty, or of the contract which the surety supposes himself to make, whether it is done before the bond is executed or afterwards, it discharges the surety.

Smith v. United States, 69 U. S. 2 Wall. 219, 17 L. ed. 788; *State v. Craig*, 58 Iowa, 288; *State v. McGonigle*, 101 Mo. 353, 8 L. R. A. 735; *Hagler v. State*, 81 Neb. 144; *White v. East Saginaw*, 48 Mich. 567; *Newark v. Dickerson*, 45 N. J. L. 38.

The payment or report of interest to the city council during the bond year was notice to the city that the money was used to earn interest, and whether the money was so used by the treasurer or by some person unknown, if the council took no step to disapprove, but permitted it to continue, and accepted for the city the proceeds, the bondsmen, being ignorant, would be released from liability.

Pittsburgh v. Grier, 22 Pa. 55, 60 Am. Dec. 65; *Humphreys v. Armstrong County*, 56 Pa. 204; *Norristown v. Moyer*, 67 Pa. 355; *Allegheny City v. McClurkan*, 14 Pa. 81; *Bohan v. Avoca*, 154 Pa. 404.

Messrs. John McGahren, William S. McLean, and Alexander Farnham for appellee.

Williams, J., delivered the opinion of the court:

This is an action upon an official bond. The principal obligor allowed judgment to go by default. The sureties made defense, and raised on the trial some questions that, so far as we have been able to discover, have not been passed upon in the form in which they now appear.

It seems that F. V. Rockafellow was elected treasurer of the city of Wilkes Barre for twenty-one years, consecutively. His last election took place in April, 1893, and he gave the bond now sued on soon after. During all this time he was a banker, in good financial standing, doing business in Wilkes Barre. In February, 1893, his bank suddenly closed its doors. Its liabilities proved to be large, and its assets practically nothing. He made a general assignment for the benefit of his creditors, but his assigned estate realized less than 7 per cent on his liabilities. His indebtedness to the city, as treasurer, was ascertained to be \$51,748.01. It was made up of four items, *viz.*, the sinking fund of the city, and between \$4,000 and \$5,000 of interest thereon, the ordinary or current funds of the city, and a considerable sum allowed as interest on the balance due upon this account.

The position of the sureties is that their undertaking is to be responsible for their principal as an officer, and not as a banker or borrower; the condition of the official bond being that their principal, "treasurer of said city of Wilkes Barre, shall faithfully discharge the duties of his said office, and pay over and safely deliver into the hands of his successor all moneys, books, accounts, papers, and other things" belonging to the city, which he shall hold as such officer. They allege that he held no part of the \$51,748.01 found due from him, when his bank closed its doors, as a city treasurer, but as a borrower, and that the city has,

for that reason, no claim upon them for any part of its loss. The position of the city, on the other hand, is that the entire amount demanded belonged to the city, and was in the hands of the city treasurer as its lawful custodian. The assignments of error all relate to some phase of this general controversy, and will be sufficiently considered by determining the relation of F. V. Rockafellow to the four items into which the plaintiff's demand is divisible. The general rule is that the liability of both principal and sureties in an official bond must be measured by the terms of the instrument. The terms must receive a reasonable construction, and, if there has been no violation of official duty, there has been no breach of the condition for which the sureties can be required to account. It follows, necessarily, that for an extraofficial act or undertaking of the principal the sureties cannot be held responsible. 2 Am. & Eng. Enc. Law, 467b. And if the ordinary course of official action is departed from, for the benefit and at the instance of the party to whom the bond is given, and loss results, the sureties are not, in law or morals, responsible for such loss, unless they assented to the departure from the ordinary course of official action which made the loss possible. *Rogers v. The Marshal*, 68 U. S. 1 Wall. 644, 17 L. ed. 714; *Skinner v. Wilson*, 61 Miss. 90. What was the official duty of the city treasurer? Simply to act as custodian of the funds belonging to the city. As to the sinking fund, it is clear that he had no power to invest it or use it in any manner, except under the direction of the sinking-fund commissioners. They had power, under the ordinance, to invest the funds under their control, subject to the approval of the council, and it was made their duty to report annually the condition of the sinking fund and its securities to the council. The eleventh section of the same ordinance provides that "the treasurer of the city shall be the custodian of the moneys and securities of the sinking fund, subject to the inspection and order of said commissioners." As the commissioners had power to invest the sinking fund in such securities as the council should approve, they had, of course, power to lend it to the person who had the custody of it as an officer. When they did this, the money was no longer in the treasury, but the security taken for its return stood in its place. The treasurer, as such, held the security. The individual borrower held the money, not as an officer, but as a debtor to the city. The sureties would, in that case, be liable for the care of the security held by their principal, or city treasurer. They would not be liable for the payment of the money borrowed by him from the sinking-fund commissioners, because that was a personal debt, for the collection of which the creditors would be compelled to look, as in the case of any other loan, to the solvency of the borrower, and the securities given at the time the loan was made. When asked to pay the personal debts of their principal, the sureties may well reply: It was the official conduct, not the personal solvency, of the treasurer for which we engaged to be responsible. If he has been guilty of a breach of official duty, for that we are liable as sureties upon his official bond; but we have no

concern with his personal debts. Now, the defendants offered to prove at the trial that Rockafellow borrowed the money in the sinking fund from the sinking-fund commissioners at 4 per cent per annum; that he held it under this arrangement for eight years before the bond sued on was given, and paid the interest regularly at the rate agreed upon. They also offered to prove, in connection with this offer, that each year the commissioners reported the receipt of the interest from him to the city council, and their reports were approved. The learned judge rejected this offer, for the reason that it did not undertake to set forth "what action was taken, either by the council or the sinking-fund commissioners, before the loaning of the money." But if the fact was as alleged, that, without the knowledge of the sureties, their principal had been turned from a mere custodian of public moneys into a borrower of them, by the action of the municipal officers, and the money subjected to all the risks of loss incident to its being mingled with the funds of the borrower, and used in his private business, the sureties had a right to show it; and if they did show it, then on the commonest principles of justice they had a right to defend as to so much of the plaintiff's claim. What difference could it make to the sureties whether the proceedings were strictly formal, so long as they resulted in the loss of the money, and were taken by those who had a right to invest it. Suppose the loan had been made to some other person, upon whose failure it was lost, and that in the treasury there was found the borrower's note, taken by the commissioners. Would the sureties, if sued, be compelled to show that every step taken by the sinking-fund commissioners had been regularly entered on their records, and had been in exact compliance with the law, before they could set up the fact that the money had been taken out of the treasury by those who had the right to invest it? Unless there was some breach of official duty on the part of the treasurer in parting with the money, neither he nor his sureties could be held for its loss because the commissioners had made a bad loan. If they had the power to make the loan, and did make it, they took the money out of the treasury for investment, and the treasurer no longer held it as the custodian. This offer should have been received. Whether the evidence would have supported it we cannot determine, but the defendants had a right to make the showing offered if it was in their power. It was, in effect, an offer to show that the sinking fund had been invested, and had not been in the treasury for more than eight years. The sinking-fund commissioners might be liable to the city for a loss resulting from their neglect of duty, but the defendants are not their sureties, and have no concern with that question.

The interest on the sinking fund stands on quite different ground. If Rockafellow, as a banker, had borrowed of the sinking-fund commissioners, the money which Rockafellow, as city treasurer, had in his custody, and had paid interest on it regularly, as alleged, for eight years, the interest, having been paid by him as borrower to himself as city treasurer, was as to himself and his sureties, in the treas-

ury. For this he was liable to account. His failure to pay it over to his successor was a breach of his official duty, and for such breach of official duty his sureties were liable on their bond. They were liable, not because it was interest due from him to the city, but because it was interest received by him as city treasurer from a borrower from the sinking-fund commissioners. It was income derived by the commissioners from an investment of the sinking-fund money, paid to the treasurer as the proper receiving officer and custodian of all uninvested money belonging to the city. If the money was not, in fact, lent to Rockafellow, then he was not liable to interest; for, as city treasurer, his duty was to hold the money subject to the orders of the proper officers, and he had no right to use it. His duty was simply to pay over, when legally required so to do, what he had received by virtue of his office; and for the discharge of this official duty his sureties were liable. When this duty was discharged their liability was at an end. Either he held the sinking fund as treasurer, or he had borrowed it as a banker. The rejected evidence, if it had sustained the offer, would have settled this question, and the extent of the liability of the defendants as to this part of the plaintiff's claim.

The remaining question relates to the general funds of the city, and the effect of the agreement by Rockafellow to pay interest at the rate of 8 per cent on balances in favor of the city. It does not appear that there was, as to this money, any agreement entered into. Some member of the city council, in naming another candidate, stated that the person named by him would, if elected city treasurer, pay interest at the rate of 8 per cent on the balance in favor of the city. Another member said, if Mr. Rockafellow was re-elected, he would do as well by the city as any one else. The election then took place and resulted in the choice of Mr. Rockafellow by a decided majority. The relation of borrower and lender was not created by these statements. It does not seem to have been contemplated. The balance would be constantly shifting in amount. The treasurer was to be prepared at all times to honor the warrants of the proper officers, and upon the surplus of receipts over disbursements, as balances were struck from time to time, interest was to be allowed. This agreement, if made, did not amount to a loan of any particular sum of money by the city council to the treasurer, but was in the nature of a premium demanded from him as the price of the office. It was a premium for which he was not liable, which he could not be compelled to pay if he had taken defense to it, and for which the sureties are not liable. The agreement, if made, was against public policy, and is incapable of enforcement. If, as we incline to think, he was not a borrower of the money of the city, but was to hold the money subject at all times to the call of the proper municipal officers, his duty and his sureties' undertaking on his behalf, are discharged by the payment of the amount of money that came into his hands as treasurer, regardless of any promise to pay interest, or a premium in any other form, for the privilege of holding the office. The promise to pay interest as the

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price of an election to the office of treasurer has no valid consideration to support it. It is a promise that we cannot recognize as binding on him who made it. *A fortiori* is it without binding effect on the sureties upon an official bond.

It is contended that, as the law requires the city treasurer to keep accounts of his receipts and disbursements of the revenues of the city, and to make at stated intervals transcripts of these accounts for the information of the municipal government, the transcripts so made should be held to be conclusive upon him and his sureties as to the amount of public moneys received by him. This is putting the effect of the entries by the treasurer upon his books too strongly. They should be held to make a case, *prima facie*, against him and those who are in privity with him. They cannot, however, preclude the defendants from showing that the items, or some of them, have been erroneously entered,—that their principal was mistaken in his view of his own liability, or was disposed unfairly to make them responsible for sums of money for which no recovery could otherwise be had against them. Their liability is limited, as we have seen, by the terms of the bond, to a breach of official duty. If it was not the duty of the treasurer to pay, as such, the price demanded from him as the consideration of his appointment, his failure to pay it was not a breach of official duty, and therefore not a breach of his official bond. By the simple device of charging himself with that for which he was not liable, he could not shut the mouths of his sureties, or estop them from alleging the truth in their own behalf. The interest, whether it be treated as an exaction the law does not authorize, or a price demanded for the office, must be struck out, so far as it relates to the general funds of the city. So far as the facts now appear, we see no reason why the sureties should not be held liable for the general funds of the city. This disposes of the questions raised on this record.

The assignments of error are sustained, so far as they relate to the questions now considered, *the judgment is reversed*, and a writ of *venire facias de novo* awarded.

Mitchell, J., dissents from so much of this opinion as holds that plaintiff cannot recover interest on balances of general account.

Reversed in 43 L. ed. 49.

COMMONWEALTH of Pennsylvania, *Appd.*,

George E. PAUL,

(170 Pa. 284.)

A ten-pound package of oleomargarine put up by a nonresident manufacturer

NOTE.—The decision in *Com. v. Schollenberger* (Pa.) 22 L. R. A. 156, is here followed and approved, to the effect that packages for retail trade cannot be protected as original packages of interstate commerce against the exercise of state police power. As intimated in the footnote to that case, the Pennsylvania court was the first to decide this point, and up to the present time it remains untouched by courts of the United States and of other states.

and sent into the state for sale at retail to an individual consumer, and thus sold by an agent for use as food, is not an original package the sale of which is protected against state laws by the Constitution of the United States.

(October 7, 1895.)

APPEAL by the Commonwealth from a judgment of the Court of Quarter Sessions for Philadelphia County acquitting defendant of the charge of selling oleomargarine contrary to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Messrs. A. Morton Cooper, Carroll R. Williams, and George S. Graham, District Attorney, for appellant:

Defendant places himself clearly within the ruling of *Com. v. Schollenberger*, 156 Pa. 201, 23 L. R. A. 155, 4 Inters. Com. Rep. 488 (1893).

While Congress has the power to regulate commerce under section 8 of article 1 of the Constitution, the states may validly "affect" commerce in two ways:

(1) In the exercise of their inherent and inalienable police power.

(2) Under the taxing power.

Munn v. Illinois, 94 U. S. 185, 24 L. ed. 87. The states did not at the formation of the Union, and cannot by any means or process, surrender the police power inherently existing in them.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 6 L. ed. 28; *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245, 7 L. ed. 412; *United States v. Dewitt*, 76 U. S. 9 Wall. 41, 19 L. ed. 598.

The scope of the police power has never yet been clearly defined, but it has never been doubted that the right of the state extends to the protection of the health of its citizens.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 81 L. ed. 700, 1 Inters. Com. Rep. 828; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Morgan's L. & T. R. & S. Co. v. Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Kimmish v. Ball*, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407; *New York v. Miln*, 36 U. S. 11 Pet. 103, 9 L. ed. 648.

The act under which defendant below was convicted is a health law.

Powell v. Pennsylvania, 127 U. S. 678, 32 L. ed. 253.

If the state, as a police measure, can restrict interstate commerce as to time, it may, upon principle and precedent, restrict as to use.

Hennington v. State, 90 Ga. 396, 4 Inters. Com. Rep. 413.

Although a state is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government.

License Cases, 46 U. S. 5 How. 577, 12 L. ed. 289; *Wilkinson v. Rohrer*, 140 U. S. 545, 35 L. ed. 572; *Stone v. Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

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The state may validly impose a license tax or fee, and such action is not a regulation of commerce.

License Tax Cases, 72 U. S. 5 Wall. 462, 18 L. ed. 497; *Osborne v. Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79.

If the business of a dealer selling for a principal residing in another state be in effect an occupation differing materially in no respect from that of a local dealer in the same class of goods, the state may regulate the occupation.

Com. v. Schollenberger, 156 Pa. 201, 23 L. R. A. 155, 4 Inters. Com. Rep. 488 (1893); *Woodruff v. Parham*, 75 U. S. 8 Wall. 128, 19 L. ed. 882; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 21, 36 L. ed. 606, 4 Inters. Com. Rep. 79; *License Cases*, 46 U. S. 5 How. 599, 12 L. ed. 299; *Munn v. Illinois*, 94 U. S. 125, 24 L. ed. 84; *Ward v. Maryland*, 79 U. S. 12 Wall. 428, 20 L. ed. 452.

Merchandise in mass or bulk, though imported and held intact by the importer, is not necessarily such a technical "original package" as to preclude state action before the sale.

Brown v. Houston, 114 U. S. 622, 29 L. ed. 257; *Com. v. Zell*, 138 Pa. 628, 11 L. R. A. 602.

The manufacture and sale of oleaginous substitutes for butter in the United States cannot be said to be sufficiently "national in its nature" to constitute the substituted article a legitimate subject of interstate commerce, at least seven states having by statutes prohibited the manufacture and sale of oleaginous substitutes, in imitation of and intended as a substitute for genuine butter.

State v. Marshall, 64 N. H. 549, 1 L. R. A. 51; *State v. Addington*, 77 Mo. 110, 12 Mo. App. 214; *Butler v. Chambers*, 86 Minn. 69; *Plumley's Case*, 156 Mass. 286, 15 L. R. A. 689; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223; *People v. Arenberg*, 105 N. Y. 128, 59 Am. Rep. 493; *State v. Newton*, 60 N. J. L. 534, 2 Inters. Com. Rep. 63; *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 850, 127 U. S. 678, 32 L. ed. 353; *McAllister v. State*, 72 Md. 390.

Messrs. A. B. Roney, Henry R. Edmunds, and Richard C. Dale, for appellee:

The judgment should be affirmed upon the authority of *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 86, and *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223.

Leisy v. Hardin has been recognized, (1) by Congress in the passage of the act of August 8, 1890, commonly known as the Wilson Bill; (2) by the several United States circuit courts in *Minnesota v. Gooch*, 44 Fed. Rep. 276, 10 L. R. A. 830, 3 Inters. Com. Rep. 530; *Re McAllister*, 51 Fed. Rep. 282; *Re Sanders*, 52 Fed. Rep. 802, 18 L. R. A. 549, 4 Inters. Com. Rep. 805; *Re Ware*, 53 Fed. Rep. 788; (3) by this court in *Com. v. Zell*, 138 Pa. 615, 11 L. R. A. 602; *Titusville v. Brennan*, 143 Pa. 642, 14 L. R. A. 100, 3 Inters. Com. Rep. 785.

Williams, J., delivered the opinion of the court:

It is not necessary to the decision of this case

that we should enter upon the discussion of the existence and extent of the police power residing in the several states of the Union. It is quite unnecessary to argue that the power of Congress to regulate commerce between the citizens of the different states was not intended to abridge the lawful exercise of the police power by any of the state governments. If judicial decisions can be said to settle any question, these questions are clearly and properly settled by the decisions of the highest tribunal known to our laws, and settled in accordance with the rules laid down in this state since its first organization. In *Powell v. Pennyloania*, 127 U. S. 678, 82 L. ed. 253, the right of this state to deal, in the exercise of its police power, with the manufacture and sale of oleomargarine, and the validity of the particular statute under consideration in this case, were distinctly affirmed. During the last year (1894) a Massachusetts statute relating to the same subject came before the Supreme Court of the United States in *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, and was sustained as a lawful exercise of the police power. The defendant in that case had, as the defendant in this case has, a license from the internal revenue department of the United States, authorizing him to deal in oleomargarine. It was held, however, that this did not authorize him to engage in the manufacture or sale of oleomargarine in violation of the state laws, lawfully passed, forbidding or regulating such manufacture and sale. The dealer in articles which the state, in the exercise of its police power, places under restrictions, must make his peace with the state in which his business is conducted, as well as with the internal revenue laws of the United States. This proposition the defendant denies. He has made his peace with the tax laws of the United States, but denies the power of the state to regulate or restrict his sales of the commodity in which he deals, and asserts that he is engaged in interstate commerce, within the true intent of the constitutional provision conferring upon Congress the power to regulate commerce between the several states. In determining the question thus raised, it is important to keep in mind the facts found by the special verdict, as follows: (1) The defendant is a resident in and citizen of this state, with a store or place of business at No. 214 Callowhill street, Philadelphia. (2) He is conducting the sale of oleomargarine as the agent for "Chicago Butterine Company," which is a firm or corporation doing business in Illinois, and is the licensed dealer at No. 214 Callowhill street. (3) The oleomargarine was not made from milk or cream. It was designed to be used in place of butter. It was sent from Chicago to Philadelphia to be sold as food, and the tub sold to Crawford, which is complained of in this case, was sold to him for use as an article of food. (4) The tub contained 10 pounds only; was put up, sealed, and stamped at the factory in the state of Illinois; was received in the same form in Philadelphia, and then "placed in defendant's store, and offered for sale as an article of food." (5) This was one of "many transactions of like character made by the defendant during the last two years;" or, in other words, this was the way in which the defendant did business for his nonresident principals, the

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manufacturers. They put up the article in 10-pound packages, suited for the retail trade; and, because they do not allow their agents to open or divide these, they treat their trade as wholesale, though in fact they supply the actual consumer, and not the retail dealers.

Looking now at these facts in the light of the cases cited, we shall find every question raised by them has been decided against the defendant by the Supreme Court of the United States, except one. The validity of our act of assembly has been distinctly affirmed as a lawful exercise of the police power. Act May 21, 1885. The fact that an internal revenue license affords the defendant no justification for disregarding a lawful exercise of the police power by the state is stated with equal clearness. The proposition that the judiciary of the United States should not strike down the police power of the states, in the exposition of the interstate commerce powers of the general government, was asserted and abundantly vindicated in *Plumley v. Massachusetts*, *supra* (decided within the last year). Our statute is directed especially against the sale of oleomargarine as an article of food. The defendant, in wilful and flagrant disregard of the letter as well as the spirit of the statute, keeps these tubs of the commodity manufactured by his principals at the store in Callowhill street, for sale "as an article of food." He offers them for sale for use as an article of food, and he sold to Crawford the 10-pound tub which is the ground of complaint in this case for use as food. Now, it is very clear that this sale was a violation of our statute. The conviction was eminently proper, therefore, and should be sustained, unless the sale can be justified as one made of an "original package," within the proper meaning of that phrase. The nonresidence of the manufacturer does not play any important part in this case, for he comes into this state to establish a "store" for the sale of his goods, pays the license exacted by the revenue laws, and puts his agent in charge of the sale of his goods from his store, not to the trade, but to customers. We have, therefore, a Pennsylvania store selling its stock of goods to its customers, for their consumption, from its own shelves; and, unless these goods are in such original packages as the laws of the United States must protect, the sale is clearly punishable under our statute.

We first encountered this question of what shall constitute an original package, within the meaning of our national interstate commerce legislation, in *Com. v. Zell*, 138 Pa. 615, 11 L. R. A. 602. A nonresident manufacturer of intoxicating drinks put up his whiskey and other liquors in quart and pint bottles, adapted for use in the retail trade to consumers. These he sent to an agent in charge of a store rented for the purpose in Washington, Pa. The bottles were corked, some sealing wax put over the cork, and the brand or initials of the manufacturer impressed thereon. The bottles so secured were then put in pasteboard boxes or covers, and packed in open boxes or barrels, for shipment to the Pennsylvania store. When they were received at the store the bottles were arranged and displayed on the shelves, and offered for sale to the consumer as original packages of whiskey. Neither the distiller who

shipped the whiskey, nor his agent who sold it, had a license to sell intoxicating drinks under the liquor laws of this state, but made sales of whiskey and beer by the pint and quart under the pretense that each bottle was an original package of commerce. The learned judge before whom an indictment against the seller of the bottles of liquor was brought to trial submitted the question to the jury whether this method of putting up the liquors in bottles was not adopted as a device to evade the liquor laws of this state. The jury found the fact to be that it was a mere device, and rendered a verdict of guilty. Upon an appeal to this court the ruling of the court below was affirmed, and, in speaking on the second assignment of error, we said that whether whiskey or beer could be put up in pint bottles, and sold by the single bottle, as an original package, under the protection of the interstate commerce laws, was a question that would be decided when it was squarely raised. The question was next raised in *Com. v. Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488, and its decision became necessary to the disposition of that case. In that case a nonresident manufacturer of oleomargarine had established a store for its sale in Philadelphia, and held a license, under the internal revenue laws, authorizing such sale. His agent sold a tub of "the goods" to a boarding-house keeper, for use, in the place of butter, on his table. The defense was that the tub had not been broken or divided by the seller, and was therefore an original package within the meaning of the interstate commerce cases. We held that the conclusion did not follow from the fact stated, and attempted to define an "original package" as such a package as was used in good faith by producers and shippers for convenience in handling and security in transportation of their wares in the ordinary course of actual commerce. But we also said that where the size of the package was adapted for the retail trade, so that "breaking of bulk" was not necessary to "reduce the goods into the common mass" and fit them for the retail trade, the traffic so conducted was not interstate, but infrastate, commerce; or, in other words, the common every-day retail traffic of the community in which the store was located. Let us look at the consequences of the adoption of the opposite rule. If a pint bottle of whiskey is an original package, under the protection of Congress, and can be sold as such regardless of the police legislation of the state, we cannot punish the sale to a minor, to a person of known intemperate habits, to a lunatic, on election days, or on the Sabbath. All power over the traffic for police purposes is gone. And why? Because the power to regulate interstate commerce intended to guard against stoppage along state lines for examination or the collection of customs duties, has been extended by construction until it is made to reach and protect a retail traffic carried on within any state, if the things sold have come into the retailer's store from a nonresident manufacturer or shipper. If this be a sound construction, then the power of a state to restrict or prohibit an injurious traffic does not depend on the deleterious character of the thing sold, or the manner in which sales are made, or the

public or private injury inflicted by the sale, but on the manner in which the thing sold comes into possession of the seller. If he makes the article, or buys it of another citizen of the state, he cannot sell it without punishment. If he buys it of a nonresident who sends it to him across the state line, he may sell it with impunity and the state is powerless to stay his hands or to regulate his sales. A pint of whiskey put up in a flask, if made or bought in this state, cannot be sold without a license granted by the courts after an examination into the character of the applicant and his business. The same flask of whiskey put up across the border may come, as an original package, into any community, and be sold to any person,—whether a minor, a drunkard, or a lunatic,—under the protection of the Constitution of the United States. We cannot adopt a construction that seems to us so unnatural and unreasonable, and that would work such absurd and monstrous results. On the contrary, we hold, as we think is held by the recent case of *Plumley v. Massachusetts*, already referred to, that the mere fact that a police law may affect the trade in articles brought from another state does not amount to an attempt to regulate interstate commerce, or to an assumption of power belonging to Congress.

Coming now to the facts of this case, we find the alleged "original package of commerce" to be a small tub of oleomargarine, containing 10 pounds, and in fact sold to a consumer for use, as an article of food, upon his table. It is true that the defendant treats his trade as one carried on at wholesale, but the facts of the special verdict show that this is not because he supplies dealers or sells in large quantities, for shipment, but because he treats the little tubs and packages he sells his customers as "original packages of commerce," and his lawbreaking traffic as "interstate commerce." He does not "break bulk," by taking 1 pound out of a package, and weighing it on his scales, for the supply of a customer, but requires him to take a whole tub,—whether of 10 pounds, or of 2 or 1, is immaterial, but it must be a whole package, as it was put up at the factory. If the pint bottle or the pound package has not been opened and divided before the sale, the contention is that it has not become a part of "the common mass" of property entering into the ordinary business of the citizens of the state, but is an original package, under the protection of Congress, as interstate commerce. The question to which we are thus brought is the same that was encountered in *Com. v. Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488. It is whether a package intended and used for the supply of the retail trade is an "original package," within the protection of the interstate commerce cases. We held in that case that a manufacturer who puts up his products in packages evidently adapted for and intended to meet the requirements of an unlawful retail trade in another state, and sends them to his own agent in that state, for sale to consumers, is not engaged in interstate commerce, but is engaged in an effort to carry on a forbidden business by masquerading in a character to which he has no honest title. We are not dealing with the legislative question. Whether the trade in oleomargarine is injuri-

ous, and should be restricted, is a question that has been decided for us. It has been declared injurious. It has been placed under restrictions. These restrictions have been held to be a valid exercise of the police power both by this court and the Supreme Court of the United States. Our question is whether this valid restriction can be enforced, or whether the transparent trick of putting up oleomargarine in small packages, in another state, so that it can be sold at retail to consumers as an article of food, will clothe an unlawful retail traffic with the coat of mail belonging to honest, legitimate interstate commerce, and set the police laws of the state at defiance. In disposing of this question, we hold as follows: (1) The character of the package, whether original or not, is a question of fact, when there are facts to be passed upon, bearing upon this question, and should go to the jury. (2) It is a question of law when the facts are agreed upon, or presented by a special verdict, as in this case, and should be decided by the court. (3) It is fair to presume that a package was intended by him who devised it, for the purpose for which he uses it in his own business. (4) A package devised by a nonresident manufacturer, or put up by him, adapted for sale at retail to individual consumers,—such, for example, as a flask of whiskey, or a tub or pail or roll of oleomargarine,—and actually sold by him or his agent to the consumer for use as an article of food or drink, in violation of the laws of the state where such sales take place, is not an "original package" within the meaning of the law relating to interstate commerce. (5) The punishment of such sales, under the police power of the state, is not an interference with the powers of Congress, or with the commerce between the states, which is protected by the Constitution of the United States.

The judgment is reversed, and judgment is now entered on the special verdict, in favor of the Commonwealth. The record is remitted that sentence may be imposed according to law.

George LYON, to Use of Gustavus CONKLIN

J. C. CLEVELAND, *Appt.*

(170 Pa. 611.)

1. The revival of a judgment against the judgment debtor is effective as against the grantee in a deed made after the judgment but before the revival, of which the judgment creditor had neither actual nor constructive notice prior to the revival.
2. Proceedings to revive a judgment as against a terre-tenant after receiving notice that he held a secret deed to the property at the time the judgment was regularly revived against the judgment debtor are erroneous, since he is bound by the proceedings against the debtor.
3. The revival by amicable *scire facias* of a judgment is not abandoned by sub

sequent erroneous proceedings upon discovering that a transferee claimed an interest in the property covered by the judgment lien, which are instituted for the purpose of making the judgment effective against him.

(October 7, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Bradford County refusing to strike off a judgment which had been revived against a judgment debtor by an amicable *scire facias* on the ground that the revival had been abandoned by subsequent proceedings. *Affirmed.*

The facts are stated in the opinion.

Mr. Edward Overton, for appellant:

There can be but one final judgment in any personal action, whether founded on contract or in tort.

O'Neal v. O'Neal, 4 Watts & S. 130; *Walton's Appeal*, 153 Pa. 99.

A recovery in a personal action is a bar to a recovery in proceedings instituted by attachment, whether defendant does or does not file a bond.

Brenner v. Moyer, 98 Pa. 274; *Miller v. Rohrer*, 127 Pa. 884.

A *scire facias* to revive a judgment and a judgment thereon are a bar to another *scire facias* on the original judgment.

Custer v. Detterer, 8 Watts & S. 28; *Fursht v. Overdeer*, Id. 470; *Little v. Smyser*, 10 Pa. 881; *Zerns v. Watson*, 11 Pa. 260.

By issuing his *scire facias* the plaintiff affirmed that he had no lien by virtue of his amicably revived judgment on the land he sought to bind by his *scire facias* on the original judgment.

Robinson v. Atlantic & G. W. R. Co. 66 Pa. 160.

A plaintiff may, by his acts, abandon a judgment obtained by an amicable revival.

Ramsey v. Linn, 2 Rawle, 281; *Eby's Case*, 9 Watts & S. 145; *Man v. Drexel*, 2 Pa. 203; *Meason's Estate*, 4 Watts, 844; *Silverthorn v. Townsend*, 87 Pa. 267; *Misimer v. Ebersole*, 87 Pa. 109; *Middleton v. Middleton*, 106 Pa. 259; *Sayer v. Schroeder*, 2 Pennyp. 79; *Baum v. Custer*, 22 W. N. C. 145.

Each successive writ of *scire facias* to revive a judgment must be founded upon the judgment which immediately preceded it. A recovery upon a writ of *scire facias* is a bar to any subsequent recovery upon the original judgment.

Collingwood v. Carson, 2 Watts & S. 290; *Custer v. Detterer and Fursht v. Overdeer*, *supra*.

The plaintiff, without notice of the conveyance, can issue his *scire facias* on the new judgment, and then bring him in as a terre-tenant so as to bind the land.

Wetmore v. Wetmore, 155 Pa. 507; *Sayer v. Schroeder*, *supra*; *Little v. Smyser*, 10 Pa. 881.

The issuing of an alias *f. fa.* and levy upon the same property first levied is an abandonment of the lien of levy by virtue of the *f. fa.* *Silverthorn v. Townsend*, *Meason's Estate*, and *Misimer v. Ebersole*, *supra*.

NOTE.—In connection with the above case, see note to *Betz v. Snyder* (Ohio) 18 L. R. A. 235, which to some extent touches the effect of failure to 30 L. R. A.

record a deed. As to defense against revival of judgment, see also *Enewold v. Olson* (Neb.) 22 L. R. A. 578.

The abandonment of a *scire facias* terminates its virtue to prolong a lien.

8 Trickett, Liens, p. 309.

Messrs. D. A. Overton and J. C. Ing-ham, for appellee:

Abandonment is absolute relinquishment. It includes both the intention to abandon and the external act by which the intention is carried into effect.

1 Am. & Eng. Enc. Law, p. 1.

If the defendant has aliened the land, his alliance must be served if he can be found, and the defendant may also be served.

2 Fish's Troubat & Haly, Pr. p. 586; *Reynolds's Appeal*, 5 W. N. C. 184; *Ramsey v. Linn*, 2 Rawle, 239; *Little v. Smyser*, 10 Pa. 381; *Furatt v. Overdeer*, 8 Watts & S. 470; *Zerns v. Watson*, 11 Pa. 260.

If the judgment is regularly revived against defendant, and the plaintiff has no knowledge, actual or constructive, of any terre-tenant, then the lien of the original judgment is continued and preserved against the land in the hands of the terre-tenant.

Buck's Appeal, 100 Pa. 109; *Porter v. Hitchcock*, 98 Pa. 626; *Melnweiser v. Hains*, 110 Pa. 468; *Hughes v. Torrence*, 111 Pa. 611; *Wetmore v. Wetmore*, 155 Pa. 507.

And while the lien is so preserved a *scire facias* may issue on the original judgment to revive it against the terre-tenant.

Furatt v. Overdeer, *Little v. Smyser*, *Porter v. Hitchcock*, and *Hughes v. Torrence*, *supra*.

The only inquiry is whether the judgment has been regularly revived between the original parties, and no distinction is made between a revival by *scire facias* and by the agreement of the parties.

Buck's Appeal, 100 Pa. 118.

The issuing of the writ of *scire facias* may be dispensed with by the agreement of the parties entered amicably in the case.

2 Fish's Troubat & Haly, Pr. p. 540; *Baum v. Ouster*, 22 W. N. C. 145; *Porter v. Hitchcock*, 98 Pa. 626.

It is the original judgment that is to be revived against the terre-tenant.

Porter v. Hitchcock, 98 Pa. 627; *Furatt v. Overdeer*, 8 Watts & S. 470; *Little v. Smyser*, 110 Pa. 381.

The judgment on the amicable *scire facias* in this case could not be revived against the terre-tenant, as she was not a party to it.

Zerns v. Watson, 11 Pa. 260; *Little v. Smyser*, 10 Pa. 383; *Davidson v. Thornton*, 7 Pa. 138; *Wetmore v. Wetmore*, 155 Pa. 507.

Williams, J., delivered the opinion of the court:

This appeal presents an interesting question. It cannot be said to be definitely settled, but its solution will be made comparatively easy by a distinct statement of it, and of the facts on which it arises. The plaintiff is the holder of a judgment against the defendant, which was entered in 1886. It then became a lien upon a valuable farm owned by the defendant, and occupied by himself and his family. In 1891 the defendant and his family were still in possession of the farm, without visible change. The record showed the title remaining in him. There is no allegation of notice, actual or constructive, that the defendant had parted

with his title to any one. Upon this state of facts, the plaintiff applied to the defendant to revive and continue the lien of the judgment by an amicable *scire facias*. This was done, and the judgment of revival duly entered on the records by the prothonotary. During the following year, Mrs. Cleveland told the plaintiff that her husband had conveyed the farm to her by a deed executed by him prior to the revival of the judgment by amicable *scire facias* in 1891. This information started in the mind of the plaintiff the question whether the unrecorded conveyance to Mrs. Cleveland would affect in any manner the lien of his judgment as revived by the amicable *scire facias*, signed only by the defendant. He seems to have assumed that this question must have an affirmative answer, and to have turned to consider, in the next place, what it was necessary for him to do in order to preserve the lien of his judgment upon the farm in the hands of Mrs. Cleveland as terre-tenant. The answer to the first of these questions will dispose of this appeal, and of the appeal of Mrs. Cleveland in another case which was heard at the same time with this one. *Lyon v. Cleveland*, 170 Pa. 631. We are to inquire, therefore, what effect the secret conveyance by Cleveland to his wife had upon the lien of the plaintiff's judgment upon the farm so conveyed.

It may be well to begin this inquiry by considering just what is meant when we speak of the lien of a judgment upon real estate. At common law, a judgment was not a lien upon either personal or real estate. We have no statute that, in express words, makes a judgment a lien on land. The lien is not an incident of the judgment, therefore, but the result or outgrowth of a succession of statutes subjecting land to seizure and sale upon execution process. Accordingly, it has been uniformly held that a judgment on which a seizure and sale of land is not authorized is not a lien on the real estate of the defendant. *Beam's Appeal*, 19 Pa. 453; *Schaffer v. Cadwallader*, 38 Pa. 126. Judgments against the commonwealth, against counties and townships, against municipal corporations, and against canal and railroad companies, belong to this class. Writs of *fi. fa.* for the seizure and sale of the property of the defendant do not ordinarily issue upon such judgments, but other methods of compelling payment are provided by statute. When the right to seize and sell land in satisfaction of a judgment does exist, it must be exercised within such period as the law giving the right may appoint. Formerly, this period was a year and a day; and, if this was allowed to elapse, the plaintiff was required to warn the defendant by a writ of *scire facias post annum et diem* before he could seize the defendant's land in satisfaction of his judgment. While the right of seizure lasted, the judgment was said to be a lien on the defendant's real estate. When the right of seizure was lost by lapse of time, the judgment was said to have lost its lien.

By our act of April 16, 1845, the plaintiff's right to seize land was extended from a year and a day to five years from the date on which the judgment was entered. The judgment is therefore said to be a lien for five years from its date upon all the real estate owned by the

defendant at that time, because the plaintiff may levy upon and sell such real estate for the collection of the sum due him on his judgment at any time within five years. If the five years are allowed to expire, the plaintiff is in the same situation that he would have been in under the old law limiting his right to execution to a year and a day. His right to seize the defendant's land is lost by the lapse of time; or, in other words, the judgment has lost its lien, since it will not support execution process until regularly revived. The revival of a judgment means simply a new award of execution process for its collection. This may be had by means of a writ of *scire facias*, which, after the expiration of five years, is in effect a *scire facias quare executionem non*. If issued before the expiration of five years, it is a *scire facias* to revive and continue the lien of the judgment for another period of five years. Judgment of revival may be had also by the consent of the defendant without a writ. Such a revival is known as an "amicable *scire facias*," and authorizes the prothonotary to enter judgment against the defendant for the amount due on the judgment, and that the lien of the judgment be extended for another period of five years. This judgment may be again revived as often as the lapse of time may require, either amicably or by writ; and the right of the plaintiff to resort to the real estate owned by the defendant when the judgment was entered is thereby preserved. The last judgment of the series is that by which the amount of the plaintiff's demand is ascertained, and his right to execution therefore determined. The several judgments that precede it have served to preserve the plaintiff's right to seize, upon execution process, all the real estate that could have been seized under the original judgment; or, in other words, they have continued the lien of the judgment upon the lands that were originally subject to it. But, being more than five years old, they will not support execution process, and have ceased to have any significance except as supports to the last of the series, and to process issued upon it. When the defendant in the judgment sells land, the purchaser is bound to take notice of the record. The record informs him of the existence and amount of the judgment; and the law, which he is also bound to know, informs him that the land he is buying is subject to seizure and sale for the payment of the judgment at any time within five years. If he takes possession of the land or records his deed, the plaintiff is bound to take notice of his situation as a terre-tenant, and thereafter, upon the revival of the lien of his judgment, to give the terre-tenant notice. *Armington v. Rau*, 100 Pa. 165.

If the purchaser does not record his deed or take possession, but leaves the defendant in undisturbed possession of the land so that the plaintiff has no knowledge of the conveyance, actual or constructive, he does not become a terre-tenant of the land, and has no interest therein of which the plaintiff can take notice. As between himself and his vendor, he may have a good title; but as to the lien creditor he has none, because the conveyance to him is and remains a secret one, while the vendor is permitted to remain in possession in the 80 L. R. A.

same manner as before the secret conveyance was made. Under such circumstances, the revival of the judgment against the defendant is all that is possible to the creditor, and it will continue the right to seize and sell the real estate which was subject to seizure under the preceding judgment or judgments of the series. It can make no difference whether the judgment of revival is obtained by means of the writ of *scire facias* regularly issued or by an amicable *scire facias*. It is a judgment against the defendant who was the owner of the land when the judgment was entered, and who remains so to all appearances, and as to all means of knowledge open to the creditor. If the creditor or the purchaser must lose, and if both of them may be said to be innocent parties, then the loss must fall on him whose neglect to give notice has occasioned the omission or failure complained of; but if the purchaser records his deed, or enters into the actual possession of the land, he becomes a holder of the land bound by the judgment,—a terre-tenant,—of whose position and interest the judgment creditor is bound to take notice at his peril. If thereafter the plaintiff, in a judgment against the vendor, disregards the position of the terre-tenant, and revives his judgment without legal notice to him, he will lose his lien, as to the lands so acquired by the terre-tenant, at the end of five years from the time when the notice of the terre-tenant's title can be brought home to him.

It remains to apply these principles to the facts of this case. The judgment held by Conklin was entered against Cleveland in 1886. The defendant then owned the farm on which he lived, and the judgment became a lien upon it. In 1891 the state of the record and of the possession remained the same as in 1886. The plaintiff, having, therefore, no notice of any change in the title, revived his judgment by an amicable *scire facias*, signed by the defendant. This judgment of revival continued the right of the plaintiff to execution against all the lands previously bound by the judgment entered in 1886; in other words, it continued the lien of the judgment upon all such lands against the defendant and all persons claiming under him by means of any secret conveyance. Mrs. Cleveland held such a conveyance. She was bound to know of the judgment and its lien upon the farm. She was bound to know that, if she expected to assert the rights of a terre-tenant, it was her duty to make her title public, so that the plaintiff could be fixed with notice of it. She did nothing. The plaintiff did the only thing possible for him,—he revived his judgment against the defendant; and we have no doubt that the revival bound the land, as to any interest acquired by Mrs. Cleveland, just as completely as it would have done if she had joined in the agreement with her husband. This revival continued the lien of the judgment for five years from the date of its entry, and the subsequent recording of a deed, or notice given in any other manner, could have no retroactive operation. This, then, was the situation when, in 1892, Mrs. Cleveland gave the plaintiff notice that she held a deed for the farm, which had been executed before the entry of the judgment upon the amicable *scire facias*. This notice did not affect the lien of the judgment in the slightest

degree. It gave her no rights as a terre-tenant, except such as began at that time. The plaintiff and the lien of his judgment stood after the notice was given just as they stood before. There was no reason for taking any precautionary steps, or making any effort to bring Mrs. Cleveland on the record, until it became necessary to revive the judgment again against the defendant. The plaintiff seems to have reached an opposite conclusion. He at once issued a *scire facias* on the original judgment, which was at the time more than five years old, and named Mrs. Cleveland therein as a terre-tenant. This was not only unnecessary, but it was wholly unauthorized. The defendant took defense on the ground that the judgment had been once regularly revived as against him, and that he was not liable to a second judgment for the same cause of action. Mrs. Cleveland took defense on the ground that the lien of the judgment of 1886 had been lost by lapse of time, and could not be revived against her. The court below overruled the defense set up by the defendant; disposed of Mrs. Cleveland's allegation that as to her the judgment of 1886,

having ceased to be a lien, would not support the *scire facias*, by admitting evidence to show the continuance of the lien against the defendant, and then rendered judgment against both. This was an error. The writ should not have been issued. Having been issued, the court should have refused to enter judgment upon it against either of the defendants. The plaintiff needed no help until it should become necessary to revive his judgment again. When that time comes, he will issue his writ of *scire facias*, naming Mrs. Cleveland as terre-tenant; but he will proceed upon the judgment entered upon the amicable *scire facias* in 1891, which, as we have seen, binds the land as well in the hands of Mrs. Cleveland, upon the facts of this case, as in the hands of her husband. But the error into which the plaintiff and the court below fell was not in this case, but, as we have said, in the action brought by *scire facias* against the defendant and his wife, as terre-tenant on the original judgment entered in 1886.

The judgment appearing upon this record is therefore affirmed.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Resp.*,
v.

Charles HECKER, *App.*

(.....Cal.....)

1. Evidence of occurrences the same day but some hours before a fatal affray is admissible in a prosecution for murder, on the question of self-defense, where they were a part of the same occurrences that culminated in the killing, and tend to enlighten the jury as to the mental attitude of the men toward each other at the time of the affray.
2. The refusal of instructions as to the rights of a finder in respect to the property found is reversible error in a prosecution against him for murder, in which he pleads self-defense and the evidence shows that the homicide occurred while he was attempting to enforce a right to possession as against the owner, when both men used firearms, since such instructions are necessary to enable the jury to determine which was first in the wrong.
3. The duty to refrain from killing a mere trespasser is not limited to cases where the trespass is committed in a peaceable manner.
4. That an attempt to kill or inflict great bodily harm is made in resisting a forcible trespass against personal property does not deprive the person assaulted of the right to kill his assailant without retreating and declining, or making known to his adversary his willingness to decline the strife, where the assault is so sudden and perilous as to render retreat and declination impossible; but as he is the first wrongdoer, although his wrong does

not justify the attack upon him, he must retreat and decline the combat, if possible, before resorting to the killing of his adversary.

5. Retreat is not an essential condition of the right of a person feloniously assaulted without adequate provocation to kill his assailant, if the assault is sudden and the danger great or apparently great; and he may under such circumstances pursue and slay his adversary if apparently necessary for his safety.
6. A first felonious assailant cannot kill the person assaulted, in defending himself against a deadly return assault by the latter, until he has in good faith declined the strife and fairly made known to the latter his willingness to do so, and the imminence of his danger does not relieve him of the necessity of so declining before availing himself of the right of self-defense.
7. A first felonious assailant may justifiably kill his adversary, if, after in good faith withdrawing from and declining further combat, and fairly making known such purpose to his adversary, the latter forces a new combat upon him.
8. A requested instruction in a criminal action, which requires the jury to be convinced to "an absolute moral certainty" before conviction, is properly refused.
9. The elimination from a requested instruction of defendant in a criminal trial, of the direction to find the defendant not guilty if the jury find the facts hypothesized in the instruction, is not reversible error, although it is the better practice to add such conclusion to each instruction which warrants it.

(October 9, 1895.)

NOTE.—A very important question as to self-defense is decided in the above case. On the general subject, see a brief note to *Drysdale v. State* (Ga.) 6 L. R. A. 424.

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APPEAL by defendant from a judgment of the Superior Court for Humboldt County convicting him of murder. *Reversed.*

The facts are stated in the opinion.

Messrs. Chamberlin & Wheeler, for appellant:

Hecker on finding and taking charge of the horses became invested with the rights and obligations of a depositary for hire.

Civil Code, § 1864.

Hecker had a lien on the horses.

Civil Code, § 8051.

This lien could be extinguished only by a voluntary restoration of the horses to their owner.

Civil Code, § 2918; *Palmtag v. Doutrick*, 59 Cal. 154, 48 Am. Rep. 245; *Walcott v. Keith*, 22 N. H. 196; *Bruley v. Ross*, 57 Iowa, 651.

Where one who finds lost property is wrongfully deprived of its possession, he may regain possession of it, and upon so doing his lien revives.

3 Story, Cont. 5th ed. p. 288, notes.

The judge must charge the jury on any points pertinent to the issue, if requested by either party.

Penal Code, § 1098, subsec. 6; *Hayne, New Trial & Appeal*, § 120; *Stanton v. French*, 88 Cal. 194; *Benedict v. Hoggins*, 2 Cal. 385; *People v. Payne*, 8 Cal. 841; *Jones v. State* (Tex.) 26 S. W. Rep. 1092; *Parker v. State*, 186 Ind. 284.

The jury were told what were the rights of the parties if the defendant was guilty of committing a trespass in a peaceable manner.

Trespass in its usual legal acceptation is a wrong done with force to the person, property, or rights of another.

Bouvier, Law Dict. 26 Am. & Eng. Enc. Law, p. 570.

Where the trespass is forcible, against personal property, an owner may resist it, but he is not justified in killing the trespasser.

Carroll v. State, 28 Ala. 28, 58 Am. Dec. 282; 26 Am. & Eng. Enc. Law, p. 572.

If Hecker in his endeavor to secure the horse committed only a mere trespass, and Riley had shot and killed him, Riley would, most assuredly, have been guilty of murder.

State v. Donyes, 14 Mont. 70; *State v. Tarter*, 26 Or. 88.

The owner of personal property may resist a trespass thereto, but not to the extent of taking the trespasser's life.

Powers v. People, 42 Ill. App. 427; *Bowman v. State* (Tex.) 31 S. W. Rep. 48; *Crawford v. State*, 90 Ga. 701; *State v. Smith*, 13 Mont. 378; *Callicoate v. State* (Tex.) 22 S. W. Rep. 1041; *People v. Flanagan*, 60 Cal. 8, 44 Am. Rep. 52; *People v. Campbell*, 80 Cal. 812; 9 Am. & Eng. Enc. Law, p. 608; *State v. Perigo*, 70 Iowa, 657.

A person in the exercise of the right of self-defense not only has the right to stand his ground and defend himself when attacked but he may pursue his adversary until he has secured himself from danger.

State v. Thompson, 45 La. Ann. 969; *Conner v. State* (Miss.) 18 So. Rep. 984; 1 East, P. C. 271; *Luby v. Com.* 12 Bush, 1; *Holloway v. Com.* 11 Bush, 344; *Bohannon v. Com.* 8 Bush, 481, 8 Am. Rep. 474; *Carico v. Com.* 7 Bush, 124; *Young v. Com.* 6 Bush, 312; *Philips v. Com.* 2 Duv. 328, 87 Am. Dec. 499; *Pond v. People*, 8 Mich. 150; *West v. State*, 2 Tex. App. 460; 2 Starkie, Ev. 968; 9 Am. & Eng. Enc. Law, p. 605.

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A man may stand his ground and kill one who is attempting to kill or inflict upon him great bodily harm. And this he may do, even though he might more readily have secured his safety by flight.

People v. Ye Park, 62 Cal. 208; *People v. Robertson*, 67 Cal. 650.

Messrs. L. M. Burnell, and *W. F. Fitzgerald*, Attorney General, and *Charles H. Jackson*, Second Deputy Attorney General, for respondent:

Under no circumstances could Hecker commit a felony in the protection of his lien. He could not resort to killing or the commission of a felony for the protection of his lien.

People v. Dunne, 80 Cal. 84; Penal Code, § 197, subsec. 2; *People v. Flanagan*, 60 Cal. 8, 44 Am. Rep. 52.

Mere words, no matter how outrageous, would not excuse the killing.

People v. Turley, 50 Cal. 469; *People v. Butler*, 8 Cal. 485; Wharton, Crim. L. 368.

Abstract and irrelevant instructions should not be given.

People v. Turley, *supra*; *People v. McCauley*, 1 Cal. 879; *People v. Roberts*, 6 Cal. 214; *People v. Honshell*, 10 Cal. 88; *People v. Vincente*, *Sanches*, 24 Cal. 17; *People v. Turcott*, 65 Cal. 126; *People v. Gray*, 66 Cal. 271; *Fowler v. Smith*, 2 Cal. 39; *Eldridge v. Cowell*, 4 Cal. 88; *Hirshberg v. Strauss*, 64 Cal. 273.

A judge may suggest the advisability of bringing in a verdict thus and thus, but he may not command or so instruct a jury, and they need not obey his injunction if he does so command them.

People v. Horn, 70 Cal. 17; Penal Code, § 1118; *People v. Jenness*, 5 Mich. 305; *Hamilton v. People*, 29 Mich. 178; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162; *People v. Schweitzer*, 28 Mich. 301.

Anything so connected with the crime in point of time and character as to explain how and why it was committed is a part of the *res gesta*.

People v. Irwin, 77 Cal. 495; *People v. Nelson*, 85 Cal. 431; *People v. O'Brien*, 73 Cal. 41.

Henshaw, J., delivered the opinion of the court:

The appellant, Hecker, was tried for the murder of one Patrick Riley, and by the jury found guilty of murder in the second degree. The killing was admitted, but it was claimed to have been done in self-defense.

It appeared by the evidence that Riley peddled wares through the country, using for the purpose a two-horse team and wagon. He had camped near the farm house of one Brice-land, and turned his horses into Brice-land's inclosure. From this they strayed, and were lost in the hills. They had been gone for several days when Riley, who had been in vain pursuit of them, met Hecker, and offered to give him \$10 if he would find and return them. Hecker was an old resident of the vicinity, and owned a sheep range, which was contiguous to the land of Brice-land. He searched for the horses that day, and found them, put them in his corral over night, and the next morning proceeded with them to Brice-land's. Riley was away at the time of his arrival, and Hecker either made a voluntary surrender of the horses

to Mrs. Riley, who put them in Brice-land's barn, as was claimed by the People, or, as was contended by the defense, they were put there by Mrs. Riley for Hecker, who thus still retained constructive possession of and a lien upon them for the promised reward of \$10. The point is one in dispute. Hecker rode on to the little town of Brice-land, and passed the day in waiting for Riley. He did not see him, and went home. The next day he returned to town, and met Riley about 11 o'clock in the morning. Riley called him to one side, and the finding of the horses was discussed. There having been no one else present at that interview, the only account of it is Hecker's. But it appears from other evidence that Riley suspected that his horses had been taken and secreted in the hills in expectation of a reward, and the promptness with which Hecker found and returned them seems to have confirmed him in his suspicion, and created the conviction that Hecker had purloined them. There was no question but that Riley's suspicions were unfounded and unjust. It was in evidence that Riley said he would kill the man who stole his horses. Hecker testified that Riley accused him of stealing the horses, and refused to pay him any money for their recovery. The men parted. Hecker returned to the store and saloon, and, after thinking and talking the matter over, as he says, concluded he would take the horses from Brice-land's barn, and put them elsewhere until he was paid. Hecker was a cripple; Riley, a powerful man. Hecker armed himself, thinking that Riley would be at Brice-land's, and knowing that "he would be trying to get a row." Arriving at Brice-land's a little after noon, Hecker found but one horse, the other having been ridden off by Sam Pollock, who had gone to find Riley, and tell him the search was at an end. Hecker took possession of the animal, and led it from the stable. Riley saw him, and came forward, calling to him, and forbidding the act. Hecker half drew his pistol from the bosom of his shirt, and, in turn, told Riley to advance no further. Riley answered that he was unarmed, and turned out his pockets in proof; and a second time the two men parted, Hecker leading away the horse. He returned with it to the town, where he spent the afternoon discussing his grievance. As was shown, he used some loose talk and indulged in some threats: He would not let Riley beat him out of his money; he would have the money, or would have Riley's blood,—while, to add to the bitterness of the matter, he was informed that Riley had gone off to procure his arrest for stealing the horses. This information was brought to him by men whom he had sent to see Riley to fix up the matter, telling them that he wanted no fuss, and to take what they could get and settle it for him. So the time passed until about half past 6 of this July afternoon, when Hecker espied Pollock riding by on the other horse. Hecker, who was himself then mounted, hailed him, and demanded the horse, believing, as he testified, that he "had to have both horses in order to make the lien good." Pollock declined to surrender the animal, saying he would put it where he got it; and so Hecker rode on once more to Brice-land's, and to the fatal meeting with Riley. As the two men rode up to

the stable, Riley came forward to take his horse. Pollock dismounted. Riley started to remove the saddle. Hecker leaned forward to seize the bridle. There was a struggle for possession, and then, by the evidence for the People, Hecker drew his pistol, and with it struck Riley over the head, and, as he staggered back, fired at him. Hecker's account is that he spurred his horse that he might seize the other's bridle; that, as his horse sprang forward, her fore shoulder struck Riley, and staggered him. "When I broke his hold, he ran right back, and had his hand twisted to pull his pistol, and at last he pulled his pistol out, and pointed at me, and I saw him shut his eye to pull the trigger; and, just as he was about to pull the trigger, I threw myself out of the saddle like that [shows] over the side of my horse, and grabbed my pistol at the same time; and, as I raised mine up, he had his pistol up, and we both shot about the same time. If anything, he shot a little before I did." The defendant was riding a nervous two year old colt, using a "hackamore" in lieu of bridle, and at the shooting she either bolted, or, as Hecker says, he started her to go around Brice-land's house, and get out of the way. Riley fired again at him as he went. At some beehives, Hecker reined up, and the two men exchanged shots. Hecker then rode on in another direction, to a place in the yard where there were four stumps, having abandoned, as he says, his first intention to pass around Brice-land's house, and endeavoring to get away by another route, or, as the People claim, coming back to engage Riley at closer quarters. Riley ran towards a granary, calling upon one of the bystanders, of whom there were several, to lend him his pistol, and to his wife and daughter to go to the wagon and bring him more cartridges. Whether Riley ran to the granary to escape further combat, or whether he designed to use it as a shield that he might fire with more security upon Hecker, is disputed. Near the granary, and, as Riley was about to pass a corner of it, there was shooting, and Riley, struck through the heart, ran a few yards, and fell dead.

Nothing of the foregoing narrative is to be taken as expressing the views of this court upon the weight of the evidence. That consideration is not before us. The account is designed to throw into prominence the claims made by prosecution and defense for the better understanding of the propositions of law which we are called upon to consider.

The first complaint of defendant is that the court erred in admitting testimony as to the occurrences at the meeting between himself and Riley at noon of the day of the affray. But this complaint is not well founded. Hecker's plea was self-defense. Whether Hecker was within or without his legal rights in seeking to gain possession of the horse, whether he or the deceased first committed a felonious assault, were disputed questions for the jury's determination. The attempt to retake the first horse, though separated in time from the taking of the second, was a part of the same occurrence and transaction which led up to and culminated in the fatal affray. The recovery of the first horse, and the manner of it, the conduct of the two men upon that occasion, their

previous difficulty, their threats against each other, whether communicated or not, all tended to enlighten the jury as to the mental attitudes of the men towards each other at the time of the affray, and thus to assist in determining the disputed question as to which in fact first put himself in the wrong, and which first made a felonious assault upon the other; for only by so determining could the jury justly decide upon the defendant's plea. *People v. Lyons*, 110 N. Y. 618; *State v. Perigo*, 70 Iowa, 657; *Monroe v. State*, 5 Ga. 85; *Williams v. State*, 8 Helsk. 376; *State v. Zeilers*, 7 N. J. L. 265; *Keener v. State*, 18 Ga. 194, 63 Am. Dec. 269; *State v. Tarter*, 26 Or. 88.

But having admitted, and properly admitted, this evidence, the court erred in refusing to give the instructions asked by defendant (defendant's proposed instructions Nos. 7, 8, and 9)* defining the rights of a finder of lost property to compensation for its care and preservation and to any promised reward, the nature of his lien upon it, and how such lien could be lost or extinguished. It is conceded by the prosecution that these instructions correctly embody the law, but it is contended that they were properly refused as irrelevant. This contention cannot be upheld. One of the questions of primary consideration for the jury was, Which of the two men was the aggressor at the time of the fatal affray, which of the two first overstepped the boundaries of the law, which of the two first trespassed upon the legal rights of the other,—in short, which of the two, by his acts and conduct, first put himself in the wrong? For it is obvious that the determination of this must throw a flood of light upon the other question, second in consideration but first in importance, namely, whether, at the time the defendant first fired, he was acting in self-defense.

The opposing claims of counsel upon this evidence have been suggested. Upon the one hand it was argued that defendant, after voluntarily surrendering his possession of the horses, and so extinguishing his lien, came with a lawless hand to retake them from their owner, prepared for this end to do murder if resisted; and that this motive dominated his conduct in the meeting at noon and the fatal later one. Upon the other hand, it was argued that the surrender of possession had been involuntary and that, consequently, defendant's right to

possession still existed even against the owner, that his intent was therefore proper, and his purpose lawful. The absence of instructions upon these questions of law left the jury without rudder or compass. The true rule for measuring the acts of the parties not having been given them, each was at liberty to set up his own independent standard, and approve or condemn in accordance with it. The refusal to give these instructions thus constituted reversible error. *People v. Taylor*, 86 Cal. 255; *People v. Keefer*, 65 Cal. 232; *People v. Rice*, 97 Cal. 459.

The court gave an instruction prepared by defendant after modification. That instruction is as follows, the modification complained of being the italicized phrase inclosed in brackets: "I charge you that the law does not permit the taking of human life or the infliction of great bodily harm in the resisting of a mere trespass against personal property. Therefore, in the present case, should you find from the evidence that defendant attempted to regain possession of the horse returned by Pollock [in a peaceable manner] for the declared purpose of holding him for a reward, and that the deceased, Riley, resisted such attempt on the part of defendant by resorting to the use of a deadly weapon, or by attempting to kill Hecker or inflict upon him great bodily harm,—and there was imminent danger of his doing so,—then I charge that Riley was acting unlawfully and without right; and if under these circumstances, you find that Hecker, in order to protect himself from death or great bodily harm at the hands of Riley, shot and killed Riley, then I instruct you that he was justified in so doing, and you must acquit him. And, in this connection, I further instruct you that, if you so find, it makes no difference whether Hecker had a right to take the horse or not; Riley had no legal right to attempt to kill Hecker in resisting a mere trespass." The instruction was offered under defendant's claim of self-defense. As given, it was unobjectionable as a statement of the law excepting for the italicized insertion. One is not justified in taking human life to prevent the commission of a mere trespass, though any person in defense of property has the legal right to prevent the commission of a felony attempted by violence or surprise, and in so doing may use all necessary force, even to the

"(7) I instruct you as law that the finder of a thing lost, upon taking charge of it, stands in the same legal position as though the owner of the lost property had deposited it with him for hire; and, furthermore, that the finder of lost property is entitled to compensation for all expenses necessarily incurred by him in its preservation, and is also entitled to a reasonable reward for keeping it; and the finder of lost property has a lien upon it for the expenses incurred in its preservation, and for the reasonable reward to which he is entitled; and, in the event of the owner refusing or neglecting upon demand to pay the lawful charges and reward of the finder, the finder may refuse to surrender the property found to the owner, and may retain possession of it until his lien for charges and reward is satisfied.

"(8) If you find from the evidence in the present case that Riley, the deceased, lost his horses, and that Hecker, the defendant, found them and took charge of them, then I instruct you as law that Hecker had a lien on the horses for his compensation for all expenses necessarily incurred by him in their preservation, and for any services necessarily performed by him for the horses, and for a reasonable reward for keeping them; and, until these charges

were paid, Hecker had the legal right to retain possession of the horses, and Riley, the deceased, had no right to take the horses away from Hecker, or to in any manner interfere with him, until he first paid or satisfied Hecker's lien.

"(9) I charge you that where a person has a lien on property found for the charges and reward, that such lien depends upon possession. A voluntary surrender by the finder to the owner extinguishes the lien, but an involuntary surrender or loss does not. If, therefore, you find from the evidence in the present case that defendant found the horses of deceased, and brought them to the town of Briceland, and placed them in the barn of one John Briceland, and that, at the time of bringing said horses to Briceland, deceased was absent; and if you further find that defendant did not voluntarily surrender said horses to deceased, but held them for the payment of his charges against them,—then I instruct you that he had not parted with his lien on them, and that if any one took one of said horses from said barn without defendant's consent, that said horse would still be subject to defendant's lien, and he would have the right to take possession of it wherever he might find it."

taking of life. Penal Code, § 197, subd. 2; *People v. Payne*, 8 Cal. 341; *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 53; *People v. Dunne*, 80 Cal. 84. The ~~amen~~ment left the instruction confused and erroneous. The defendant was entitled to have the jury instructed that even if he was in the act of committing a forcible trespass in endeavoring to take the horse, if his act amounted to no more than a trespass, Riley was not justified in trying to kill him, if he did try, in attempting to prevent it. And if, under these circumstances, Riley did make the first felonious assault upon defendant, defendant, in turn, would be justified in killing Riley, if the circumstances of Riley's felonious assault were sufficient to excite defendant's fears, as a reasonable man that he was in danger of death or great bodily injury, and he acted under these fears alone, and had in good faith declined further struggle before firing the fatal shot, or was put in such sudden jeopardy by the acts of deceased that he could not withdraw, and if it was thus that Riley met his death. But as given, the court in effect told the jury that the defendant's rights were to be governed by their determination whether or not he was endeavoring to take possession of the horse in a peaceable manner. Even if a peaceable trespass be conceded, the jury was substantially told that Hecker's plea of self-defense under the hypothesis could not be upheld unless his act was a peaceable trespass. But such is not law. "Where the trespass is forcible against personal property, an owner may resist it, but he is not justified in killing the trespasser unless it is necessary to prevent a felonious destruction of the property, or to defend himself against loss of life or great bodily harm." *Carroll v. State*, 28 Ala. 28, 58 Am. Dec. 282; 26 Am. & Eng. Enc. Law, p. 572; *State v. Tarter*, 26 Or. 38; *State v. Perigo*, 70 Iowa, 657.

The acts which a defendant may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondarily upon the conduct of the deceased. There is no fixed rule applicable to every case, though certain general principles, well established, stand forth as guides for the action of men and measures for the jury's determination of their deportment:

First. Self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for killing. *People v. Robertson*, 67 Cal. 646; *Stewart v. State*, 1 Ohio St. 66.

Second. It is not available as a plea to one who, by prearranged duel or by consent, has entered into a deadly mutual combat in which he slays his adversary. In both of these cases the same rule applies. A man may not wickedly or wilfully invite or create the appearances of necessity or the actual necessity which, if present to one without blame, would justify the homicide. *State v. Parlow*, 90 Mo. 608, 59 Am. Rep. 31; *State v. Underwood*, 37 Mo. 225; *Lambert's Case*, 9 Leigh, 605; 1 Bishop, Crim. L. § 870; *Gilleland v. State*, 44 Tex. 356; *Clifford v. State*, 58 Wis. 478; *Tate v. State*, 46 Ga. 151.

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Third. Where one, without fault, is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit a felony or some great bodily injury upon him, and to afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, slay his assailant, and be justified by the appearances; and as, where the attack is sudden and the danger imminent, he may increase his peril by retreat, so situated he may stand his ground, that becoming his "wall," and slay his aggressor, even if it be proved that he might more easily have gained his safety by flight. *People v. Herbert*, 61 Cal. 544; *People v. Gonzales*, 71 Cal. 569; *People v. Ye Park*, 62 Cal. 204; *People v. Robertson*, 67 Cal. 650; *Runyan v. State*, 57 Ind. 84, 26 Am. Rep. 52; *Brucin v. State*, 29 Ohio St. 186, 28 Am. Rep. 733. So, too, under such circumstances, he may pursue and slay his adversary. But the pursuit must not be in revenge, not after the necessity for defense has ceased, but must be prosecuted in good faith to the sole end of winning his safety and securing his life. *Carroll v. State*, 28 Ala. 28, 58 Am. Dec. 282; *Young v. Com.* 6 Bush, 312; *State v. Collins*, 83 Iowa, 36; *Horrigan & T. Cases on Self-Defense*, p. 280.

Fourth. Where one is making a felonious assault upon another, or has created appearances justifying that other in making a deadly counter attack in self-defense, the original assailant cannot slay his adversary and avail himself of the plea, unless he has first and in good faith declined further combat, and has fairly notified him that he has abandoned the contest. And if the circumstances are such, arising either from the condition of his adversary, caused by the aggressor's acts during the affray, or from the suddenness of the counter attack, that he cannot so notify him, it is the first assailant's fault, and he must take the consequences (*People v. Button*, 106 Cal. 628, 28 L. R. A. 591; *State v. Smith*, 10 Nev. 106; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470); for, as the deceased, acting upon the appearances created by the wrongful acts of the aggressor, would have been justified in killing him, he whose fault created these appearances cannot make the natural and legal acts of the deceased looking to his own defense a justification for the homicide. Before doing so he must have destroyed these appearances, and removed, to the other's knowledge, his necessity, actual or apparent, for self-preservation.

Fifth. Where one is the first wrongdoer, but his unlawful act is not felonious, as a simple assault upon the person of another, or a mere trespass upon his property, even though forcible, and this unlawful act is met by a counter assault of a deadly character, the right of self-defense to the first wrongdoer is not lost; for, as his acts did not justify upon the part of the other the use of deadly means for their prevention, his killing by the other would be criminal, and one may always defend himself against the criminal taking of his life. But in contemplation of the weakness and passions of men, and of the provocation, which, though inadequate, was wrongfully put upon the other, it is the duty of the first wrongdoer, before he can avail himself of the plea, to have retreated

to the wall, to have declined the strife, and withdrawn from the difficulty, and to have killed his adversary, under necessity, actual or apparent, only after so doing. If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then, as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying forthwith in self-defense. *People v. Robertson*, 87 Cal. 646; *People v. Westlake*, 62 Cal. 308; *State v. Perigo*, 70 Iowa, 657. The distinction between this principle and the one preceding it consists in this: In the former case the provocation for making a deadly counter attack in self-defense is adequate, and therefore the first aggressor must remove the necessity for it, and make that fact known before his own right of self-defense can exist; in the latter case the provocation is inadequate, and if the other by his own unlawful act deprives the first wrongdoer of the opportunity to decline a deadly strife, that fault lies, not at the door of the slayer, but of the slain.

So much it has seemed necessary to say in view of the varying theories upon the facts attending this homicide, and in contemplation of a new trial.

If, at the time of the affray, Hecker was a trespasser, and no more, in his endeavor to take the horse, and Riley met his endeavor by a deadly assault upon him with a pistol, it was Hecker's first duty to decline the strife; and, if the suddenness of the assault precluded this, he was justified, so long as the imminence of his danger continued, or apparently continued, in meeting it by a deadly return. If, however, Hecker was not a wrongdoer in seeking to take the horse, and Riley met his attempt by a felonious assault with a pistol, Hecker, if the assault was sudden, and the danger great, or apparently great, would have been justified in standing his ground, or even, as above set forth, in pursuing and slaying his adversary, to win his safety. If, on the other hand, Hecker made the first deadly assault, his right to slay Riley in self-defense did not exist, even though willing thereafter to decline further combat until he had in good faith declined and fairly made known to Riley his willingness to do so. And, if he did not do this, even though he failed because of his own imminent danger, and under these circumstances killed Riley, his act was criminal. And, lastly, if, upon the other hand, he made the first felonious assault, and thereafter, and before firing the fatal shot, did in good faith withdraw and decline further combat, and this was fairly made known to Riley by his conduct, and thereafter Riley pursued him, and forced a new combat upon him, and under these circumstances Riley was killed, the killing was justifiable.

Defendant's proposed instruction No. 13,* as

*"(13) I further charge you as law that a person in the exercise of self-defense, as I have stated it to you in the foregoing instructions, not only has the right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger; and if, in so doing, it be necessary, or upon reasonable grounds it appear necessary, to kill his antagonist, the killing is exculpable on the ground of self-defense."

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to the right to pursue and slay to secure safety, is, in itself, a correct, if not a full, exposition of the law, and it cannot be said that it does not address itself to a theory permissible under the evidence. It, or an equivalent instruction, should therefore have been given.

It was not error to refuse defendant's proposed instruction 19*. The jury was advised as to the weight of evidence, number and credibility of witnesses. The vice of the rejected instruction was that he declared that the jury must be convinced to an "absolute moral certainty." The refusal to give such an instruction has more than once been upheld. *People v. Davis*, 64 Cal. 440; *People v. Nelson*, 85 Cal. 408; *People v. Ferry*, 84 Cal. 81; *People v. Smith*, 105 Cal. 676.

The instruction lettered O† is not erroneous. Standing by itself, it would be of little value to the jury, since it merely declares that the killing after withdrawal from the struggle might be justified. However, it is obviously but a preliminary declaration, as, in the instructions immediately succeeding (P‡ and

*"(19) Gentlemen of the jury, I charge you in this case you are the sole and exclusive judges of the truth of the facts that have been adduced in evidence, and of the credibility of the witnesses who have testified in your hearing; and, in this connection, I further charge you that you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, as against a less number or against a presumption or other evidence satisfying your minds. In other words, notwithstanding the number of witnesses that may testify, or the amount of evidence that may be introduced upon the part of the prosecution in a criminal case, unless the jury are thereby convinced to an absolute moral certainty of the guilt of the defendant, they must not return a verdict in accordance with such testimony. Upon the other hand, notwithstanding the small number of witnesses that may testify, or the small amount of material evidence that may be introduced on the part of the defense, if the jury are thereby led to believe the defendant is innocent of the crime charged, it is their solemn duty so to find, and their verdict must be, not guilty."

†"O. A homicide is justifiable when committed in the lawful defense of such person, but such person, if he was the assailant, must really and in good faith have endeavored to decline any further struggle before the homicide was committed. If the defendant himself brought on the fight, and went into it armed, and assaulted Riley in the first instance with a deadly weapon, he cannot justify killing him, unless he had really and in good faith endeavored to decline any further struggle before the killing occurred. If, however, the defendant was the assailant, if he had really and in good faith endeavored to decline any further struggle, and thereafter Riley assaulted him with a deadly weapon, the killing then might be justified by the defendant in self-defense."

‡"P. In other words, gentlemen of the jury, if you believe from the evidence that the defendant was the aggressor, and made an assault upon Riley with a deadly weapon, he cannot justify killing him, unless he had really and in good faith sought to avoid further conflict before the fatal shot was fired. In case, however, that the defendant was the assailant, if he had really and in good faith endeavored to decline any further struggle before the mortal wound was given, and thereafter Riley renewed the conflict and made an unlawful assault upon Hecker, then Hecker could justify the killing if it was done in necessary defense of his own life, or to prevent his receiving great bodily injury. In order to determine whether there was any such attempted withdrawal, and whether the defendant really and in good faith endeavored to decline any further struggle, the jury are to take into consideration all the surrounding circumstances, the situation and conduct and relation of the parties at the time of the shooting, and all the other evidence in the case."

Q^o), there are set forth in detail the circumstances under the assumed state of facts which would and would not justify. These instructions will be construed together. *People v. Turcott*, 65 Cal. 126.

The court gave an instruction substantially as asked by defendant, but struck therefrom the closing sentence, as follows: "And if, under these circumstances, he killed deceased you must find, as your verdict, not guilty." The complaint is founded upon this excision. It is the natural tendency of advocates to bear with emphasis upon the favorable points both in argument and in instructions, and all the cases are replete, as is this case, with instructions asked by attorneys for the prosecution and defense, and closing with this or an equivalent formula. It cannot be said that to eliminate it from one instruction is error. Yet the practice is not wise. If the instruction offered is not the law, the court may reject it; if it be law, it is better to give it as presented, for not only has either party the right to emphasize by instructions a true principle, but the danger of modifying an instruction which is correct in itself is that it may occasion some just ground for complaint that the modification devitalizes and emasculates the proposition of law whose exposition was sought. We are far from implying that such was the effect in this case, still further from implying that such was the intent, but it certainly is not amiss to suggest the wiser and better practice.

Instruction E^t, which is complained of, has often been given and as often approved by this court. The cases in which it is discussed, are reviewed in *People v. Bruggy*, 93 Cal. 476. As was said by this court in *People v. Herbert*, 61 Cal. 544: "To justify a homicide, there must be a necessity, actual or apparent; and this we understand to be true under our statute as well as at common law." Those cases where the assailed is not required to look to escape as an avenue of safety, arise, as has been before dis-

*Q. If you believe from the evidence beyond a reasonable doubt that the defendant was the assailant, and fired the first shot that was fired and did not thereafter really and in good faith endeavor to decline any further struggle, and that the shots fired by Riley were shot by him in necessary self defense, as I have defined it to you, and that thereafter Riley ceased to fire, and then ran away to avoid the defendant; and if you further believe from the evidence that the defendant, Charles Hecker, with intent to wilfully and deliberately kill and murder the deceased pursued the deceased towards the granary, with his pistol in his hand for the purpose of overtaking the deceased and killing him; and you further believe from the evidence that the defendant, Charles Hecker, did pursue and overtake the deceased while he was thus fleeing and showing no disposition to kill and murder the defendant, Hecker and that the defendant then and there, without believing himself to be in danger of losing his own life or receiving great bodily injury at the hands of the deceased or having reasonable ground to believe himself in such danger, fired the fatal shot and killed deceased,—then I instruct you that in such case the defendant would not be justified under the law of self-defense."

*E. The law of self-defense is founded upon necessity, and, in order to justify the taking of life upon this ground, it must not only appear that the defendant had reason to believe, and did believe, that he was in danger of his life or of receiving great bodily harm, but it must also appear to the defendant's comprehension as a reasonable man that, to avoid such danger, it was absolutely necessary for him to take the life of the deceased."

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cussed, where the peril is swift and imminent, and the necessity of action immediate. Therein the law does not weigh in too nice scales the conduct of the assailant, and say he shall not be justified because he might have resorted to other means to secure his safety. The suddenness of the attack puts him to the wall. Upon the duty of retreat there was a contrariety of opinion by the writers of common law, and this difference has found its way into the decisions of our states,—some, as Alabama and Iowa, holding to the rule that retreat is necessary; others, as Indiana, Michigan, and our own state, declaring for the contrary doctrine. But it is not stating it too strongly to say that the trend of later judicial decisions is in favor of the latter rule. So that while the killing must still be under an absolute necessity, actual or apparent, as a matter of law, that absolute necessity is deemed to exist when an innocent person is placed in such sudden jeopardy. The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: Beatty, Ch. J.; Temple, J.; McFarland, J.; Van Fleet, J.; Garoutte, J.; Harrison, J.

S. M. BUCK, *Resp.*,
v.
City of EUREKA, *Appl.*
(..... Cal.....)

1. One who has accepted the appointment to an office having at least a potential existence, and has received the emoluments of it, is estopped from endeavoring to show to his own advantage that the office had never been lawfully created because it was not done in the proper mode, as by ordinance.
2. The duty of a city attorney to attend to "all suits, matters, and things" in which the city may be legally interested, under Pol. Code, § 4901, is not limited to suits in any particular courts.
3. A contract to pay a city attorney any compensation other than his salary for conducting litigation on behalf of the city, which is within the scope of his official duties, is void by public policy as well as by the provisions of Const. art. 11, § 9.
4. For services rendered after the expiration of his term of office under a void contract to pay an officer extra compensation, he cannot have any recovery under the contract, though he may be entitled to some compensation upon an implied contract.

(October 10, 1886.)

APPEAL by defendant from a judgment of the Superior Court for Humboldt County

NOTE.—For contract with an officer to pay him extra compensation, see also *Tipppecanoe County Comrs. v. Mitchell* (Ind.) 15 L. R. A. 530, and note; *Adams County v. Hunter* (Iowa) 8 L. R. A. 614; *Lancaster County v. Fulton* (Pa.) 5 L. R. A. 426.

in favor of plaintiff in an action brought to recover the value of professional services which plaintiff had rendered for defendant. *Reversed.*

The facts are stated in the opinion.

Messrs. J. N. Gillett and E. W. Wilson, for appellant:

The services for which the contract of employment undertakes to provide, and which were covered by the first and second counts of the complaint, were within the sphere of the plaintiff's duties as city attorney, and such contract was therefore *ultra vires* and void.

Mechem. Pub. Off. § 874; 1 Dill. Mun. Corp. § 238; Decatur v. Vermillion, 77 Ill. 815; Ryes v. Osage, 88 Iowa, 558; Lancaster County v. Fulton, 128 Pa. 48, 5 L. R. A. 486; Detroit v. Whittemore, 27 Mich. 281; Chester County v. Barber, 97 Pa. 455.

The contract, being void, creates no obligation between the parties, and cannot form the basis of judicial proceedings.

Santa Clara Valley Mill & L. Co. v. Hayes, 76 Cal. 387.

The court erred in refusing to permit the defendant to show that the plaintiff after his nomination, confirmation, and qualification acted in the capacity of city attorney of the defendant corporation, and was so acting during the time the contract in controversy was made.

1 Greenl. Ev. §§ 88, 92, 195; Delphi School Dist. v. Murray, 58 Cal. 29; People v. Otto, 77 Cal. 45; McCoy v. Ourtice, 9 Wend. 17, 24 Am. Dec. 118; Colton v. Beardsley, 38 Barb. 29; People v. Olingan, 5 Cal. 389; 19 Am. & Eng. Enc. Law, p. 51.

The language of the ordinances must be held to create the office of city attorney.

People v. Addison, 10 Cal. 1; People v. Bedell, 2 Hill, 196; North v. People, 139 Ill. 81.

Plaintiff is estopped from denying that he was city attorney.

1 Greenl. Ev. §§ 195, 307.

Messrs. S. M. Buck and F. A. Cutler, for respondent:

There was no office of city attorney of the city of Eureka.

In order that there may be a *de facto* officer there must be a *de jure* office; and the notion that there can be a *de facto* office has been characterized as a political solecism, without foundation in reason and without support in law.

1 Dill. Mun. Corp. § 276; People v. Toal, 85 Cal. 335; Decorah v. Bullis, 25 Iowa, 18; Hildreth v. McIntire, 1 J. J. Marsh. 206, 19 Am. Dec. 63; Re Hinkle, 31 Kan. 713.

Merely appointing an attorney is an executive and not a legislative act.

Achley's Case, 4 Abb. Pr. 37.

The mayor and common council might appoint an attorney to give advice, and draw ordinances and do such legal business as they desire done in the city, and agree by ordinance to give him a specified monthly allowance.

Such act, however, would not create the office of city attorney; it would be simply an employment from month to month to act as attorney for the city.

People v. Toal, 85 Cal. 333.

Plaintiff is not estopped to deny that he acted in the official capacity of city attorney.

A fair construction of the language of Pol.

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Code, § 4391, limits the duties of a city attorney to all such matters as arise within the city.

Herrington v. Santa Clara County, 44 Cal. 506; Jones v. Morgan, 67 Cal. 311; Huffman v. Greenwood County Comrs. 23 Kan. 281.

Nor is the contract of employment of plaintiff void as against public policy.

Jones v. Morgan, supra; 1 Dill. Mun. Corp. § 479; Memphis v. Adams, 9 Heisk. 518, 34 Am. Rep. 335.

Henshaw, J., delivered the opinion of the court:

Appeals from the judgment entered upon verdict of jury, and from the order denying a new trial. Plaintiff sued the city of Eureka, and charged in his complaint upon three counts. In the first, he pleaded that one Wing Hing, upon January 31, 1886, brought action against the defendant, city of Eureka, in the circuit court of the ninth judicial circuit, to recover damages in the sum of \$432,800. The city of Eureka, on the 8th day of February, 1886, employed and retained plaintiff to act for it as its attorney in the matter of said action, and agreed to pay him a reasonable compensation for his services, under resolution ordering: "That S. M. Buck, Esq., be, and he is hereby retained, and authorized to act for the city of Eureka as its attorney in defense of said action; and he is also authorized to retain and associate with himself in the defense of said action some able attorney and counselor residing in San Francisco, California, if in his judgment it becomes necessary. And said S. M. Buck, Esq., is instructed to conduct said defense as economically as it can be done consistent with a vigorous and successful defense thereof." Plaintiff performed all duties imposed upon him by his contract. The case in the circuit court was finally dismissed for lack of prosecution. The value of plaintiff's services is alleged to be \$13,000, of which the city paid \$1,000, and refused to pay more. The second count charges in like manner and for like services as the first, asking compensation, however, for so much of the services as was rendered after August 1, 1886. The value of this is alleged to be \$10,000. The second count is apparently framed in anticipation of the defense presented by the city; namely, that at the time of the making of the contract plaintiff was, and continued to be until August 1, 1886, the city attorney of the city of Eureka. The third count charges for services in a different employment, and does not call for consideration or review. Judgment was asked for \$7,000, with interest. A verdict in the sum of \$4,250, with interest, was rendered; and this verdict, so far as the value of the services is concerned, is supported by the evidence. In defense of the action, the city of Eureka pleaded and sought to prove that, at the time of his employment, plaintiff was its city attorney, and that the contract was therefore void, as increasing his compensation during his term of office. Const. art. 11, § 9. By respondent it is contended (1) that the office of city attorney of the city of Eureka was never created; (2) that he was never the incumbent of such office; and (3) that if the office existed, and he was its incumbent, still

he is entitled to compensation under the contract, since it was no part of his duty as such officer to defend the suit in question.

Certain provisions of part 4, title 3, of the Political Code were and are a part of the charter of the city of Eureka (Stat. 1878-74, p. 91). Those pertinent to this consideration are as follows:

"Sec. 4408. The common council has power: (1) To create the office of city clerk, city attorney, assessor, tax collector and such other offices as may be necessary, and prescribe their duties and fix their compensation. . . ."

"Sec. 4369. The common council must during the first year by ordinance fix the term of office of all elective officers and the time when they must be elected, and provide for the appointment of other necessary officers, including city clerk and treasurer, and fix their terms and amount of their bonds."

"Sec. 4386. The mayor has power: (1) To nominate and with the consent of the common council to appoint all nonelective officers of the city provided for by the common council, including city attorney, secretary of the council, and city treasurer. . . ."

"Sec. 4374. All city officers, before entering upon their duties, must take the oath of office. The marshal, attorney, clerk, assessor, collector, and treasurer must also give a bond with sureties to be approved by the mayor payable to the corporation by its corporate name in such penalty as may be prescribed by ordinance conditioned for the faithful performance of the duties of their office, and a like bond may be required of any officer whose office is created by an ordinance."

"Sec. 4391. The city attorney must attend to all suits, matters, and things in which the city may be legally interested; to give his advice or opinion in writing whenever required by the mayor or common council, and do and perform all such things touching his office as by the common council may be required of him."

The defendant produced its records for the purpose of showing that plaintiff was nominated and confirmed as city attorney for the term of two years from July 12, 1884, to July 12, 1886, and that after such nomination he qualified and acted as such city attorney. The court refused to admit the proofs, and defendant then offered in evidence its records to show the existence of the office of the city attorney of the city of Eureka, and the plaintiff's incumbency therein during the time mentioned, which record evidence was stricken out upon motion of plaintiff. The evidence so offered and rejected consisted of various ordinances "fixing official fees and salaries in the city of Eureka," and dating from the year 1876. In each of these the council fixed the salary of the "city attorney." Finally, in 1893, by ordinance, the council declared that the city attorney shall receive a "salary of \$35 a month." This ordinance was in force during all the time in question. In 1877 the council passed its ordinance "fixing the bonds of city officers," which provided that "the city officers hereinafter named, before entering upon the duties of their respective offices, shall give a bond," etc. "The penalty of such bonds shall be as follows: . . . The city attorney's bond, \$1, 80 L. R. A.

000." This ordinance remained in full force and effect. The minutes of the meeting of the common council for July, 1884, show: "The mayor placed before the council the name of S. M. Buck for the position of city attorney for the ensuing term; whereupon, on motion, the nomination was confirmed." The bonds of the city officers for the terms commencing in 1884 could not be found, but the minutes of the council for August of that year show that "the mayor verbally announced to the council his approval of the bonds of . . . S. M. Buck as city attorney." There was likewise offered in evidence a document from the mayor's office, under the seal of the city, reciting the especial confidence reposed in the integrity and qualifications of S. M. Buck for the office of city attorney, and appointing him with consent of the council as city attorney for the term as established by law, etc., to which was appended the oath of S. M. Buck to support the Constitution of the United States and of this state, and faithfully discharge "the duties of the office of city attorney of the city of Eureka." It was likewise shown that plaintiff drew and received from the city the "salary" fixed by ordinance, of \$25 per month during all of this time, up to July 12, 1886.

There can be no question upon this evidence, assuming for the moment the existence of the office, but that plaintiff was not only *de facto* city attorney, but that he was the regularly appointed, qualified, and acting city attorney,—a *de jure* officer,—charged with all the duties and entitled to all the emoluments of the office. There can be no better proof of the acceptance and holding of an office than the qualification of the officer, and his drawing of the salary. Here, the plaintiff was appointed as city attorney, filed his bond as city attorney, took the oath of office as city attorney, and drew the fixed salary of city attorney, all duly and regularly, as required by law and the ordinance of the city.

Nor can plaintiff be heard to say (still assuming the existence of the office) that his contract with the city, or his understanding with the council, imposed upon him other or different or lesser duties than those which by law he was obliged to perform. He cannot, for example, be heard to say, as here he undertakes to do, in the face of the ordinance fixing his compensation, that his understanding with the council was that they were to give him \$25 a month as a "retainer,"—a "stipend,"—and were to pay him "extra for all important duties, particularly business in the superior court, or business in the higher courts." It was not within the power of the plaintiff or of the council to modify, by convention, the duties which by law were made to pertain to the office of city attorney. Pol. Code, §4391. And the plaintiff, after having qualified, filed his bond, and taken his oath to perform the duties of the office, and drawn the salary pertaining thereto, will not be permitted to assert that the duties he swore to perform were not those the performance of which the law made obligatory upon him.

The contention that he was not city attorney cannot, then, be based upon any defect in the machinery of appointment, nor upon plaintiff's refusal, with proper formalities, to accept the

appointment. It is claimed to rest upon the fact that the council, notwithstanding its repeated recognition of the existence of the office, never in fact created it, and that, therefore, it never existed. And the argument is that the council had power to create the office (Pol Code, § 4408); that they were required, if they created it, to do so by ordinance (Id. § 4869); that the mode is the measure of their power; and that no ordinance was produced wherein and whereby the common council of the city Eureka did ordain that the office of city attorney of the city of Eureka is hereby created.

It is a general rule, founded upon the dictates of public policy, that the acts of a *de facto* officer are valid, and that those who deal with such an officer are protected. The public is not required to know the terms and tenure upon which one openly holding and claiming the right to hold a public office maintains his position; nor is any person who has dealt with such an officer to suffer loss if the tenure should prove illegal. So, likewise, it is the general rule, upon grounds of plain justice and public policy, that a *de facto* officer is forever estopped in civil or criminal actions from denying that he holds the office, and from escaping any of the responsibilities which attach to his incumbency. But the further rule is that the law as to *de facto* officers applies only where there is a *de jure* office, the idea of a *de facto* officer being necessarily founded upon the conception of a *de jure* office. A *de jure* office is one having a legal existence, or, rather, one having an existence recognized by law. We are not here further concerned with the law concerning *de facto* offices, since, as has been said, this office, if it existed, was filled by a *de jure* incumbent. While it is certainly impossible to conceive of an officer either *de facto* or *de jure* filling or attempting to fill a nonexistent office, there is a marked and well-recognized distinction between such nonexistent offices and those which, while having an irregular or merely potential, or in some instances even an illegal, existence, yet do exist, and are recognized by the law. Of offices having an illegal existence which are, nevertheless, recognized, the government of a state in rebellion and of a municipality acting as such without legal authority are conspicuous examples. The government of a state in rebellion and all officers thereunder are absolutely illegal; yet, upon strong and plain grounds of public policy, the government and officers are recognized by law, and the incumbents are treated as *de facto* officers. "In such a case the acts of a *de facto* executive, a *de facto* judiciary, and of a *de facto* legislature, must be recognized as valid. But this is required by political necessity." *Hildreth v. McIntire*, 1 J. J. Marsh. 207, 19 Am. Dec. 61. So a municipal corporation acting under color of the law may have no legal existence, and consequently no legal municipal offices; yet such a corporation has still an existence recognized by law, and, upon plain grounds of public policy, the question of its legal existence should be raised only by the state itself upon quo warranto. *Cooley*, Const. Lim. 254; *Geneva v. Cole*, 61 Ill. 397; *St. Louis Comrs. v. Shields*, 62 Mo. 247; *State v. Carr*, 5 N. H. 367.

In some states, indeed, it is the established rule that officers filling offices created by un-

constitutional laws are, nevertheless, *de facto* officers, until, under direct proceedings, the act has been declared unconstitutional. Thus, in *Burt v. Winona & St. P. R. Co.* 81 Minn. 479, it was held that the municipal court of Mankato was a *de facto* court, and that there can be a *de facto* office under an unconstitutional act creating it until the act is declared void. In the case of *Trumbo v. People*, 75 Ill. 561, a school district had been illegally established. The supreme court of Illinois, reviewing the case in a later opinion (*Leach v. People*, 123 Ill. 420), says: "So far as that alleged district was concerned, there was no such legal district, and there was no *de jure* office of school director of that alleged district." Yet, upon a proceeding to collect a tax, the tax was sustained, it being held that the school directors were officers *de facto*, and that in collateral proceedings the legality of the formation of the district could not be inquired into. And in *Com. v. McCombe*, 56 Pa. 486, it is said: "An act of the assembly even if it be unconstitutional, is sufficient to give color of authority to the person acting under it." These decisions are in obvious conflict with the authority of the great leading cases of *State v. Carroll*, 88 Conn. 449, 9 Am. Rep. 409, and *Norton v. Shelby County*, 118 U. S. 425, 80 L. ed. 178; in the latter of which Field, J., explains that, while there are many cases deciding that a person holding an office under an unconstitutional law is a *de facto* officer, in every one it will be found that there was a legal office, and that the unconstitutional law went only to the mode or manner of filling it. And they are likewise in conflict with the rule in this state, declared in *People v. Toal*, 85 Cal. 333. They are not here cited in commendation or approval, but as instructive examples of the lengths to which those courts have felt compelled to go in carrying out what they conceived to be the plain mandate of public policy. When, however, we come to consider the doctrine as applied to offices having an irregular or potential existence (as distinguished from a nonexistent office, or one void in its creation), the cases are numerous and uniform in treating the incumbents of such offices as *de facto* officers.

In *Gibb v. Washington*, McAll. 430, Fed. Cas. No. 5,880, dealing with the question of the creation of the office of appraiser, the court says: "If such an office has been even colorably created, then any irregularity which does not render the creation of the office void cannot be availed of." In *Re Ah Lee*, 6 Sawy. 410, 5 Fed. Rep. 899, the Constitution of Oregon provided that, when the population of the state reached 200,000, the legislature should district the state into designated circuits, and provided for the election of judges to the circuit courts therein. The legislature passed the act before the state attained the requisite population, and before election, the governor, without authority, appointed the judge whose act was under review. The court held that, admitting the act to be unconstitutional and the appointment of the governor to be invalid, still the judge was a judge *de facto*, since the office in effect was created by the Constitution. In *Carlton v. People*, 10 Mich. 250, the county officers were elected before the law creating the offices went into effect. They were held to be

de facto officers. Though there were no legal offices in existence at the time, still the offices were created and had a potential existence. And the court, in distinguishing between such offices and nonexistent offices, aptly says: "Where the law negatives the idea that there can be a legal incumbent, any one assuming to act assumes what any one is bound to know is not a legal office." In *Forty v. Paine*, 62 Wis. 154, the legislative act creating the town of Pine River provided that the electors should meet upon the first Tuesday of the following April (April 4), and elect town officers, but the act itself did not become a law until four days afterwards,—April 8. The potential existence of the town was recognized as sufficient for holding the election, and the officers were declared to be *de facto*, though elected without authority of law to offices then having no more than a potential existence. In *Fowler v. Beebe*, 9 Mass. 231, 6 Am. Dec. 62, the legislature had created a new county and the offices thereof. The governor appointed officers before the law went into effect. It was held that their acts were binding as *de facto* officers, though the appointments themselves were afterwards declared void by the same court when the question was presented upon direct attack. *Com. v. Fowler*, 10 Mass. 291. Here, too, therefore, the potential existence of the office was recognized. In *Leach v. People*, 122 Ill. 420, an unconstitutional law regulating township organizations provided for the number of members, mode of election, etc., of the board of supervisors, and under this law a board was selected whose acts were under consideration. It was held that, notwithstanding the invalidity of the law, there was still "such a legal official body known to the law as the 'Board of Supervisors of Wayne County;'" and the acting board, though in number and in mode of selection illegal, was upheld as a *de facto* body. The case of *Smith v. Lynch*, 29 Ohio St. 261, is nearly a parallel case with the one at bar. The legislature of Ohio authorized villages and towns to establish boards of health and appoint members. The village of West Cleveland, by a void ordinance, attempted to do this. The members appointed qualified and entered upon the discharge of their duties, and were accepted and regarded by the public as such members. The opinion of the court, delivered by Welch, Ch. J., is as follows: "The questions argued by counsel are: (1) Had the superior court jurisdiction? (2) Are the requirements of the statute as to the manner of passing the ordinance mandatory, or are they merely directory? (3) If these requirements are mandatory, are the persons so acting to be regarded as a board of health *de facto*? We are satisfied that the last named of these questions must be answered in the affirmative. It is unnecessary, therefore, to consider the first and second questions. In other words, we think that, under the circumstances, the board is to be regarded as a board *de facto*. Whether it was a board *de jure*, and whether the superior court had jurisdiction of the case, became, therefore, immaterial questions. It is claimed by counsel for the plaintiff that this is not a case where an office has been filled, and its duties performed, by parties not legally appointed or qualified, but a case where there was no office to be filled. We do not so

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understand the law. The statute (66 Ohio Laws, p. 200) creates the office. It authorizes the council to 'establish' the board, and to fill it by appointment. True, until the council act in the premises, it is a mere potentiality in their hands; yet it is none the less an office, known to the law. Where the council assumes to establish the board under the law, and to appoint its members, there is no good reason why an irregularity or illegality in the act of establishing the office, any more than the irregularity or illegality in the appointment of the officers, should be held as rendering the acts of the officers void, and themselves mere trespassers. The reasons—the considerations of public policy—which exist in one case exist equally in the other. It is enough that the office is one provided for by law, and that the parties have the color of appointment, assume to be and act as such officers, and that they are accepted and acknowledged by the public as such, to the exclusion of all others. Such was the case here. There was both the color and the fact of office."

The office under consideration was given a potential existence by the acts of the legislature in the sections of the Code above quoted. The plaintiff, having accepted the appointment to it, and received the emoluments of it, is estopped from endeavoring to show to his own advantage that the council did not follow a prescribed mode in perfecting that potential existence. It was therefore error for the trial court to strike out the admitted evidence. It does not seem to be disputed that, if plaintiff's services in the case of *Wing Hing v. Eureka* were such as under his office he was in duty bound to perform, his contract with the council would be void as an attempt to increase his compensation; and, indeed, no question can arise upon this point. It is definitely settled by the language of the Constitution, in the first place (Const. art. 11, § 9); and in the second place, even in the absence of such a provision, such a contract would be declared void upon grounds of public policy. "It is a well-settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He cannot legally claim additional compensation for the discharge of these duties, even though the salary be a very inadequate remuneration for the services. . . . Whenever he considers the compensation inadequate, he is at liberty to resign. The rule is of importance to the public. To allow changes and additions in the duties properly belonging or which may properly be attached to an office to lay the foundation for extra compensation, would introduce intolerable mischief. The rule, too, should be rigidly enforced." Dill. Mun. Corp. 4th ed. § 233; Mechem, Pub. Off. §§ 324-376.

The contention here is, however, that these services were not among those whose performance is enjoined on the city attorney, and herein plaintiff relies upon the case of *Herrington v. Santa Clara County*, 44 Cal. 496. As the law then stood, the district attorney was entitled to receive as compensation 10 per cent of all money recovered by him, for the county in any action. The county supervisors, ignoring the district attorney, authorized other attorneys to bring suit without the county for

the recovery of a large sum of money. Recovery was had in the action, and the district attorney sued to recover his percentage. The law made it the duty of the district attorney to prosecute all actions for the recovery of debts, etc., and to defend all suits brought against his county. Pol. Code, § 4256. The district attorney was not denying that it was his duty to prosecute this suit, but, to the contrary insisted that it was his duty. The defendant county never claimed that it was not the district attorney's duty to prosecute the suit, but insisted that the duty was not exclusively imposed upon and the right not exclusively vested in him, but that the supervisors could, if they saw fit, engage other counsel to perform the service, as in many cases special counsel are employed. The language of the court in its opinion, therefore, while not *obiter*, was not addressed to any contention raised by the parties. The decision of the court was by a bare majority; Chief Justice Wallace being disqualified, and Justice Rhodes expressing no opinion. It was based upon two grounds; the second, which is argued at length, holding that, as the district attorney had not collected the money, he was not entitled to his commission; and the first, which is not argued, being a declaration to the effect that it was "not a duty enjoined upon the district attorney by law to prosecute or defend civil actions in which the county is interested which are pending in any other county than his own." This declaration is, however, supported by no reasoning, by no analysis of the statute, and by no citation of authority; and it would be difficult so to support it. Says Dillon: "The statutes of the legislature and the ordinances of our municipal corporations seldom prescribe with much detail and particularly the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse." 1 Dill. Mun. Corp. 4th ed. § 283.

When the law of the state says that the district attorney shall prosecute and defend all suits, and the city attorney shall attend to "all suits, matters, and things in which the city may be legally interested," it is a most forced and unwarranted construction to hold that in the one case it means only such suits as are commenced and finally determined in the county courts, and in the other only such as are in like manner commenced and determined in the municipal courts. If the legislature meant that, it could and would have said so. But when it says "all suits, matters, and things," the language will bear no other construction than that which is patent on its face. No rules of interpretation are necessary to be considered, for no need or room for interpretation exists. Thus the court, in *Ryce v. Osage*, 88 Iowa, 558, said the law made it the duty of the city attorney "to act as attorney for the city in any suit or action brought by or against the city, and generally to attend to the interests of the city as its attorney." There, as here, plaintiff claimed extra compensation for services rendered under contract with the counsel for defending an action against the city in the district

and supreme court, and there, as here, urged that it was no part of his official duty to defend the suit. Says the court: "It seems to us that a mere reading of that section of the ordinance which prescribes the duties of the city attorney is sufficient to show that under it he was required to act for the city, as its attorney, in any case brought by or against it. . . . That the services rendered by the plaintiff, and for which he now seeks to recover, were included within his duties as city attorney, is too plain to admit of argument." In *Lancaster County v. Fulton*, 126 Pa. 48, 5 L. R. A. 486, construing a similar statute, says the court: "The services for which the contract in question undertakes to provide, are clearly within the sphere of the duties of the solicitor of Lancaster county." *Russell v. Hallett*, 28 Kan. 276, is not in conflict with the authorities upon this question. In that case the county attorney sued his county for compensation for services demanded of him without the duties of his office, as the court decided. He had been compelled to assist in a trial in a county other than his own. The law expressly limited his duty to attend before magistrates and judges in his county. Kan. Gen. Stat. 1868, p. 284, § 187.

But it is unnecessary to multiply quotations upon this plain proposition. We think it must be apparent that the construction given to the statute in *Herrington v. Santa Clara County*, *supra*, cannot be supported, and should no longer be maintained; and we believe that the evil results to the public service which must arise under that construction justify and demand a declaration from this court that it be no longer considered as authority. It is of the last importance that any and every public officer entering upon the discharge of his duties should know once and for all that, be the duties onerous or be they easy, the compensation for them must be that fixed by law, and that only. If they become too burdensome, the law does not forbid the officer's resignation; but it does emphatically say that he shall not under any circumstances, by use of the power of his office, by contract, express or implied, fair or unfair, or by aid even of legislative enactment, obtain increased compensation for their performance. "The successful effort to obtain office is not unfrequently speedily followed by efforts to increase its emoluments; while the incessant changes which the progressive spirit of the times is introducing effects, almost every year, changes in the character, and additions to the amount, of duty in almost every official station; and to allow these changes and additions to lay the foundation of claims for extra services would soon introduce intolerable mischief." *Evans v. Trenton*, 24 N. J. L. 764.

The services here performed by the plaintiff being such as it was his duty to perform as the city attorney of the city of Eureka, the contract was an attempt to increase his compensation, and is in violation of the Constitution, against public policy, and therefore void. "A promise to pay them [officers] extra compensation, is absolutely void, under the statute of Ohio. Such promise could not be enforced at common law, being against sound policy, and quasi extortion. English judges have declared that such claims by them are novel in courts of justice, and that actions founded on

such promises are scandalous and shameful (2 Burr. 934); and in the court of errors of New York they meet with no more favor. *Hatch v. Mann*, 15 Wend. 46." *Gillmore v. Lewis*, 12 Ohio, 281; *Vandercook v. Williams*, 106 Ind. 345; *Decatur v. Vermillion*, 77 Ill. 315; *Hunter v. Nolf*, 71 Pa. 282.

Nor can plaintiff recover under the contract, as by his second count he seeks to do, for such part of the services as was rendered after his term of office had expired. This is not the case of a city attorney carrying on litigation, after his term of office had expired, with the knowledge and consent of the authorities, in which case an implied contract and promise to pay might arise after his tenure had terminated. Here plaintiff declares on and seeks to recover under a contract against public policy and wholly void. Such a contract will not support any action for recovery. As is said by the court in *Lancaster County v. Fulton*, *supra*: "There is no pretense that any new agreement was entered into or the terms of the original in any manner changed after the expiration of his term of office. Neither the subject of a new contract nor the modification of the original ever appears to have been considered by the parties. The services of plaintiff below were no doubt efficient and valuable; but, so far as they were rendered during his term of office, his salary is all the compensation he can claim. As to services rendered after the expiration of his term of office, under and in pursuance of the original illegal and

void contract, he cannot, under the pleadings and evidence in this case, recover." A void contract cannot form the basis of a judicial proceeding. *Santa Clara Valley Mill & L. Co. v. Hayes*, 76 Cal. 387.

There are considerations in plaintiff's case which appeal with force to a court. In the first place, the services rendered, as found by judge and jury, were of great value to defendant. In the second place, they were rendered under an early interpretation given to the statute, which justified plaintiff in suing upon his contract. In now declaring what we believe to be the only tenable construction of the law relative to the duties of the office, it has followed as a necessary consequence that the contract, void as against public policy, will not support a cause of action. Plaintiff, however, if the facts will warrant it, should recover, not upon the original or void contract, but upon an implied one for services rendered after the expiration of his term of office.

The judgment and order are reversed, with directions to the trial court to permit plaintiff, if he shall be so advised, to amend his complaint, or file an amended complaint, seeking compensation upon *quantum meruit* for services rendered after the expiration of his term of office.

We concur: Beatty, Ch. J.; McFarland, J.; Garoutte, J.; Van Fleet, J.; Harrison, J.; Temple, J.

MONTANA SUPREME COURT.

STATE of Montana, *as rel.* Sam TOI, *Resp.*,
v.

E. S. FRENCH, *Appt.*

(.....Mont.....)

1. Imposing on laundrymen the payment of a license fee of \$15 for a steam

laundry, \$10 for every male person in the business other than that of a steam laundry, and \$35 for a male laundryman employing one or more other persons, does not grant a monopoly or have a prohibitory effect.

2. The uniformity clause of Const. art. 12, § 1, relating to taxation, does not apply to licenses imposed on occupations.

NOTE.—Limit of amount of license fees.

I. Power to fix license fees generally.

II. Constitutional restrictions as to amount.

a. Provisions against discrimination.

b. Provisions against violation of contract obligations.

c. Provisions requiring equality and uniformity.

d. Direct restrictions as to amount of levy.

e. Miscellaneous provisions.

III. Graduation of license fees.

IV. Limitations peculiar to municipal corporations.

a. Statutory and charter restrictions.

b. Must not be discriminating.

c. Under a general power to regulate.

1. What may be included in the fee.

2. Must not be for revenue.

3. Distinction between measures for revenue and for regulation.

4. Must not be unreasonable or in restraint of trade.

5. Reasonableness, by whom determined.

6. Presumption of reasonableness.

7. What impositions are reasonable.

d. Under a power to restrain or prohibit.

e. Under a power to tax or license.

f. When discretion is expressly conferred.

I. Power to fix license fees generally.

The power of a sovereign state to fix license fees at such figures as it may see fit would appear to be unlimited, except in cases in which its exercise would conflict with some constitutional provision.

Thus, the legislature of a state may impose such license taxes upon privileges as it may choose. *Columbia v. Bealy*, 1 Humph. 232, 34 Am. Dec. 646 (1839).

And it may, in regulating any matter which is a proper subject for the police power, impose such sums for licenses as will operate as a partial restraint on the business or on the keeping of a particular kind of property. *Tenney v. Lens*, 15 Wis. 536 (1838).

And in the exercise of the police power it might prohibit altogether the sale of liquors, and consequently may attach such conditions to the allowance of their sale as it sees fit to prescribe. *Timm v. Harrison*, 109 Ill. 593 (1884) (*dictum*).

And it may prohibit or permit the doing business in the state by foreign insurance companies, as it sees fit, and if it is permitted it may impose such conditions and restrictions, and require such payment, for the privilege as it may choose. *Milwaukee Fire Department v. Helfenstein*, 15 Wis. 137 (1862); *Leavenworth v. Booth*, 15 Kan. 637 (1875) (*dictum*).

3. The fact that Chinamen are engaged in the hand-laundry business does not make invalid a statute imposing a license fee of \$25 on a male laundryman employing one or more other persons in such business, while the fee for a steam laundry is \$15, where the law in its terms applies to all male laundrymen of every condition and nationality.

(October 14, 1885.)

A PPEAL by defendant from a judgment of the District Court for Lewis and Clarke County in favor of relator in a mandamus proceeding to compel defendant to issue a license to relator to conduct a laundry. *Reversed.*

Statement by De Witt, J.:

This is an appeal from the judgment of the

district court upon an application for a writ of mandate requiring the appellant to accept \$10 as a license fee from the respondent, and to issue to respondent a license to conduct a laundry. Sections 4079 and 4080 of the Political Code are as follows:

"Sec. 4079. Every male person engaged in the laundry business, other than the steam laundry business, must pay a license of \$10 per quarter; provided, that where more than one person is engaged or employed or kept at work, such male person or persons shall pay a license of \$25 per quarter, which shall be the license for one place of business only.

"Sec. 4080. Every person who carries on a steam laundry must pay a license of \$15 per quarter."

So, it may properly delegate the power to license and to fix the fees to be paid for the license, to municipal subdivisions and bodies. See *infra*, IV. c. f.

And where by the charter of a city a power to license a particular occupation is given, such power involves the necessity of determining both the extent and duration of the license and the sum to be paid therefor. *Darling v. St. Paul*, 19 Minn. 399 (1873) (*dictum*).

A city council having power to license and regulate may require a reasonable sum by way of an excise for granting such license. *Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593 (1846).

Where a municipal corporation is authorized to regulate a given subject and require those who do any act or carry on any business to obtain a license, a reasonable fee for the license and the labor or expense attending its issue may be properly charged, although the power to do so is not expressly given. *St. Paul v. Dow*, 37 Minn. 20 (1887); *Jacksonville v. Ledwith*, 26 Fla. 168, 9 L. R. A. 69 (1890).

See, as to the requirement of reasonableness, which appears to be applicable to municipal corporations only, *infra*, IV. c. 4-7.

II. Constitutional restrictions as to amount.

Various constitutional provisions have been frequently interposed, sometimes successfully, as furnishing a limitation either directly or relatively, upon the discretion of legislative and municipal bodies in fixing the amount of license fees; such provisions applying of course, when deemed applicable, alike to state and to municipal licenses.

a. Provisions against discrimination.

Provisions against discrimination sometimes act as a limitation, preventing the imposition of a license fee upon one class of subjects relatively larger than that imposed upon another class.

Thus, a license tax of \$300 per annum, imposed upon persons not permanent residents in the state upon the sale of any goods other than agricultural products and articles manufactured in the state, conflicts with the provision of the Federal Constitution that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, where the tax imposed upon resident traders ranges from \$12 to \$150 per annum. *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449 (1871).

And a license tax imposed by statute upon vendors of patent rights or territory for the sale of patent rights or patented articles, of double the amount of that imposed upon other peddlers, is invalid as discriminating against peddlers of patent rights, as well as being a tax upon a patent right. *Re Sheffield*, 64 Fed. Rep. 838 (1894).

So, an ordinance imposing a license fee of \$25 upon nonresident hawkers and peddlers, and only \$10 upon those residing in the city, is illegal in so

far as it imposes a larger tax on nonresidents. *State v. Orange*, 50 N. J. L. 399 (1888).

And a license fee of \$100 imposed upon keepers of meat shops in one part of a city, and of \$25 in other parts, is a tax for revenue purposes, and unconstitutional as such for discrimination between different portions of the city. *St. Louis v. Spiegel*, 75 Mo. 148 (1881).

So, an ordinance imposing a license fee upon transient merchants doing business in the town, designed to discriminate in favor of resident merchants and against all others, conflicts with the provision of the Federal Constitution giving power to Congress to regulate commerce between the states, and with that of the state of Iowa, that laws of a general nature shall have a uniform operation. *Pacific Junction v. Dyer*, 64 Iowa, 38 (1894).

But a license tax imposed by a city, of \$2 per year upon hand carts, of \$3 for buggies, and so on for vehicles of a different character, and finally of \$30 per year for a six-horse omnibus, is not unconstitutional because of discrimination or as being in violation of natural rights. *St. Louis v. Green*, 7 Mo. App. 468 (1879).

And a license tax of \$85, imposed by statute on persons dealing in distilled liquors or retailing spirituous liquors on land, is not unconstitutional for unjust discrimination because a tax of only \$50 is levied on persons following a like occupation on steamboats, though such steamboats ply between places in a single parish only. *Kaliski v. Grady*, 25 La. Ann. 576 (1879).

And Ga. act Feb. 16, 1876, requiring persons employed in hiring laborers in the state for employment outside its limits to procure a license and pay \$100 therefor for revenue purposes, is not unconstitutional as discriminating between residents and nonresidents. *Shepherd v. Sumpter County Comrs.* 59 Ga. 539, 37 Am. Rep. 394 (1877).

See also, as to fixing different rates for different classes of callings, *infra*, II. c. and III. And see generally, as to discrimination in fixing municipal license fees, *infra*, IV. b.

And see, in connection with this subdivision, the principal case, *STATA, TOX v. FRENCH*.

Discrimination against nonresidents by imposing license taxes is not considered here further than it depends upon the amount of the charge. Many other cases decide that such burdens which are placed only upon nonresidents are unconstitutional.

As to discrimination against foreign corporations, see *note* to *Cone Export & C. Co. v. Poole* (S. C.) 24 L. R. A. 239 (1894).

b. Provisions against violation of contract obligations.

Licenses are not contracts which cannot be changed within the constitutional prohibition against violation of contract obligations, and when required for regulation they do not violate a

The respondent here, Sam Toi, appeared in the district court, and filed a petition praying for a writ of mandamus, in which petition he set forth as follows: That appellant is the treasurer of Lewis and Clarke county, and that it was his duty to issue licenses when tendered the fees therefor; that respondent is a male person, a resident of the county, and engaged in the laundry business, other than a steam laundry, and that he is employing male persons other than himself in such business; that he tendered to the said treasurer the sum of \$10, and demanded that the treasurer issue to him a license for the conduct of the laundry business; that the treasurer refused to issue said license unless the respondent paid him the fee of \$25, as required by section 4079, Pol. Code.

The county attorney filed a demurrer to this petition, upon the ground that it did not set up facts sufficient to warrant the issuing of the writ of mandamus. The demurrer was overruled, and the writ was issued, commanding the treasurer to receive from the respondent the sum of \$10, and issue to him a license for the conduct of said laundry business. From this judgment the respondent below appeals. There are some other matters set up in the petition for the writ, which will be noticed as the subject is treated in the opinion below.

Mr. H. J. Haskell, for appellant:

The license is uniform on all persons engaged in carrying on the same class of laundries.

contract not to tax, but the rule is different where they are exacted for the purpose of revenue.

Thus, a license to sell liquor is a mere permit to engage in that business, and not a contract guaranteeing that the state will not increase the amount required to be paid therefor. *Hadtner v. Williamsport*, 15 W. N. C. 138 (1888).

And the same was held in *Moore v. Indianapolis*, 120 Ind. 483 (1889), with reference to the power of a municipality to raise the price of a license for the unexpired period before its expiration.

So, a franchise conferred by the legislature on private persons to construct a railroad track through the streets of a city and run cars thereon, prescribing certain conditions to be performed by the grantees, is not a contract which will exempt the occupation of operating the road from a tax imposed by the city under a power to license and regulate occupations. *San José v. San José & S. O. R. Co.* 58 Cal. 475 (1879).

And a provision in the charter of a city railroad company that the company shall pay such license for each car run as is paid by other passenger railroad companies in a city, which is \$30, is not a contract that the license fee should never exceed such sum. *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 423, 25 L. ed. 913 (1879).

Nor do a license fee of \$5 on each car of a railroad company, imposed by a city, and a subsequent bond required by ordinance for faithful compliance with regulations, etc., given by the railroad company as a condition for the consent to its occupancy of its streets, constitute a contract with the city that such license fee shall not be varied or increased. *Johnson v. Philadelphia*, 60 Pa. 445 (1869).

And the right of a municipality to require payment of a license fee of \$50 per year for each boat used, under a charter authorizing it to license, tax, and regulate ferries, is not affected by a provision in the charter of the ferry company that it should be subject to the same taxes as should be imposed on other ferries and under the same regulations and forfeitures, where other ferries are required by general law to pay to the county not less than \$5 nor more than \$300, such charge being a license fee and not a tax. *Wiggins Ferry Co. v. East St. Louis*, 103 Ill. 560 (1882).

In *Howland v. Chicago*, 103 Ill. 500 (1884), it was said that it was decided in *Wiggins Ferry Co. v. East St. Louis*, *supra*, that a license fee exacted for the mere purpose of revenue, for a license to do that which the exactor had no power to forbid, is not a tax in the sense of the Constitution.

An imposition by a municipal council of a license tax upon the cars of a railroad company within its limits for the purpose of raising revenue, however, would be an invasion of the chartered rights of a company and void where its charter subjected it to certain regulations of the municipality with re-

lation to paving, grading, etc., and exempted it from other municipal control. *Johnson v. Philadelphia*, *supra*.

And a municipal requirement of an annual license fee of \$60 for large cars and \$25 for small cars, imposed upon a street-railroad company, which regulated nothing except to prohibit the running of the cars without such payment, is not a measure of regulation, but the imposition of a tax upon the company in derogation of its rights to property acquired under a precedent contract for the use and occupation of the streets. *New York v. Second Ave. R. Co.* 32 N. Y. 231, 34 Barb. 43 (1855).

Nor can a municipal corporation exact an additional license fee from a telephone company for the purpose of revenue only, where such companies are required to pay to the state annually a license fee for carrying on other business, which is declared to be in lieu of all taxes for any purposes authorized by the laws of the state. *Wisconsin Teleph. Co. v. Oshkosh*, 63 Wis. 82 (1884).

a. Provisions requiring equality and uniformity.

The provision found in the Constitutions of most of the states, requiring taxation to be equal and uniform, is the one which has been most frequently interposed with a view to limiting the license fees imposed upon one class or locality so as to be uniform with those imposed upon others; but while there is some conflict of authority, the great majority of the decisions have declined to give that effect to the provision, though they have placed such refusal upon different grounds.

Thus, it has been held that a license fee is not a tax within constitutional restrictions upon the power to tax.

This is the rule of the principal case, *STATE TOI, v. FRENCH*.

And this was decided in *Chilvers v. People*, 11 Mich. 43 (1862), with reference to a fee for the privilege of running a ferry.

And in *Wiggins Ferry Co. v. East St. Louis*, 103 Ill. 560 (1882), with reference to a license fee of \$50 annually for each boat, required of a ferry.

And in *People v. Thurber*, 13 Ill. 554 (1852), with reference to a license fee of 8 per cent on the amount of premiums charged by persons acting as agents for foreign insurance companies.

And in *Braun v. Chicago*, 110 Ill. 126 (1884), with reference to an ordinance requiring a license fee of \$100 of bankers and of \$25 of commission merchants, brokers, and money changers.

So, in *Charity Hospital v. Stickney*, 2 La. Ann. 550 (1847), a charge of \$520 annually, imposed on theaters for the benefit of a charity hospital, was attacked as unconstitutional, but upheld on the ground that the exaction was the price of a license, and not a tax.

And a license tax imposed upon liquor dealers is

The legislature is authorized to divide a business into classes for the purpose of imposing a license tax.

People v. Henderson, 12 Colo. 869.

If it operates on all alike who fall into the same class, the constitutional requirement that "taxes shall be uniform upon the same class of subjects" is satisfied.

Timm v. Harrison, 109 Ill. 598; *Cooley*, Taxn. 169; *Howland v. Chicago*, 108 Ill. 496; *Boeeman v. Cadwell*, 14 Mont. 480.

Even within the class taxed, however, there may be rules of distinction, and these are perfectly admissible, provided they are general rules and are observed.

Cooley, Taxn. 170; *State v. Stevenson*, 109

N. C. 780; *Singer Mfg. Co. v. Wright*, 83 Fed. Rep. 121.

The power to classify and arrange into classes of subjects is not limited or restricted.

Weaver v. State, 89 Ga. 689; *People v. Henderson*, *supra*; *Black*, Const. Law, p. 408; *Howland v. Chicago*, *supra*; *Home Ins. Co. v. Swigert*, 104 Ill. 658; *Germania L. Ins. Co. v. Com.* 85 Pa. 513; *Ex parte Miranda*, 78 Cal. 885; *Timm v. Harrison*, *supra*; *Ex parte Thornton*, 12 Fed. Rep. 588; *Gatlin v. Tarboro*, 78 N. C. 119.

There is no discrimination between persons engaged in carrying on the same class of businesses. The law operates alike upon all persons under like circumstances and conditions.

not a state tax and is not therefore unjust or unequal because levied on all dealers alike without regard to the amount of business done by each. *Youngblood v. Sexton*, 22 Mich. 406, 20 Am. Rep. 654 (1875).

Nor is Idaho act 1881, § 1, providing for the payment of \$500 per year, or a proportionate amount for each fraction of a year, for a license to sell intoxicating liquor in towns in which a designated vote was cast for governor at the last general election, and \$800 in all other cities and towns, and \$100 for licenses for hotels outside of cities, towns, villages, and hamlets, within Idaho Const. art. 7, §§ 2, 5, requiring equality and uniformity of taxation upon the same classes of subjects. *State v. Doherty*, 2 Idaho 1105 (1892).

And a statute requiring a license fee of \$10 of all liquor dealers in addition to all other licenses required by law, and providing that the moneys received therefrom shall constitute a fund for the foundation and maintenance of an asylum for inebriates, is within the police powers of the legislature and not in violation of the constitutional provisions against unequal taxation. *State v. Cassidy*, 22 Minn. 812, 21 Am. Rep. 765 (1875).

And Ala. act Jan. 18, 1884, authorizing and requiring the probate judge of the county to collect a tax of \$50 on licenses for the retailing of spirituous liquors in the city of Mobile, for the use of the Mobile school commissioners, is a police regulation which may be graduated by the populousness of the community in which the privilege is to be exercised, and by the profitability of the employment, and not subject to the objection that it is not levied equally throughout the taxable district. *Ex parte Marshall*, 64 Ala. 266 (1879), *Stone*, J., dissenting.

So, a municipal requirement of a building license and that a fee of 50 cents shall be paid for a license to erect, enlarge, or add to any building under a power to make by laws regulating the erection of buildings, is not a tax for revenue purposes, and is not therefore subject to the objection that it is unequal in its operation and operates as a restraint of trade. *Welch v. Hotchkiss*, 39 Conn. 140, 12 Am. Rep. 383 (1872).

And a license fee imposed upon merchants or dealers in wines and liquors, estimated upon the amount of their gross annual sales, is a tax upon the thing and not upon the persons, and is not subject to objection for want of uniformity. *Williamsport v. Stearns*, 2 Pa. Dist. R. 351, 12 Pa. Co. Ct. 625 (1892); *Allentown v. Gross*, 122 Pa. 319 (1890).

But such a fee imposed upon merchants, created by adopting the classification made by the appraiser of mercantile taxes, is void for want of uniformity where the classification adopted exempts persons whose annual sales do not reach a certain amount. *Williamsport v. Stearns*, *supra*.

And a requirement of a license fee from peddlers, classifying them as foot peddlers, peddlers with

one-horse cart or wagon, and peddlers with two-horse cart or wagon, charging a different rate for each, is a police requirement and a valid exercise of a power to regulate, and not in conflict with a constitutional requirement of uniformity of taxation upon all of a class. *Kneeland v. Pittsburgh* (Pa.) 10 Cent. Rep. 421 (1887).

So, many of the cases have laid down the rule, without either denying or affirming the application of the constitutional provision, that license fees are equal and uniform so long as the tax imposed is the same upon all the members of a particular class.

Thus, the constitutional requirement as to uniformity of taxation does not prevent a municipality from discriminating in fixing rates for licenses for the transaction of different classes of business, and imposing a higher rate upon one class than upon another. *Ex parte Hurl*, 49 Cal. 557 (1875).

A license tax upon different industries, varying in amount upon each, but being the same upon the subjects of the same class, is not unconstitutional for want of uniformity. *Hadtner v. Williamsport*, 15 W. N. C. 138 (1893).

And an ordinance imposing a license tax of a fixed sum upon each of various occupations named does not violate the constitutional rules requiring uniformity because it does not graduate the amount required to be paid by persons pursuing the vocation according to the amount of business done. *Templeton v. Tekamah*, 22 Neb. 542 (1891).

So, the rule of uniformity prescribed by Ill. Const. art. 981, authorizing the general assembly to tax liquor dealers, etc., by general law, uniform as to the class upon which it operates, permits it to classify the different kinds of liquor dealers included in the general description, and impose differential taxes upon such classes so long as the tax imposed is the same upon all the members of the particular class. *Timm v. Harrison*, 109 Ill. 598 (1884).

And Ill. act July 1, 1883, prohibiting cities, towns, and villages from granting licenses for keeping dram shops except upon payment of a sum not less than \$500 per annum, or not less than \$150 per annum, when the license is for the sale of malt liquors only, does not conflict with the principle of uniformity prescribed by the Illinois Constitution, the fee being the same for all members of the particular class. *Timm v. Harrison*, 109 Ill. 598 (1884).

Nor is a law fixing the fee for a license of a liquor dealer at \$50 per quarter, and for one who sells at a way-side inn or station at \$10 per quarter, and exempting physicians and apothecaries, unconstitutional and void for want of uniformity, as there is uniformity as to each class. *Territory v. Connell* (Ariz.) 16 Pac. Rep. 200 (1888).

So, a license tax imposed upon express companies, of various amounts in different cities in proportion to the number of inhabitants in each, is not unconstitutional as not of uniform operation

and therefore does not deprive any person of his property without due process of law, or deny to any person the equal protection of the law in violation to the 14th amendment of the Constitution of the United States.

Home Ins. Co. v. New York, 184 U. S. 594, 88 L. ed. 1025; *Giozza v. Tiernan*, 148 U. S. 657, 37 L. ed. 599; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 928; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 138 Ind. 518, 18 L. R. A. 789; *Singer Mfg. Co. v. Wright*, 88 Fed. Rep. 121; *State v. Hathaway*, 115 Mo. 36; *Oraig v. Board of Medical Examiners*, 12 Mont. 208.

The classification made of laundries other than steam laundries is valid.

Cooley, Taxn. 171, 582; *Gatlin v. Tarboro*, 78 N. C. 119.

throughout the state, as it operates uniformly as to all persons standing in the situation which is held to be the test of such taxation. *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731 (1894).

And La. act 1886, No. 101, providing for a license fee of \$600 to be paid to both the city and the state by all banks the capital of which is less than \$500,000, is not unconstitutional for want of equality and uniformity, as the fee required is equal and uniform as to all banks constituting that class. *State v. Traders' Bank*, 41 La. Ann. 329 (1899).

Nor is a license tax imposed by a municipality upon merchants, the amount of which is graduated according to the amount of their monthly sales, unequal and therefore unconstitutional, as it applies uniformly to all persons in the same category. *Sacramento City & County v. Crocker*, 16 Cal. 119 (1880).

And an ordinance charging a license fee upon vehicles graded in amount from \$3 to \$25, with reference to the character of the particular vehicle and the use to which it is put and the number of horses used therewith, enacted under a power to license vehicles and charge not more than \$30 nor less than \$2, is not void for want of uniformity, as it acts uniformly on all the subjects of a particular class. *Smith v. Louisville (Ky.)* 6 S. W. Rep. 911 (1889).

So, the same result has been reached in other cases by a general holding that the rule of equality and uniformity was not violated without stating the grounds.

This was done with reference to a law requiring a license fee of \$35 from proprietors of bar-rooms, etc., on land, and of only \$50 from proprietors of bars kept on steamboats, in *State v. Rolle*, 30 La. Ann. 991, 31 Am. Rep. 224 (1878).

And with reference to a license tax of \$250 for pursuing the occupation of junk dealers, when the license tax imposed upon ordinary dealers was only \$100, in *New Orleans v. Kaufman*, 29 La. Ann. 288, 29 Am. Rep. 628 (1877).

And with reference to an occupation tax of \$250 upon persons dealing in stocks and bills of exchange in towns or cities exceeding 5,000 inhabitants and of \$50 in towns and cities of less population, in *Texas Bkg. & Ins. Co. v. State*, 43 Tex. 636 (1875).

And with reference to a license tax imposed upon keepers of private markets when no such tax was imposed upon persons selling meats, etc., in the public markets, in *New Orleans v. Dubarry*, 33 La. Ann. 481, 30 Am. Rep. 273 (1881).

And the same rule has been applied when the exaction was designed for the purpose of revenue as well as for regulation.

Thus, in *Wiley v. Owens*, 39 Ind. 429 (1872), it was held that a fee charged by a city for a license designed for the purpose of revenue as well as regu-

The action of the legislature in the classifying of laundries for the purpose of imposing a license tax, as steam laundries and laundries other than steam laundries, is justified, if justification were needed, by their different nature, character, means, and methods of doing business.

Pacific Exp. Co. v. Seibert, 142 U. S. 839-853, 35 L. ed. 1035-1039, 3 Inters. Com. Rep. 810; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270; *Warren v. Geer*, 117 Pa. 207; *Cooley, Taxn.* p. 223.

Those affected by the proviso are not necessarily Chinese; it applies to all alike who carry on the class of laundries mentioned therein.

Ex parte Thornton, 12 Fed. Rep. 538; *Soon Hing v. Crowley*, 118 U. S. 708, 28 L. ed. 1145.

lation is not invalid within the constitutional requirement of uniformity and equality of taxation, because it is larger than the fee charged for a similar license in other cities.

And in *Hadtner v. Williamsport*, 15 W. N. C. 188 (1883), it was held that a license tax which is greater upon some employments than upon others, imposed under a power to tax as well as to regulate, cannot be judicially declared invalid because of inequality.

In *Denver City R. Co. v. Denver*, 2 Colo. App. 84 (1892), however, it was held that a license tax of an amount greater than the amount necessary to defray the expense of police supervision imposed by a city without valuation upon property subjected to general taxation and used in the business licensed, under a statute authorizing it to license, regulate, and tax any lawful occupation, violates Colo. Const. art. 10, § 8, requiring taxes to be uniform and to be levied and collected under general law prescribing a just valuation.

And an insurance company required to pay a license tax of \$1,000 upon an agency maintained in New Orleans cannot be required to pay a second tax because it has established a second office therein auxiliary to the first, for the accommodation of persons residing at a distance from the main office, without contravening the constitutional requirement of uniformity of taxation. *Merchants' Mut. Ins. Co. v. Blandin*, 24 La. Ann. 112 (1872).

And a city ordinance, fixing the amount of a license tax upon insurance companies upon the basis of the amount of premiums received by them, contravenes the requirement of La. Const. art. 112, of uniform taxation, and cannot be enforced. *New Orleans v. Home Mut. Ins. Co.* 23 La. Ann. 449 (1871).

And a city having power to exact a license fee from tugs and barges, which makes a reduction of 40 per cent on vessels owned by residents thereof, must, under Mo. Const. art. 10, § 8, requiring that the tax shall be uniform upon the same class of subjects, make a similar reduction as to all boats taxed. *St. Louis v. Consolidated Coal Co.* 112 Mo. 83 (1892).

The contrary rule, that the constitutional provision is applicable, however, was adopted by the earlier Louisiana cases.

Thus, license taxes imposed by municipalities on persons pursuing the same calling or profession must be equal under the constitutional provision requiring uniformity of taxation. *New Orleans v. Home Mut. Ins. Co. supra*.

And a license imposed by a parish upon retail liquor dealers, the amount of which is regulated by the amount of business done, one sum being charged when the business is more than a specified amount and another when it is less, conflicts with that provision. *East Feliciana v. Gurth*, 26 La. Ann. 140 (1874).

So, a statutory provision authorizing the levying

To be obnoxious to the objection that it is class legislation there must be a discrimination between persons of the same class.

State v. Hathaway, and Pacific Exp. Co. v. Seibert, supra; *Cooley, Const. Lim. 385*; *Doyle v. Continental Ins. Co. 94 U. S. 585, 24 L. ed. 148*; *Black, Const. Law, p. 60*; *Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55*.
Messrs. Alex C. Botkin and J. M. McDonald, for respondent:

The court may declare a portion of an act or a proviso in a section of an act of the legislature to be in violation of the Constitution.

Cooley, Const. Lim. pp. 9, 214; *State v. Sinks, 43 Ohio St. 845*; *Warren v. Charlestown, 2 Gray, 84*.

Courts look to the effect of a law, as well as

to its ingenious wording, in the effort to have it appear constitutional.

District Court Cases, 84 Ohio St. 440; *State v. Hopp, 38 Ohio St. 19*.

The Constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void.

Cohens v. Virginia, 19 U. S. 6 Wheat. 264, 5 L. ed. 257; *Gibbons v. Ogden, 22 U. S. 9 Wheat. 210, 6 L. ed. 78*; *Barbier v. Connolly, 118 U. S. 27, 28 L. ed. 928*; *Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676*; *Ex parte Turner, Chase Dec. 137*.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

Henderson v. Wickham, 92 U. S. 268, 23 L. ed.

and collecting of a specific tax on drays, wagons, carriages, etc., in proportion to the number of animals used in drawing any particular vehicle, is unconstitutional for want of uniformity, whether the imposition is regarded as a tax or a license, as licenses are required to be uniform upon the same professions or callings. *State v. Endom, 28 La. Ann. 663 (1871)*.

And a license tax varying in amount according to the number and character of vehicles and the number of horses used to draw them, and not upon the business or vocation or upon the value of the property, if it be intended as a property tax, conflicts with the constitutional provision. *Cullinan v. New Orleans, 28 La. Ann. 102 (1876)*.

In *State v. Liverpool, L. & G. Ins. Co. 40 La. Ann. 468 (1888)*, however, it was held that La. Const. 1879, art. 206, requiring license taxes to be graduated, exempts them from the constitutional requirement of equality and uniformity.

As to the Louisiana rule subsequent to the taking effect of the Constitution of 1879, see later Louisiana cases *supra*, this section, and *infra*, III.

d. Direct restrictions as to amount of levy.

Direct restrictions as to the amount of taxes which can be levied do not apply to licenses unless they are imposed for the purpose of revenue, but a constitutional restriction as to the amount of the license fee is of course imperative.

Thus, a license tax is not a property tax, and is not therefore unconstitutional, when it, together with the ad valorem tax permitted by the Constitution, exceeds the constitutional limitation on the amount of tax that can be levied. *Morehouse v. Brigham, 41 La. Ann. 666 (1890)*.

But a municipal ordinance exacting fees for keeping a butcher's stand or selling articles within the corporate limits but without the market place, imposes a tax for revenue, and is not a contribution legally authorized in the exercise of the police power, under La. Const. art. 248, with reference to the regulation of the slaughtering of cattle and other livestock, and is therefore invalid if in excess of the limitation. *Mestayer v. Corrige, 38 La. Ann. 707 (1886)*.

And a municipal corporation cannot exceed the limit prescribed by La. Const. art. 206, and impose a license fee for the sale of alcoholic and spirituous liquors greater than that required by the general assembly on the ground that it is a police regulation, within La. Const. art. 170, authorizing the general assembly to regulate their sale and use. *State v. Chase, 38 La. Ann. 287 (1881)*.

So, the requirement by a municipality of a license fee of \$25 per month for a traveling agent is unauthorized and invalid, under La. Const. art. 206, prohibiting any political corporation from imposing a greater license tax than is imposed by the 30 L. R. A.

general assembly for state purposes, when no license is imposed upon that calling by the legislature. *New Orleans v. Graves, 34 La. Ann. 840 (1882)*.

But a license tax levied by a city, which does not exceed that levied upon the same occupations in the city by the state in accordance with the provision of the Louisiana Constitution, is not rendered invalid by the fact that the state has invalidated her license tax by illegal discrimination between persons pursuing the same business in different subdivisions of the state. *New Orleans v. Ponchartrain R. Co. 41 La. Ann. 619 (1890)*.

And police juries are not restricted in their action, under a statute giving them exclusive power to make such laws and regulations for the sale or prohibiting the sale of intoxicating liquors as they may deem advisable, and requiring them to adopt such regulations as may be necessary to carry out the purposes of the law in regard to licenses exacted by them for that purpose, to the amount exacted by the state for the same. *Jones v. Grady, 25 La. Ann. 586 (1873)*.

So, a license fee imposed upon owners of hacks, of \$3 annually for each hack, and of different sums ranging from \$2.50 to \$12 upon owners of other vehicles, which is intended as a license tax under the police power, and the leading and primary purpose of which is for regulation, is not invalid as being in excess of the Texas constitutional limitation of one half the occupation tax imposed by the state upon the same class of subjects, though as a secondary purpose it provides a fund for improving the streets. *Ex parte Gregory, 20 Tex. App. 210, 54 Am. Rep. 518 (1886)*.

But a municipal exaction of \$30 for the privilege of running a hack, and of \$5 for running a buggy within the city for hire, cannot be regarded as a license proper to meet the necessary expense of numbering, registering, and otherwise providing for their government, but is an occupation tax and invalid as such under the provision of the Texas Constitution, where such amount is in excess of half the rate levied by the state. *Ex parte Gregory, 1 Tex. App. 758 (1877)*.

And an annual license tax of \$25 on every vehicle used for transporting passengers or baggage, drawn by two animals, is invalid under that provision, where the general law levies \$1 annually for each stall and \$1 for each hack or other vehicle in every livery or feed stable, but imposes no specific tax on public vehicles other than those in livery and feed stables. *Ex parte Slaren, 3 Tex. App. 663 (1878)*, following *Ex parte Gregory, supra*.

e. Miscellaneous provisions.

An annual license tax imposed upon artists, photographers, etc., of \$35 in cities of over 3,000 inhabitants and \$30 in cities of between 500 and 3,000 inhabitants, and \$5 in towns of less than 500

547; *Chay Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

Where a state law is attacked, the question is whether, if followed, it would avoid the protection guaranteed by the Constitution, laws, and treaties of the United States.

Kennard v. Louisiana, 92 U. S. 490, 28 L. ed. 478; *Yick Wo v. Hopkins*, 118 U. S. 856, 80 L. ed. 220.

Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction.

Brown v. Piper, 91 U. S. 87, 23 L. ed. 200; *Ah Kow v. Nunan*, 5 Sawy. 552; *Sparrow v. Strong*, 70 U. S. 3 Wall. 97, 18 L. ed. 49.

A statute that in operation and effect im-

poses upon subjects of the emperor of China lawfully residing in the United States burdens or exactions not common to all persons in the same calling and condition is in violation of the Constitution, laws, and treaties of the United States, and void.

Yick Wo v. Hopkins, *supra*; *Wo Lee v. Hopkins*, 26 Fed. Rep. 471; *Barbier v. Connolly*, 118 U. S. 27, 28 L. ed. 923; Chinese Treaty, art. 4, March 17, 1894.

The proviso is in violation of § 27, art. 3, of the Constitution of Montana in that it deprives the persons affected of their property without due process of law.

Yick Wo v. Hopkins, 118 U. S. 856, 80 L. ed. 220; *Re Louis*, 6 Colo. 516, 54 Am. Rep. 558.

inhabitants, does not conflict with a constitutional prohibition against class legislation. *State v. Schlier*, 3 Heisk. 281, 3 Heisk. 455 (1871).

And a license tax of \$2.50 per day, required by a municipality of hawkers and peddlers of merchandise kept by merchants or manufacturers in the city, is not subject to objection as class legislation. *Cherokee v. Fox*, 34 Kan. 16 (1885).

And the ordinance of Mobile passed March 2, 1893, requiring every express company doing business in that city and whose business extends beyond the limits of the state to pay an annual license of \$500, if within the limits of the state \$100, and if within the limits of the city \$50, is a tax for the license to do business, and does not impose an import or export duty, and is not a regulation of commerce, foreign or interstate, and is not in conflict with either the Federal or state Constitution. *Osborne v. Mobile*, 44 Ala. 493 (1870); *Southern Exp. Co. v. Mobile*, 49 Ala. 404 (1873).

So, a municipal requirement of a license fee of not more than \$300 from any person selling spirituous liquors by retail within 1 mile of the town is a police regulation, and not unconstitutional as taking private property for public use, though it would be so if it were regarded as a tax for municipal purposes upon property outside of the municipal limits. *Falmouth v. Watson*, 5 Bush, 600 (1899).

But Ala. act Jan. 22, 1879, as amended December 8, 1890, providing that no person shall employ or contract with or in any other way induce laborers to leave designated counties without first paying such counties a license tax of \$250, is prohibitory and unconstitutional as impairing the laborers' right of free emigration. *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347 (1882).

And a license tax levied upon goods brought from another state cannot be upheld as an imposition for inspection where the amount is more than is required for inspection and the proceeds are applied to other uses. *American Fertilizing Co. v. North Carolina Board of Agriculture*, 43 Fed. Rep. 606, 11 L. R. A. 179, 3 Intern. Com. Rep. 532 (1890).

III. Graduation of license fees.

La. Const. art. 217, provides that the general assembly shall graduate the amount of license taxes.

This provision, not indicating any standard of graduation, leaves it to the legislature to determine the method to be adopted in effecting it. *State v. Traders' Bank*, 41 La. Ann. 329 (1889); *New Orleans v. Ponchartrain R. Co.* Id. 519 (1889); *State v. Liverpool, L. & G. Ins. Co.* 40 La. Ann. 463 (1888).

And the judiciary has no authority to interfere in the absence of any rule to guide its investigation and scrutiny. *State v. Traders' Bank*, and *New Orleans v. Ponchartrain R. Co.* *supra*.

Thus, the division by the general assembly of companies and persons pursuing the business of

insurance into different classes according to the amount of premiums collected, and the levying upon each class a different license tax, greater upon those receiving a larger amount than upon those receiving a less, are a sufficient graduation. *State v. Liverpool, L. & G. Ins. Co.* *supra*.

And that a license law requires smaller insurance companies to pay a larger tax in proportion to their premiums than larger companies does not render it unconstitutional under that provision, there being no requirement that the tax shall be in proportion to the business done, though it may impugn its justice. *Ibid*.

So, a license tax of \$1,000 imposed upon places for concert, dancing, and variety performances, in cities having a population of more than 25,000, and of \$500 in cities and towns having less than that number, is properly graduated and equal and uniform as to each class, within the requirement of the Louisiana Constitution. *State v. Schoonhausen*, 37 La. Ann. 43 (1885); *State v. O'Hara*, 38 La. Ann. 94 (1884).

And a license tax of a specified sum on peddlers of a particular kind of goods is not subject to the objection that it is not sufficiently graduated. *McClellan v. Pettigrew*, 44 La. Ann. 368 (1892).

Nor is a license tax upon a business as a whole, which is duly graduated, rendered unconstitutional for want of graduation by a requirement of a license fee of not less than \$50 for an additional business, as the addition of the \$50 when the additional business is done does not destroy the original graduation. *New Orleans v. Clark*, 42 La. Ann. 9 (1890).

But the constitutional provision with reference to graduation does not require license taxes to be equal and uniform as to all corporations transacting the same kind of business, and does not prevent the imposition of a different tax upon domestic corporations from that imposed on foreign ones. *New Orleans v. Ponchartrain R. Co.* 41 La. Ann. 519 (1889).

The power to graduate license fees, however, is not dependent upon constitutional authority, but has been upheld universally within proper limits in other states in the absence of any constitutional requirement or authority.

Thus, a municipal council has the right to grade and class and fix the rate of licenses granted by it, but in doing so it must keep within the limits fixed by charter or other statutory provisions. *Kniper v. Louisville*, 7 Bush, 599 (1870).

And a city authorized to license insurance companies may properly vary the amount charged therefor to correspond with the incomes of the different companies licensed. *Burlington v. Putnam Ins. Co.* 81 Iowa, 102 (1870).

Nor can a citizen doing a general business at the place of his domicile escape payment of a license tax imposed upon merchants by the municipal

De Witt, J., delivered the opinion of the court:

It appears that the legislative assembly divided laundry licenses into three classes, as follows: Steam laundry, \$15; one male laundryman, \$10; male laundryman employing one or more other persons, \$25. The respondent contended in the lower court—a contention which prevailed—that this legislation is unequal and not uniform, and therefore void, under the Constitution. The legislature is not required to tax all property and occupations equally or uniformly, unless so commanded by the Constitution. *Cooley*, Taxn. p. 870, chap. 6, quoting *Butler's Appeal*, 73 Pa. 448; *Rome v. McWilliams*, 52 Ga. 251; *Decker v. McGowan*, 59 Ga. 805. See also *Singer Mfg. Co. v.*

Wright, 88 Fed. Rep. 121. Constitutions of a state are distinguished from the Constitution of the United States, in this: "The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess. In this respect it differs from the Constitutions of the several states, which are not grants of powers to the states, but which apportion and impose restrictions upon the powers which the states inherently possess." *Cooley*, Const. Lim. p. 10. Therefore a state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the pro-

government because the amount of his tax is arrived at by reference to his profits. *Ficklen v. Shelby County Tax. Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Intern. Com. Rep. 79 (1892).

And a charter provision authorizing the city council to license, tax, and regulate all such business and employments as the public good may require, authorizes the enactment of an ordinance requiring a license for carrying on the business of selling goods, wares, and merchandises at a fixed place, graduating the amount or the fee according to the amount of sales or business done. *Ex parte Mount*, 66 Cal. 448 (1885).

And a percentage on the gross receipts of a foreign insurance company doing business in a municipality may be properly taken as an equitable mode of ascertaining the amount of a license fee charged for the privilege of carrying on such business. *Walker v. Springfield*, 94 Ill. 364 (1890).

So, the classification of townships and cities by population for the purpose of fixing a minimum license fee for the sale of intoxicating liquors therein is valid. *State v. Gloucester County Circuit Ct. Judge*, 50 N. J. L. 585, 1 L. R. A. 36 (1888).

And a police regulation providing for a license may graduate the amount thereof by the number of votes cast for the governor at the last general election next preceding the date of the application therefor. *State v. Doherty*, 2 Idaho, 1105 (1892).

And a tax of \$50 on licenses for retailing spirituous liquors for the use of the school commissioners is a police regulation, which may be graduated by the populousness of the community in which the privilege is to be exercised and by the profitability of the employment. *Ex parte Marshall*, 64 Ala. 266 (1879).

But the question of population, for the purpose of ascertaining the amount to be paid for a license to sell liquors, can only be determined from the last preceding census by the state or general government, under Wis. Laws 1885, chap. 296, § 1, providing therefor. *State v. Keaough*, 68 Wis. 135 (1887).

So, a license tax upon merchants is not a property tax, and therefore unconstitutional, because the amount thereof is graduated by the average amount of their stock. *Newton v. Atchison*, 81 Kan. 151, 47 Am. Rep. 436 (1883).

And the city council may provide that the license to be paid by laundrymen shall be in proportion to the number of persons employed by them under the charter of the city of Oakland, providing that licenses shall be discriminating and proportionate to the amount of the business done. *Ex parte Sisto Li Protti*, 68 Cal. 636 (1883).

And a municipal requirement under a power to establish and regulate market houses and to license and regulate fresh-meat stores, establishing market houses and requiring persons selling therein to pay rent but no license, and that persons keeping meat

stores shall pay a license of \$100, and forbidding them to sell game, fish, vegetables, and other articles of merchandises, and requiring a license of \$50 from keepers of game or fish shops, is a mere classification of dealers with a license differing in amount, and properly graduated. *Vosse v. Memphis*, 9 Lea, 294 (1884).

So, a municipality has full power, under a charter authorizing it to license keepers of livery stables, to prescribe a rule that such license should be paid in proportion to the number of carriages kept for hire. *Howland v. Chicago*, 108 Ill. 500 (1884).

And Ky. act May 8, 1886, providing for a license tax in the city of Louisville for each vehicle running therein, of not more than \$30 nor less than \$2, authorizes the city council to fix the amount of the fee by ordinance within the specified limits at different amounts with reference to, and graded upon the character of, the particular vehicle, and the use to which it is put, and the number of horses used therewith. *Smith v. Louisville (Ky.)* 6 S. W. Rep. 911 (1898).

So, the amount of a fee charged by a municipal corporation for a building permit, may be graduated according to the estimated cost of the building, as the examination of the plans and specifications necessary to its issuance would require more labor and expense in the case of a large building than of a smaller one. *St. Paul v. Dow*, 87 Minn. 20 (1887).

And a license tax imposed upon hotels is not unreasonable or oppressive because the amount paid is graduated by the number of rooms which may be devoted to the accommodation of the public. *St. Louis v. Bircher*, 7 Mo. App. 169 (1879).

So, a license tax on vehicles, graduated at \$5 on those drawn by one horse, and \$8 on those drawn by two horses, and \$12 on those drawn by three or more, is reasonable and valid. *Gibson v. Coraopolis*, 22 Pittsb. L. J. N. S. 64, 8 Lane. L. Rev. 359 (1891).

And an annual license tax imposed upon artists, photographers, etc., of \$35 in cities of over 3,000 inhabitants, and \$20 in cities of between 500 and 3,000 inhabitants, is not unconstitutional as class legislation. *State v. Schlier*, 8 Heisk. 231, 8 Heisk. 455 (1871).

The right of a municipality, however, to require an annual license fee of more than \$50 from the larger manufacturers depends, under a charter provision authorizing the requirement of a license of not less than \$50 nor more than \$500 and the grading and fixing of rates within the designated limits, upon the existence of the fact that all smaller ones within the city are charged at least \$50; and an ordinance requiring brewers to pay 1-10th of 1 per cent on the amount of liquor manufactured, for a license, providing that each shall be required to pay at least \$15 per annum, is unauthorized and invalid. *Kniper v. Louisville*, 7 Bush, 539 (1870).

See also *supra*, II. c., *Provisions requiring*

visions of their sovereign Constitution. We therefore inquire whether our Constitution restrains the legislature from enacting such a law as §§ 4079, 4080, Pol. Code.

The respondent contends that the restraint is found in the following provisions of the Constitution:

"Sec. 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon per-

sons and upon corporations doing business in this state." Art. 12.

"Sec. 11. Taxes shall be levied and collected by general laws and for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Art. 12.

The respondent argues that under these provisions the imposition of a license fee of \$25 upon him, as a laundryman with a helper, while the laundryman without a helper and the steam laundryman pay a less license, is unconstitutional, in that it is not uniform and equal. We shall not decide whether this law is or is not a classification of the laundry business for license purposes, which the legislature may

equality and uniformly, a large number of the decisions in which uphold provisions for a graduated fee.

IV. Limitations peculiar to municipal corporations.

Power to license, conferred upon cities, is not an unlimited or arbitrary power, but one to be exercised in conformity with the general law. *Louisville v. Kean*, 18 B. Mon. 9 (1856).

But it confers authority to impose an additional tax for the grant of a privilege besides that which is required to be paid to the state. *Ibid*.

And the municipality is not limited with reference to the amount which it may require to be paid therefor to that levied by the state on citizens generally. *Perdue v. Ellis*, 18 Ga. 586 (1855); *Ex parte Burnett*, 30 Ala. 461 (1857); *Deits v. Central*, 1 Colo. 223 (1871).

The limit is to be found in statutory and charter provisions, and in the general principle requiring municipal ordinances to be reasonable and in the nature and purposes of the power conferred.

a. Statutory and charter restrictions.

Statutory and charter restrictions upon the amount of license fees are, of course, applicable to municipal licenses only, and the question of their existence is usually one of statutory construction.

Thus, a municipal charter conferring power upon city authorities to levy taxes upon all subjects within its jurisdiction upon which a tax may be levied by the state, providing that the tax shall be apportioned in the same manner as the state tax, requires the city to follow the apportionment of occupation taxes assessed by the state in levying a license tax on such occupation. *Marshall v. Sneider*, 25 Tex. 480, 78 Am. Dec. 534 (1880).

And the Illinois insurance law, § 30 (Rev. Stat. 1874, chap. 78), providing for taxation of foreign insurance companies, which shall be received in lieu of all town and municipal licenses, except that a license fee not exceeding 2 per cent on the gross receipts of the agents may be imposed in towns having an organized fire department, operates as a limitation upon the power of a city to impose more than 2 per cent on such receipts. *Walker v. Springfield*, 94 Ill. 364 (1880).

And the proviso of that act, permitting cities having an organized fire department to levy a license fee not exceeding 2 per cent of the gross receipts of foreign insurance agents, requires affirmative action by the city in fixing the rate, which may be less but not more than 2 per cent, and must be computed upon the gross, and not the net, receipts. *Chicago v. James*, 114 Ill. 479 (1885).

But an ordinance requiring all foreign fire and life insurance companies engaged in effecting insurance in the city to pay to the city treasurer the sum of \$2 upon the hundred upon the amount of all premiums received during the half year, to be

set apart for the maintenance of the fire department, and requiring agents of such companies to render an account of the premiums received under penalty of \$200, is justified under a charter authorizing the city to license and regulate agents of such insurance companies, and is not rendered invalid by that act. *Ibid*.

So, Kan. act 1871, creating the insurance department, does not repeal or modify the act of 1870 authorizing cities of the first class to levy and collect a license tax on fire and life insurance companies or agencies, so as to exempt a foreign insurance corporation doing business in such a city, which pays to the superintendent of insurance under the provision of that law an amount greater than that paid by other insurance companies, from a license fee of \$50 upon fire companies and \$100 upon life companies, imposed by a municipal ordinance therein. *Leavenworth v. Booth*, 15 Kan. 627 (1875).

And La. act 1879, No. 27, providing that no parish or municipal corporation shall assess any license tax of over \$500 upon any insurance company transacting business therein, and containing the usual repealing clause, is not retroactive, and does not repeal an ordinance of a municipality previously enacted under due authority, which had gone into effect, imposing a license tax of \$1,000 on certain designated classes of companies. *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 781 (1879).

So, an ordinance enacted a few days after the enactment of Ill. act June 15, 1888, fixing the minimum license fee for keeping a dram shop at \$500, but before it took effect, fixing fees for licenses issued thereunder previous to the taking effect of that law at \$103, and providing that unless otherwise revoked they should extend to a time about nine months after such law took effect, is not a fraud upon the statute or invasion thereof, and licenses issued thereunder at a fee of \$103 are valid. *Swarth v. People*, 109 Ill. 621 (1884).

And a liquor dealer in a city containing between 23,000 and 24,000 inhabitants is subject to a license fee of \$500, under a statute fixing that rate for cities of the first, second, and third classes, and \$300 for all other cities, where such city was one of the third class under an act dividing cities into three classes only, though by a subsequent act, subsequently held to be unconstitutional, cities were divided into seven classes, and those containing less than 75,000 inhabitants were put into the fourth, fifth, sixth, and seventh classes. *Com. v. Smoulter*, 126 Pa. 137 (1889).

But a brewer is a manufacturer of beer and subject to the license tax of \$10 imposed upon manufacturers by La. act 4, Extra Sess. 1881, § 3, when his receipts are between \$30,000 and \$40,000, and not to that of \$75 imposed upon persons engaged in distilling and rectifying alcoholic or malt liquors, imposed by § 9 thereof. *State v. Weckerling*, 38 La. Ann. 36 (1889).

make, even if it were held that the uniformity clause in the Constitution applied to such a license. Many cases might be cited upon this question. We shall decide this appeal without reaching a consideration of that point. A license fee is a tax sometimes, and for some purposes. Sometimes, and for some purposes, it is not a tax. *Cooley*, Taxn. pp. 572, 573, 592, 596, 600, 601; *People v. Martin*, 60 Cal. 153; *Santa Barbara v. Stearns*, 51 Cal. 499; *Cooley*, Const. Lim. p. 245; *Desty*, Taxn. p. 305. The particular distinctions as to when a license fee is a tax and when it is not, we shall not discuss, further than to give the reasons for our opinion that this license fee under consideration is not a tax, as falling within the equality and uniformity provisions of the Constitution.

And a retail dealer upon whom a license fee of \$5 was imposed under the provisions of the state license law of 1881, § 6, but who combines with his business the sale of liquors in less quantities than one pint, can only be required to pay a total license fee of \$50 under the proviso thereof that no license shall issue to sell liquors in such quantities at a fee less than \$50, as that proviso excepts him from the general rule prescribed by that act in such case requiring payment of four times the ordinary rate, that being less than \$50. *Jefferson Police Jury v. Marrero*, 38 La. Ann. 896 (1886).

And a retail grocer who sells liquor in quantities less than five gallons in addition to his other business is subject to a license fee of not less than \$50 under the proviso of the license act that the license for such additional business shall be as therein-after provided for in § 11, providing that no license shall issue for making such sales for less than \$50, and the license will not be regulated by the provision of § 11 thereof for licensing hotels, bar rooms, and persons engaged in the sale of soda water, etc., such provision not being applicable to the business of a retail grocer. *New Orleans v. Clark*, 42 La. Ann. 9 (1890).

But statutory and charter restrictions upon the power to tax, like constitutional ones, do not apply to license fees required for the purpose of regulation.

Thus, the right to pass an ordinance fixing the price of a license to retail liquor at \$500 per year is not limited, when otherwise duly authorized, by a charter provision allowing the city authorities to levy a tax not exceeding 50 per cent of the state tax, the license not being a tax. *Perdue v. Ellis*, 18 Ga. 586 (1855).

And U. S. Rev. Stat. §§ 180, 181, and the act of Congress of 1873, § 3, limiting the rate of taxation in the District of Columbia to \$1.50 per hundred, expressly confines the limitation to taxes upon real and personal property, and does not apply to taxes upon employments or occupations to be raised by licenses which may be exacted under police powers confided to municipalities. *Cooper v. District of Columbia*, 4 McArthur. 250 (1890).

So, a penalty of 2 per cent per month, imposed by city authorities for delinquency in the payment of license fees, is not prohibited by La. act 43 of 1871, § 9, amending the city charter of 1870, limiting penalties on delinquent taxes to 10 per cent per annum, as that provision applies to taxes only and not to licenses. *New Orleans v. Ponchartrain R. Co.* 41 La. Ann. 519 (1890).

But an ordinance requiring agents of foreign insurance companies to pay to the city 2 per cent of the premiums received, not granting permission to do business, but assuming that the authority already exists, does not provide for a license within the meaning of a charter provision limiting the amount
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The Constitution provides that the legislature shall levy a uniform rate of assessment and taxation, and secure a just valuation for taxation of all property (art. 12, § 1), and that taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax (Id.). In a separate sentence in said section 1 it is provided that the legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state. But neither in this sentence of section 1, nor elsewhere, is it stated that licenses shall be uniform. If the Constitution does not require that licenses shall be uniform, they need not be. Judge Cooley says, in his work on Taxation: "It has been seen that the sovereignty may, in the discretion

of license fees. *Hartford F. Ins. Co. v. Peoria*, 156 Ill. 430 (1895).

In *Hartford F. Ins. Co. v. Peoria*, *supra*, the court distinguished *Walker v. Springfield*, 94 Ill. 364 (1880), in which a sum charged an insurance company was said not to be a tax but a fee paid for a license, saying that there is not authority in that case or any other to which its attention had been called for holding that such a requirement is a license.

Such restrictions with reference to licenses, however, are imperative, and must be strictly complied with.

Thus, a municipal council must, in the exercise of a power to grade, fix, and class licenses, keep within the limits fixed by charter or other statutory provisions. *Kniper v. Louisville*, 7 Bush, 599 (1870).

And a city having authority by its charter to demand license fees from certain classes of business not to exceed \$500 per annum cannot require the payment of a percentage on all business done which might amount to more than \$500, and no recovery can be had under such an ordinance even for a less sum than such limit. *Hartford F. Ins. Co. v. Peoria*, 156 Ill. 430 (1895).

And an ordinance requiring a license fee of \$5 for every three days for selling goods by sample, enacted under a charter provision authorizing a license fee of not less than \$5 or more than \$500, is invalid as the licensee might sell for so long a period for the license as to make the amount greater than the maximum amount fixed by the charter. *Darling v. St. Paul*, 19 Minn. 389 (1872).

So, the Arkansas revenue act of March 13, 1833, §§ 4, 6 directing an annual county tax of \$400, upon liquor dealers supersedes the former provisions fixing the price of licenses and investing the county court with a discretion as to the amount, and an excess exacted by it may be recovered from the county. *Drew County v. Bennett*, 43 Ark. 364 (1884).

And a power conferred upon a municipality to increase the price of licenses does not authorize the increase of a penalty imposed for violation of the requirement of a license, where the amount of the penalty is fixed by statute. *Schroder v. Charleston*, 2 Treadway Const. 726 (1815).

And a municipal ordinance of a township in Canada, imposing a duty of £25 upon a tavern, is invalid when not referred to the electors at the meeting duly convened, as required by 16 Vict. chap. 184, § 4, whenever the fee imposed exceeds £10. *Re Barclay*, 12 U. C. Q. B. 86 (1855).

And a municipal ordinance requiring a license fee of \$50 for every passenger railroad car and \$25 for small one-horse cars bases the fee on the size of the cars and not upon the manner in which they are propelled, and a change by a railroad company of the motive power of smaller cars from one horse

of its legislature, levy a tax on every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the legislature that course will be wiser. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by Constitution. In another chapter it has been shown that constitutional provisions requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication,

forbid the taxation now under consideration." Page 570. These remarks of Judge Cooley are taken from the opening sentence of his chapter entitled "Taxation of Business and Privileges." See also chapter 6 of the same work, as to a general discussion of the impossibility of absolute uniformity.

In the case of *People v. Coleman*, 4 Cal. we find, on page 54, 60 Am. Dec. 581, that the counsel arguing in favor of the uniformity and equality of license fees makes the following remarks: "'How this is to be done,' says the learned counsel, 'is no part of our province to decide; nor are we to say whether it is possible to devise an occupation tax which would be equal and uniform, unless it be a tax levied equally and for the same amount upon all oc-

to two does not make it liable for more than the \$25 tax on such cars. *New York v. Twenty-Third Street R. Co.*, 62 Hun. 545 (1891).

But a charter provision requiring rates of license for the transaction of business to be proportionate to the amount of business done, and that the license shall be discriminating, only requires that after the selection of a business as a subject for license, the sum exacted from each person following that business shall be fixed by the amount of business done by each. *Ex parte Hurl*, 49 Cal. 557 (1875).

And an ordinance requiring the payment of \$5 per day for a license for auction houses is not rendered invalid by a statute providing that license taxes shall be at such rate per year as shall be just and reasonable. *Fretwell v. Troy*, 18 Kan. 271 (1877).

So, one who refuses to apply for or take out a license to sell intoxicating liquors, and continues to sell in violation of the law requiring it, cannot complain while thus continuing to sell that a fee of \$1 for the clerk in addition to the license fee is in excess of the amount allowed by statute. *Moore v. Indianapolis*, 120 Ind. 433 (1889).

And interest at the rate of 2 per cent per month may be added by a city to an unpaid license tax imposed by it under La. act 20 of 1882, § 63, providing that the city council may impose an annual license tax on trades, professions, and callings, and act 119 of 1882, authorizing them to enforce the collection of taxes due them. *New Orleans v. Ponchartrain R. Co.*, 41 La. Ann. 519 (1889); *New Orleans v. Firemen's Ins. Co.*, Id. 1142 (1889).

So, in *State v. Schonhausen*, 37 La. Ann. 42 (1885), in which an appeal was taken from a judgment for a license tax of \$1,000 for keeping a place for a concert, dancing, and variety performance, manifestly for delay, 10 per cent on the amount of the license was adjudged as damages for a frivolous appeal.

So, an application for a license is a proceeding within the purview of an ordinance providing that no action or proceeding pending at the time any ordinance shall be repealed shall be affected in any way by such repeal, so that the city authorities cannot hold an application in abeyance for the purpose of repealing the ordinance under which it was made and enacting another, thus exacting another higher license fee. *State v. Baker*, 33 Mo. App. 98 (1888).

b. Must not be discriminating.

The effect of constitutional provisions upon discriminating license fees, which is applicable alike to state and municipal licenses, is treated *supra*, II. a. *Provisions against discrimination*. But the principle of municipal law requiring municipal ordinances to be reasonable, operates to prevent improper discriminations in fixing the rates for municipal licenses.

Thus, authority conferred upon municipal au-

thorities to levy license taxes upon privileges, does not authorize them to create a privilege for the purpose of taxing it or to discriminate between persons exercising the same privilege by taxing one at a higher rate or in a different mode from another. *Nashville v. Althorp*, 5 Coldw. 554 (1868).

And a municipal ordinance passed under a general power exacting a license for selling goods, fixing a much larger rate of license for selling such as are not in the city or *in transitu* to it, than for such as are within it or *in transitu* to it, is unjust, unequal, partial, oppressive, and in restraint of trade, and therefore invalid. *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642 (1878.)

So, an agent of a mercantile firm from another state taking orders by sample within a city is liable to taxation therein, if at all, as a merchant only, and a municipal requirement of a license fee of \$300 per annum for the privilege of selling goods by sample in a city declaring it a separate avocation is invalid as discriminating against merchants selling by sample. *Nashville v. Althorp*, *supra*.

And a municipal ordinance providing that any person who shall sell or contract to sell in a designated city or county, or cause to be sold, or solicit the sale or purchase of, any goods, wares, or merchandise, or other property with designated exceptions which is still in original packages, without at the time having the goods at or in the said city or county, or a bill of lading or receipt of a common carrier showing that the goods therein named had been shipped and were *in transitu* to such city or county, shall pay a license in proportion to the amount of business done, is obnoxious to the objection that it is unjust and oppressive in that it discriminates between merchants of the same place against one who deals in goods outside the corporate limits and not actually *in transitu*, and obstructs commercial intercourse between the seaports and interior, and is in restraint of trade, exacting a heavy tribute from the owner of goods outside the corporate limits and not *in transitu* as a condition on which he will be allowed to offer them for sale therein. *Ex parte Frank*, *supra*.

And an ordinance imposing a prohibitive license fee on hawkers and peddlers, which practically exempts residents, is invalid for discrimination between residents and nonresidents. *Brooks v. Mangin*, 86 Mich. 576 (1891).

So, in *Columbia v. Beasley*, 1 Humph. 232, 34 Am. Dec. 646 (1839), it was said that municipal corporations may tax privileges in such proportion as they choose, but the inequality must not be such as to make the tax oppressive on a particular class.

And in *McGrath v. Newton*, 29 Kan. 384 (1883) an ordinance levying a license tax on a large number of different kinds of business at different rates, in some instances charging transients more than persons permanently located, was attacked upon the ground that it was in restraint of trade and dis-

cupations. All that we maintain is that an occupation tax which is not equal and uniform violates the Constitution."—In reply to which the court remarks: "Is, then, the clause under consideration so vague as to be wholly unsusceptible of a practical meaning, and the force of the provision to be defeated from a want of some indefinable equality and uniformity existing in the imagination of learned counsel, but so subtle in its character as to defy the ordinary use of language in its description? In construing this section, force and meaning must be given to every part of it. We cannot suppose the convention intended to enact, as a part of the fundamental law of this state, a provision so doubtful and ambiguous, and at the same time so completely calculated

to paralyze the energies and prostrate the resources of the state government. . . . The occupation of the humble artisan, with no capital but his labor, the reward of whose toil secures to him only a scanty subsistence, must be taxed equally with the [occupation of the] richest merchant, banker, or broker, or if not equally, at least the state has no right to release the miserable pittance so cruelly wrung from his hard earnings." In that case it was held that the uniformity clause of the Constitutions did not apply to license fees upon occupations. We do not concur in all that was said in deciding that case. We have omitted a portion of the remarks from our quotation, and added a parenthesis which the language seems to need. The California supreme court

criminated against certain kinds of business, and that it was oppressive and unreasonable, but was upheld upon the ground that at least some of the items were legal, and that, owing to a misjoinder of parties having no community of interest, the judgment below would have to be affirmed, though the conclusion was reached that some of the taxes were void.

And a license fee of \$50 per day, imposed on transient dealers under a police power, is invalid as discriminating between goods manufactured in the wholesale and manufacturing parts of the city and goods held for sale by dealers in the retail streets. *Glaser v. Cincinnati*, 81 Ohio L. J. 243 (1893).

But when the discrimination is between different classes, and consists of nothing more than a reasonable graduation of the license, the validity of the imposition is not affected.

Thus, a county ordinance is not invalid because it fixes a less rate of license for the business of selling liquors at a wayside tavern or watering place than for the same business carried on in a village, town, or city. *Amador County v. Kennedy*, 70 Cal. 453 (1893).

And an ordinance requiring a license for keeping a dramshop is not invalid because the price therefor is differential according to the street upon which the shop is located, all persons being left to apply for a license in whatever locality they choose. *East St. Louis v. Wehrung*, 46 Ill. 362 (1868).

And a city ordinance levying an annual license tax of \$30 payable quarterly, upon druggists having permits from the probate court to sell intoxicating liquors, and an annual license tax of \$5 upon druggists not having such permits, under statutes authorizing the levy of license taxes upon various kinds of business and occupations, is not illegal and void so far as it levies a greater tax upon druggists having such permit than upon those not having it. *Tulloss v. Sedan*, 81 Kan. 165 (1893).

Nor is a municipal ordinance requiring a license tax of \$2,500 and a hospital tax of \$50 of keepers of bar rooms or coffee houses who conduct concert saloons where theatrical plays are performed in the same room or building, unconstitutional and void as discriminating against their business by charging largely in excess of other business of the same character, because coffee houses are only required to pay \$75 and theatrical plays \$250. *Goldsmith v. New Orleans*, 31 La. Ann. 646 (1879).

And an ordinance requiring a license for exhibitions is not invalid because it requires the payment of a smaller fee for a license for a month than would be required for three weeks by the week. *Webber v. Chicago*, 50 Ill. App. 110 (1892), affirmed in 148 Ill. 313 (1894).

So, a license fee of \$2.50 per day required by a municipality of professional hawkers and peddlers for selling merchandise similar to that kept by

merchants or manufacturers in the city, is not objectionable as being partial and discriminating. *Cherokee v. Fox*, 34 Kan. 16 (1893).

And an ordinance imposing a license fee upon transient merchants is not to be regarded as discriminating against nonresident merchants merely because there may be no resident merchants who are compelled to pay the fee. *Ottumwa v. Zekind* (Iowa) 29 L. R. A. 734 (1895).

But ordinances fixing license fees with a view to protect the home merchants against a transient one cannot be passed under a power to license and regulate. *Ottumwa v. Zekind*, *supra* (dictum).

And a license tax imposed upon persons engaged in raising, grazing, herding, or pasturing sheep, of \$50 for every 1,000 sheep, required by a county ordinance, is not invalid as discriminating, special, unequal, or partial. *Ex parte Miranda*, 78 Cal. 365 (1887).

So, in *Los Angeles v. Southern P. R. Co.* 61 Cal. 59 (1882), a license tax of \$420, charged against a steam railroad company having a depot in the city, was upheld under attack upon the ground that its business extended beyond the city limits.

See also *supra*, III., *Graduation of license fees*.

c. Under a general power to regulate.

1. What may be included in the fee.

A few of the cases have adopted and acted upon the theory that the fee for a license, required for the purpose of regulation only, should be limited to a sum sufficient to meet the necessary expenses incident to its issue.

Thus, in *State v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518 (1890), it was said that a fee for a license may be exacted under a grant of power for regulation only, but it should not exceed the necessary or proper expense of issuing the license.

And in *Mobile v. Yuille*, 3 Ala. 137 (1841), the court doubted the validity of a provision for the forfeiture of bread of less weight than the ordinance required, and exacting from the baker as a price for his license a sum beyond what was necessary to compensate for issuing and registering it; but the case was decided on other grounds.

And in *State v. Herod*, 29 Iowa, 123 (1870), it was held that a charge of a license fee of \$5 for every vehicle used for the purpose of carrying passengers, upon persons engaged in such business, is not unreasonable when it is scarcely, if any, more than is necessary to pay the clerk's fine connected with the registry of the vehicles.

But the general rule is that a license tax imposed for regulation is intended as a means of carrying the regulation into effect. *Vansant v. Harlem Stage Co.* 59 Md. 330 (1882) (dictum).

And that a power to license as a means of regulation implies the power to charge a fee therefor, sufficient to defray the expense of issuing the license and to compensate the city for any expense

has not followed that case, in whole. *People v. McCreery*, 84 Cal. 438. But the principle that the uniformity clause does not apply to license fees has been maintained in California. *Ex parte Hurl*, 49 Cal. 557. It was again said in *Santa Barbara v. Stearns*, 51 Cal. 490: "A license charge or fee for the transaction of business is, in our opinion, a tax, within the meaning of the term 'tax,' as employed in those sections [referring to sections other than the uniformity clause]. It is not a tax within the meaning of section 18 of article 11 of the Constitution [which is the uniformity section of the California Constitution]. . . . *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *People v. Raymond*, 84 Cal. 492; *Sacramento City and County v. Ocker*, 16 Cal. 119; *Taylor v.*

Palmer, 81 Cal. 240; *Emery v. San Francisco Gas Co.* 28 Cal. 845; *Emery v. Bradford*, 29 Cal. 75; *Ex parte Hurl*, 49 Cal. 557; Cooley, Const. Lim. 201." See also *San José v. San José & S. C. R. Co.* 58 Cal. 475; *Ex parte Miranda*, 78 Cal. 375; *Ex parte Sisto Li Protti*, 68 Cal. 635; *People v. Thurber*, 18 Ill. 554; *East St. Louis v. Wehrung*, 46 Ill. 392; *Slaughter v. Com.* 18 Gratt. 787; *Baker v. Cincinnati*, 11 Ohio St. 534; *Kleizer v. State*, 15 Ind. 449.

The alleged inequality or nonuniformity of this classified laundry license does not seem to be such as to grant a monopoly, or such as to be prohibitory of a legitimate trade or occupation. We are of opinion that the first sentence of section 1, article 12, and the whole of sec-

incurred in maintaining such regulation. *Re Wan Yin*, 10 Sawy. 532 (1886); *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69 (1890); *Vansant v. Harlem Stage Co.* *supra* (*dictum*); *Mankato v. Fowler*, 32 Minn. 364 (1884) (*dictum*).

And the power to regulate and inspect justifies the imposition of such fees and charges as will cover the expense of inspection as well as the police supervision necessary to prevent the business to be regulated from becoming harmful to the public. *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69 (1890).

Thus, shows and performances require inquiry as to the character of those who propose to exhibit, and as to the nature of the thing to be exhibited, and the exhibition may require additional attention from those entrusted with the public peace to prevent disorder and disturbances, the burden thus devolved on the public officials requiring perhaps an increase in their number or compensation for the benefit of exhibitors, and so may justly be charged a license fee of an amount greater than the expense of filling up a blank. *Baker v. Cincinnati*, 11 Ohio St. 534 (1880).

And a grant of municipal authority to regulate the vending and inspection of meats, etc., justifies the imposition of such fees as will cover the expenses of the inspection of the articles offered for sale as well as of the police supervision of the business necessary to prevent its becoming harmful to the public. *Jacksonville v. Ledwith*, *supra*.

And the power to regulate the soliciting from travelers of patronage for hotels, conferred upon municipal corporations by *Manst.* (Ark.) Dig. § 751, gives them the right to charge a license fee sufficient in amount to cover the expense of the license and of the enforcement of such police superintendence as may be lawfully exercised over the business. *Fayetteville v. Carter*, 52 Ark. 301, 6 L. R. A. 609 (1890).

So, in *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85 (1881), the rule was laid down that the amount exacted for a license, when designed for regulation and not for revenue, is not to be confined to the expense of issuing it, but that a reasonable compensation may be charged for the additional expense of municipal supervision over the particular business or vocation at the place where it is licensed.

And the expense of issuing and of regulation have been said to constitute the extreme limit.

Thus, in *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69 (1890), it was said that no more can be charged for a license than the necessary expense of issuing it and of the labor of officers and other expenses caused to the public by the business licensed.

And in *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150 (1870), and *St. Louis v. Marine Ins. Co.* Id. 163 (1870), it was held that a power to license insurance companies limits the right to charge a fee 30 L. R. A.

therefor to such an amount as will cover the necessary expenses of issuing it and the additional labor of officers and the expense thereby incurred.

And in *Burlington v. Putnam Ins. Co.* 81 Iowa, 102 (1870), it was said the license should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the license and for the care exercised by it under its police authority over the particular person licensed.

And in *Moore v. Minneapolis*, 43 Minn. 413 (1890), it was said that a charge of \$1 for the clerical work of issuing a license, in addition to the fee prescribed by the ordinance providing for it, is unauthorized; but the recovery for the sum thus paid was refused because the complaint did not properly allege a cause of action therefor.

But the power to impose licenses for municipal purposes carries with it power to consider and determine the nature of the occupations, trades, and business to be licensed, and to discriminate between the business which may be useful and beneficial to the community and that which may be immoral or disorderly in its nature and tendency, and fix the fees therefor at such sums as shall be equitable and just. *Re Guerrero*, 60 Cal. 89 (1886).

And the license charged should not ordinarily be as great in case of occupations, trades, and professions which are beneficial to the community as in case of those not useful or beneficial, especially when immoral in their nature and tendency. *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85 (1881) (*dictum*).

In granting licenses the items which may be taken into consideration as elements in fixing the cost are the value and material in merely allowing and issuing the license, the value of the benefit of the license to the person obtaining the same, the value of the inconvenience and cost to the public in protecting such business and in permitting it to be carried on in the community and in some cases an additional amount imposed as a restraint upon the number of persons who might otherwise engage in the business. *Leavenworth v. Booth*, 13 Kan. 627 (1875) (*dictum*).

Thus, where the occupation, like peddling, is liable to degenerate into a public nuisance if not restrained, it is a legitimate exercise of the police power to impose a license fee large enough to act as a restraint upon the number of persons who might otherwise engage in it, though the sum exacted is greater than the expense of issuing a license and of police supervision over the business. *Duluth v. Krupp*, 46 Minn. 435 (1891).

And a municipal requirement of a license to peddle or deliver milk and of a fee of not less than \$500 or more than \$10 for every vehicle used for that purpose, under a power to license such persons as shall be best calculated to secure a supply of

tion 11, article 12, are upon the same subject, and must be read together, and that they refer to taxation, and the equality and uniformity thereof, and that the last sentence of section 1, article 12, upon licenses, does not fall within the uniformity provision.

The laundry license fee is not obnoxious to the provisions of section 1 of the 14th amendment to the Constitution of the United States. *Home Ins. Co. v. New York*, 184 U. S. 594, 33 L. ed. 1025; *Pacific Exp. Co. v. Seibert*, 142 U. S. 839, 35 L. ed. 1035, 8 Inters. Com. Rep. 810.

It is also set up in the petition for the writ of mandamus, and, of course, admitted by the demurrer, that the relator below, and respondent here, is a subject of the emperor of China,

and that the provision of the law requiring a fee of \$25 from a male laundryman with one assistant was meant and intended to affect only Chinamen; that Chinamen are engaged in the class of laundry business falling within the \$25 fee; that steam laundries employ a large number of persons, and make greater profits than the petitioner or his countrymen; and that he will not be able to conduct his business in competition with the steam laundry, if he is required to pay the license fixed by the laws cited. The fact that Chinamen are engaged in the hand laundry business is purely fortuitous. *Singer Mfg. Co. v. Wright*, 83 Fed. Rep. 121. The law, in its terms, applies to all male laundrymen, of every condition and nationality. If the equality and uniform-

pure and wholesome milk, is a means of regulation and control and a proper restraint upon persons by whom milk is offered, and within the scope of the power granted. *People v. Mulholland*, 83 N. Y. 324, 37 Am. Rep. 568 (1880).

So, a license fee charged for the keeping of dogs is not invalid because more than the sum required for the expense of issuing it, as dogs are liable by running mad and destroying sheep to do great mischief, and the license fee may be fixed therefor with a view to restraints as well as regulation. *Tenney v. Lenz*, 16 Wis. 566 (1863).

And in *Cole v. Hall*, 103 Ill. 30 (1882), a license fee imposed by a municipality, of \$1 for each dog, upon the owner thereof for the purpose of indemnifying the owners of sheep in case of damage committed by dogs, was upheld on that ground.

And a license fee required for keeping a saloon may be fixed at such an amount as will produce a considerable revenue in excess of the amount required for regulation, where the object is to restrain the number of places and keep the business within control. *Kitson v. Ann Arbor*, 26 Mich. 325 (1873).

So, a sufficient sum may be charged for a license to wholesale liquor dealers to restrict the persons selling as well as to compensate the municipality for additional police expenses that may directly or indirectly result from the traffic, as a license to wholesale dealers for police supervision, as well as in case of licenses authorizing sales in smaller quantities. *Dennehy v. Chicago*, 120 Ill. 627 (1887).

Thus, a municipal ordinance fixing the price of a retail license for the sale of spirituous liquors for one year at \$125 is not designed to raise revenue, and is in no proper sense a tax, but a part of the police regulations, the fee being intended to prevent the indiscriminate opening of establishments for the sale of liquor thought to be dangerous to the public peace and morals. *Burch v. Savannah*, 42 Ga. 596 (1871) (*dictum*).

And a municipal requirement of a license of \$50 per quarter or \$200 per year for the sale of spirituous liquors will not be declared illegal when it does not appear but what that amount is necessary to properly regulate the business by confining it to fewer and more responsible persons, or in some other way tending to the preservation and enforcement of good order and the general welfare of the city. *Ex parte McNally*, 73 Cal. 632 (1887).

So, in *Dennehy v. Chicago*, *supra*, a license of \$500 per annum charged to wholesale liquor dealers, was upheld.

The only license fee that can be required for ordinary legitimate kinds of business, like that of butcher, baker, auctioneer, or the like, which are not liable to become public nuisances, however, should be a sufficient sum to pay the cost of issuing the license and defray the expense of necessary police supervision, and it should not be competent to 30 L. R. A.

attempt to restrain the number of persons engaging in them by the imposition of a large fee. *Duluth v. Krupp*, 46 Minn. 436 (1891) (*dictum*).

Thus, a license tax of \$500 imposed upon railroad ticket brokers or scalpers under a power to license, tax, and regulate is excessive, exorbitant, and illegal, where it would have the effect of prohibiting the business, as it is not per se injurious to the public. *Hirshfield v. Dallas*, 29 Tex. App. 242 (1890).

Nor is an annual license fee of \$25 for selling vegetables in the streets of a city authorized under a power to regulate, where that sum is much in excess of what is necessary to cover the expense of its issue, as the business is not pernicious but beneficial, and there is little occasion for police supervision. *St. Paul v. Traeger*, 25 Minn. 243, 28 Am. Rep. 462 (1878).

And the occupation of an emigrant agent does not belong to that class which is so inherently harmful or dangerous to the public that it may be restricted or prohibited by the requirement of a prohibitive license fee or otherwise, where the occupation consists merely in hiring laborers in the city to be employed beyond its limits. *State v. Moore*, 118 N. C. 697, 23 L. R. A. 472 (1895).

So, in *Marmet v. State*, 45 Ohio St. 77 (1887), the general rule was laid down that power to regulate by license and to compel the payment of a reasonable fee may be maintained where a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to or involves danger to the public.

And in *Perdue v. Ellis*, 18 Ga. 586 (1855), in which an ordinance fixing the price of a retail liquor license at \$500 was attacked on the ground that it was in restraint of trade, the court intimated its opinion that the price of a license ought to vary according to the profits of the business and other circumstances, but the ordinance was upheld on the ground that it was duly authorized by charter provision and therefore valid.

So, a license tax upon the business of running drays, imposed under a power to license and regulate, will not be held void as in restraint of trade and the levy of a tax, where the employment gives the draymen or hackmen special privileges which they enjoy to the prejudice of the city in the injury necessarily done to her streets and pavements of an amount far greater than the price of a license. *Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593 (1846).

And it is competent for a city council in fixing the sum required for a license to look at the probability that the city might be put to an expense in litigation and to other expenses arising out of the business licensed, as well as at the expediency of fixing such prices as to prevent persons from embarking in the business who could not furnish such evidence of their responsibility as that required by

ity provisions of the Constitution do not apply to the license fee under consideration, the subjects of the emperor of China are certainly in no different or better condition to make complaint than the subjects of any other foreign power who may be residing within the state, or even the citizens of the United States themselves.

We are of opinion that the district court erred in issuing the writ of mandate. The

questions which we have determined in this opinion are the only ones presented upon the appeal, and upon them is rested the decision. *It is ordered that the judgment be reversed, and the case be remanded, with directions to dismiss the writ.*

Pemberton, Ch. J., and Hunt, J., concur.

IOWA SUPREME COURT.

STATE of Iowa

V. A. WHEELOCK, *App't.*

(.....Iowa.....)

1. A reasonable license fee charged upon itinerant vendors of drugs or ar-

the payment of the fee. *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278 (1866).

And that a license tax imposed upon a telegraph company is wholly disproportioned to the usual, ordinary, or necessary expenses of municipal officers of issuing licenses and other expenses thereby imposed by the municipality, is not sufficient as a defense against the payment thereof where the liability imposed upon the city by the erection of telegraph poles is not considered. *Chester City v. Western U. Telegr. Co.* 154 Pa. 464 (1893).

But a license fee of an amount much greater than the cost of controlling and supervising the licensee cannot be sustained on the ground that demands might be made against the municipality imposing it on account of the licensee. *Philadelphia v. Western U. Telegr. Co.* 40 Fed. Rep. 615, 2 Inters. Com. Rep. 728 (1899).

See also, as to a larger license fee than is necessary to meet expenses of regulation, *supra*, IV. c. 3, *Distinction between measures for revenue and for regulation*; IV. c. 7, *What impositions are reasonable*.

And see *infra*, 2, 3, of this section, as to the effect of fixing a license fee at a figure which will produce revenue.

2. Must not be for revenue.

A power to license and regulate does not confer authority to tax for revenue purposes. *Vansant v. Harlem Stage Co.* 59 Md. 380 (1882); *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85 (1881); *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69 (1890); *Burlington v. Putnam Ins. Co.* 31 Iowa, 102 (1870); *Littlefield v. State*, 42 Neb. 223, 28 L. R. A. 568 (1894); *State v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518 (1880); *State v. New Brunswick*, 48 N. J. L. 175 (1881); *State v. Hoboken*, 41 N. J. L. 71 (1879) (*dictum*).

And a license tax imposed by a city under its police power is invalid where the fees required are not for the purpose of paying the costs of labor and material in issuing the license and it is clearly intended as a means of revenue. *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 307 (1882); *Van Hook v. Selma* (*dictum*); *State v. New Brunswick*, and *State v. Hoboken*, *supra*.

And a power to grant licenses for the privilege of carrying on trades and regulating the price thereof is a police power which does not give the right to use a license as a mode of taxation for revenue, and the fee must be reasonable for the purpose of regulation. *State v. Bean*, 91 N. C. 554 (1884).

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articles intended for the treatment of diseases, who publicly profess to cure or treat diseases, is not an unconstitutional interference with interstate commerce, although the medicines sold are in original packages brought from another state.

2. A license fee of \$100 per annum, charged upon an itinerant vendor of drugs professing to cure or treat all diseases, is not unreasonable.

And a charter provision, giving the city court exclusive jurisdiction to license innkeepers within the city limits, does not authorize the imposition of a tax on innkeepers for the license issued. *Essex County Freeholders v. Barber*, 7 N. J. L. 78 (1823).

Thus, in *Jackson v. Newman*, *supra*, a fee of \$40 per year exacted by a city for a license for hack driving under its police power was held to be invalid as clearly intended as a means for raising revenue.

And a power to license insurance companies does not confer a right to charge a license fee therefor with a view to revenue, unless that seems to be its manifest purpose, but is limited to such a charge for the license as will cover the necessary expenses of issuing it and the additional labor of officers and the expense thereby incurred. *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150 (1870); *St. Louis v. Marine Ins. Co.* Id. 163 (1870).

And a power to grant or refuse licenses to insurance companies does not justify a municipal requirement of the payment by insurance companies of 1 per cent of the premiums into the city treasury in addition to the sums required for licenses, such an exaction being a tax. *Burlington v. Putnam Ins. Co.* 31 Iowa, 102 (1870).

And a municipality authorized by charter provision to appoint measurers of coal, wood, etc., brought in for market and sold therein, and to make them a reasonable allowance and make such regulations as may be necessary and proper for carrying the same into effect, and inflict penalties for breach of such regulations, does not authorize the levy of a tax on coal, etc., for revenue purposes. It has power to tax thereunder only so far as is necessary to defray charges of inspection and measurement when required. *Collins v. Louisville*, 2 B. Mon. 184 (1841).

So, a grant of authority to regulate the vending of meats, etc., does not give power to tax the occupation of vending any of the named articles. *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69 (1890).

And a charter provision authorizing a municipality to license and regulate hawkers, peddlers, and others confers police power for the purpose of regulation only, and ordinances passed thereunder requiring a larger amount are in effect revenue measures and illegal. *State v. New Brunswick*, 48 N. J. L. 175 (1881).

A market, being a franchise or technical privilege, is not taxable except for regulation, under a charter provision authorizing taxes for the purpose

(October 10, 1896.)

APPEAL by defendant from a judgment of the District Court for Shelby County convicting him of being an itinerant vendor of drugs and nostrums without a license, contrary to the provisions of the statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. Pfau & Young and Whitney Brothers, for appellant:

The powers vested in Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes is a power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations

other than those prescribed in the Constitution.

Leisy v. Hardin, 185 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 86; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465, 81 L. ed. 700, 1 Inters. Com. Rep. 828.

While, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confined by the Constitution exclusively to Congress is not within the

of revenue upon all property and privileges taxable by the state for state purposes, and licensing, taxing, and regulating auctioneers and certain other designated employments and all other privileges taxable by the state, the term "all other privileges" meaning others of the same kind as those designated. *Jacksonville v. Ledwith*, *supra*.

And a license tax of 25 cents per day for keeping a private butcher's stand within the corporate limits of a town cannot be imposed under police powers to regulate private markets or the selling of meats, etc., at private stands. *Delcambre v. Clere*, 84 La. Ann. 1050 (1882).

These cases and those in the following subdivision are to be distinguished from those under statutes or charter provisions conferring the power to tax as well as to regulate. Cases of the latter character are collected, *infra*, IV. e. *Under a power to tax or license*.

There is some apparent conflict between the cases in the above subdivision and some of those in the following one by which the rule is laid down that the mere fact that a measure for regulation incidentally produces revenue will not invalidate it when its primary purpose is regulation or restraint, but in view of the latter class of cases, and of the absolute impossibility of fixing a rate which will just suffice to regulate without the slightest variation, it is thought that the above cases must be taken as going no farther than to prohibit the use of a power to regulate either for the sole purpose of revenue or with revenue as one of its direct purposes.

3. Distinction between measures for revenue and for regulation.

A reasonable fee for a license issued under a power to regulate is not a tax but simply a sum collected of the party interested for the purpose of defraying necessary expenses attending its issuance. *St. Paul v. Dow*, 37 Minn. 20 (1887).

And a measure adopted by a city in the exercise of a power to regulate will be upheld by the courts when plainly intended as a police regulation and the revenue derived therefrom is not disproportionate to the cost of issuing the license and regulation of the business licensed. *Littlefield v. State*, 42 Neb. 223, 28 L. R. A. 588 (1894).

And a license fee charged by a city for keeping a stall for the sale of fresh meats outside of the public market is not a tax, but compensation demanded from those who will not sell in the public market, for the additional expense thereby caused. *Ash v. People*, 11 Mich. 347, 88 Am. Dec. 740 (1863).

Thus an ordinance requiring each owner of a dog to procure a collar and pay a tax of \$2 for each dog owned by him is not a revenue measure though called a tax, but is a valid exercise of the power to regulate. *Com. v. Markham*, 7 Bush, 486 (1870).

And a charge of 25 cents imposed by a municipality 30 L. R. A.

palilty upon persons keeping stands in the market is not a tax, though so called in the ordinance providing therefor, but a price demanded for accommodations provided, which is justified under ordinary municipal powers. *Cincinnati v. Buckingham*, 10 Ohio, 227 (1845).

And a charge of \$25 on each day's exhibition of a circus, imposed by statute, is a charge for a license to exhibit, and not a tax to which a percentage fixed by the board of police can be added for county taxes, under the Mississippi statute. *Orton v. Brown*, 35 Miss. 426 (1856).

And a license required for building, and a fee of 50 cents for each license to erect, enlarge, or add to any building, under a power to regulate the erection of buildings, is not a tax for revenue purposes. *Welch v. Hotchkiss*, 89 Conn. 140, 12 Am. Rep. 388 (1872).

If the fee required for a license is intended for revenue, however, its exaction is an exercise of the power of taxation. *Home Ins. Co. v. Augusta*, 50 Ga. 590 (1874) (*dictum*).

And the sum demanded for a license to pursue an employment when used as a means of supplying the public treasury is a tax on such employment which is unauthorized in the absence of the power to tax. *Mays v. Cincinnati*, 1 Ohio St. 206 (1853).

In *Mays v. Cincinnati*, *supra*, *Cincinnati v. Buckingham*, 10 Ohio, 227 (1845), was distinguished upon the ground that in that case the sum exacted was not a tax but rather a price demanded for the accommodations provided for the frequenters of the market by the city authorities.

So, the amount of a license fee or charge is to be considered in determining whether or not the exaction is really one for revenue or prohibition, instead of one for regulation under the police power. *Atkins v. Phillips*, 26 Fla. 231, 10 L. R. A. 158 (1890) (*dictum*).

And an exaction of a sum for a license in excess of what is necessary to cover public expenses, and graduated by the amount of business done, is a tax upon the business upon its face. *State v. Long Branch Comrs.* 42 N. J. L. 364, 36 Am. Rep. 518 (1890); *Re Wan Yin*, 10 Sawy. 532 (1885).

Thus, a license fee required of draymen, which is so large as not to be necessary to secure the objects of the grant of power and as to have been principally for revenue, is in effect a tax, and not within a charter power to regulate drays, etc. *Fort Smith v. Ayers*, 43 Ark. 82 (1884).

And an ordinance imposing a license fee of 25 cents per wagon on wagons run for hire, and an additional license tax of \$2 for each six months for the privilege of exercising the vocation, is as a matter of law one for revenue purposes, and invalid when enacted under police power. *Knox City v. Thompson*, 19 Mo. App. 523 (1885).

So, a fee of \$75 for an original license, imposed by a municipality upon owners of passenger omni-

jurisdiction of the police power of the state, unless placed there by congressional action.

Henderson v. Wickham, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 465, 24 L. ed. 527; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leisy v. Hardin*, *supra*.

Whenever a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the states may be exerted as if a specific power had not been elsewhere reposed, but, on the contrary, the only legiti-

mate conclusion is that the general government intended that the power should not be affirmatively exercised.

Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 8 Inters. Com. Rep. 86.

The license is in effect a tax upon the goods shipped and sold by the licensee, upon the property of a nonresident while in the hands of the owner, and, before the same has become a part of the mass of the property of the state

buses upon each omnibus used within the corporate limits, and \$50 for the annual renewal thereof, is unreasonable and excessive, and invalid as an attempted exercise of the power of taxation not granted by the statute. *Vansant v. Harlem Stage Co.* 59 Md. 380 (1882).

And a license fee exacted from gardeners, of 25 cents for every load of vegetables sold in a public market, will be regarded as a measure for creating revenue and cannot be justified under the police power, where the presence of the gardeners and their wagons does not cause additional expense to the city but tends to increase her revenue. *State v. Blaser*, 36 La. Ann. 368 (1884).

So, an ordinance requiring an annual license fee of \$100 for the privilege of engaging in the fish and crab business at a designated market, enacted under a power to regulate markets and sell, lease, or dispose of the stalls and stands therein, is invalid as an effort to raise revenue under guise of the police power, where it is far in excess of the expense of issuing the license and regulation of the calling. *State v. Rowe*, 73 Md. 548 (1890).

And a license fee of \$3 per month exacted for the privilege of selling butcher's meat was held to be a tax for revenue purposes, and not an exercise of police power conferred upon the corporation, and therefore illegal, in *State v. Bean*, 91 N. C. 554 (1884).

And a license fee of \$25 for a saloon and \$50 annually for peddling with a wagon, required of liquor dealers in addition to other licenses, is a revenue measure, and invalid as against one having a general license to sell beer in the county. *Du Bolstown v. Rochester Brewing Co.* 9 Pa. Co. Ct. 442.

So, a license fee charged for the privilege of building vaults in the streets in front of the licensee's dwelling, which is graduated by the capacity of the vault, is a tax or assessment and not a regulation, within a charter provision authorizing the regulation of the building of vaults. *State v. Hoboken*, 83 N. J. L. 280 (1890).

So, a license fee of \$250 per month or \$25 per day for shorter periods, exacted from transient merchants by ordinance, is excessive and invalid as an attempted exercise of the taxing power, the fee not being required for regulation, and the business not being injurious or liable to become a nuisance. *Ottumwa v. Zekind* (Iowa) 29 L. R. A. 734 (1896).

Ottumwa v. Zekind, *supra*, distinguishes *Decorah v. Dunstan Bros.* *infra*, IV. c. 7, upon the ground that in that case the license tax was imposed upon auctioneers and not on transient merchants, and that auctioneers require more supervision.

And a license tax cannot be upheld as a provision for inspection with respect to goods brought from another state, when the amount of the tax is in excess of what is required for the purposes of inspection and the proceeds are applied to other uses. *American Fertilizing Co. v. North Carolina Board of Agriculture*, 43 Fed. Rep. 608, 11 L. R. A. 179 (1890).

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The fact that a city derives a revenue incidentally from a reasonable exercise of its police power in licensing, regulating, and controlling a business, however, is no serious objection to such control. *Mankato v. Fowler*, 33 Minn. 384 (1884) (*dictum*); *State v. Hoboken*, 41 N. J. L. 71 (1879) (*dictum*).

And a reasonable license fee imposed under a power to regulate is not necessarily invalid because it incidentally produces revenue. *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278 (1866).

And a license fee will not be regarded as a revenue measure because fixed at a rate designed to prevent the indiscriminate engagement in the business licensed, where it is one which is dangerous to the public peace and morals. *Burch v. Savannah*, 42 Ga. 596 (1871) (*dictum*).

Thus, a reasonable charge for a license imposed by a municipality upon a railroad within its limits as a police regulation is valid and reasonable though it incidentally augments the receipts of the treasury. *Johnson v. Philadelphia*, 60 Pa. 445 (1890).

So, in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419 (1882), it was said that the power to license is a police power though it may be used for the purpose of raising revenue.

But it must appear that the means adopted are such as are reasonably necessary to accomplish the purpose of regulation. *State v. Hoboken*, *supra* (*dictum*).

And a requirement of a license fee of \$50 for large cars and \$25 for small ones, of a street-railroad company, which regulates nothing but to prohibit the running of the cars until the fee is paid, is not a measure of regulation but the imposition of a tax. *New York v. Second Ave. R. Co.* 32 N. Y. 261, 34 Barb. 43 (1865).

So, a license fee for keeping a butcher's stand or selling articles within the corporate limits and without the market place is a tax for revenue, and not a contribution legally authorized in the exercise of the police power. *Mestayer v. Corrige*, 88 La. Ann. 707.

Where the leading and primary purpose is regulation, it is a license and not a tax, though, as a secondary purpose, it is designed to produce revenue. *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516 (1886).

Numerous cases illustrating as to what is reasonable for the purpose of regulation and what will be deemed an attempted exercise of the taxing power, will be found *infra*, IV. c. 7, *What impositions are reasonable*.

4. Must not be unreasonable or in restraint of trade.

The amount of a license fee exacted by a municipality for the transaction of a business in it, under a general power conferred by its charter, must be reasonable and not oppressive, partial or in restraint of trade. *Ex parte Frank*, 53 Cal. 608, 29 Am. Rep. 642 (1878); *Bloomington v. Wahl*, 46 Ill. 439 (1868).

seeking to tax it, is a measure regulating interstate commerce, and therefore void.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 184; *Robbins v. Shelby County Tax. Dist. and Wabash, St. L. & P. R. Co. v. Illinois, supra*; *Cook v. Pennsylvania*, 97 U. S. 568, 24 L. ed. 1015; *State Freight Tax Case*, 82 U. S. 15 Wall. 282, 21 L. ed. 146; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Wabash, St. L. & P. R. Co. v. Illinois, supra*; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59.

The smallness of the license or tax does not eliminate its regulative character.

Brown v. Maryland, 25 U. S. 12 Wheat. 429, 6 L. ed. 685; *State Freight Tax Case*, 82 U. S. 232, 21 L. ed. 146.

The purpose for which the license for selling proprietary medicine in the state of Iowa is exacted does not render the statute constitutional if in effect it lays a burden upon interstate commerce.

State Freight Tax Case, supra.

Because the statute in question is indiscriminate it is not for that reason constitutional, in so far as it applies to the facts in the case at bar.

Bowman v. Chicago & N. W. R. Co. 125 U.

And it must not create oppressive monopolies but must be calculated to advance the general welfare of the inhabitants of the municipality. *Bloomington v. Wahl, supra*.

The amount of a license fee adopted under a power to grant licenses for the privileges of carrying on trades and regulating the price therefor, must be reasonable for the purpose of regulation. *State v. Bean*, 91 N. C. 554 (1884).

And an ordinance purporting on its face to be for the levying and collection of a license tax, but which is a clear and palpable attempt to destroy and prohibit a legitimate and commendable business, is invalid and cannot be enforced. *Lyons v. Cooper*, 30 Kan. 324 (1888).

And the invalidity of an ordinance fixing the price for a license to retail liquors at a prohibitory figure is not affected by the fact that a dealer who had submitted to its terms had done a prosperous business. *Ex parte Burnett*, 30 Ala. 461 (1857).

5. Reasonableness, by whom determined.

What is a reasonable license fee must depend largely upon the sound discretion of the city council with reference to all the circumstances of the case. *Re White*, 43 Minn. 250 (1890) (*dictum*); *Manakato v. Fowler*, 32 Minn. 364 (1884).

And the courts will not interpose and declare a license tax to be unjust and unreasonable unless a flagrant case of excessive and oppressive abuse of power by the city authorities in levying the tax is established. *Lyons v. Cooper, supra*.

So, in *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731 (1894), a doubt was expressed as to whether judicial action could be based even upon a showing that the imposition was prohibitive or destructive to the business on which it was imposed.

But the courts have power to inquire into the reasonableness of a fee exacted in the exercise by a municipality of a power to regulate, though considerable latitude will be allowed for the exercise of legislative discretion. *Littlefield v. State*, 42 Neb. 223, 23 L. R. A. 588 (1894).

The city authorities are primarily at least the judges of what is a reasonable fee for a license, and it is not within the legitimate province of a court to fix the precise amount to be charged, but it is the right and duty of the courts to decide whether the amount so fixed is unreasonable or excessive. *Vansant v. Harlem Stage Co.* 59 Md. 380 (1882) (*dictum*).

And it belongs to the court to determine what are reasonable regulations made by a municipality within the power granted by charter. *State v. Orange*, 50 N. J. L. 369 (1889); *Kip v. Paterson*, 26 N. J. L. 298 (1867) (*dictum*); *Glaser v. Cincinnati*, 31 Ohio L. J. 243 (1893).

And whether the circumstances incident to the inspection or regulation of occupations justify the imposition of a rate prescribed by ordinance for a

legitimate purpose, is a proper subject of testimony where the validity of the ordinance is in question. *State v. New Brunswick*, 43 N. J. L. 173 (1871) (*dictum*).

But evidence of the population of the city and county and of the annual sales of liquor and the profits therefrom is inadmissible on a jury trial in an action for violation of an ordinance imposing a license tax on liquor dealers claimed to be unreasonable and prohibitive in amount, the question of the reasonableness of the ordinance being one for the court. *Elk Point v. Vaughn*, 1 Dak. 118 (1875).

6. Presumption of reasonableness.

The amount required to be paid for a license demanded under a power to regulate, however, will be presumed to be reasonable unless the contrary appears. *Fayetteville v. Carter*, 52 Ark. 301, 6 L. R. A. 509 (1890); *Van Hook v. Selma*, 70 Ala. 361, 45 Am. Rep. 85 (1881); *Littlefield v. State*, 42 Neb. 223, 23 L. R. A. 588 (1894).

The judiciary will not declare such a requirement void unless from its inherent character or from previous proofs adduced it is shown to be unreasonable. *Littlefield v. State*, and *Van Hook v. Selma, supra*.

Every fair intendment should be made in favor of its reasonableness. *Vansant v. Harlem Stage Co.* 59 Md. 380 (1882) (*dictum*).

Whether it was intended as a regulation or a tax, see *State v. Long Branch Comrs.* 43 N. J. L. 364, 36 Am. Rep. 518 (1880) (*dictum*).

And where a municipal government imposes a license charge in the exercise of its police power on a business which, for the protection of the health of the community, requires daily inspection and supervision, the amount of the charge will be presumed to be reasonable and not a tax for revenue, unless the contrary appears on the face of the ordinance or is established by proper evidence. *Atkins v. Phillips*, 26 Fla. 231, 10 L. R. A. 158 (1890).

Thus, a municipal requirement of a license fee of \$500 for the privilege of selling intoxicating liquor cannot be held as a matter of law to be so large as to render it void as unreasonable and prohibitory. *Wiley v. Owens*, 39 Ind. 429 (1872).

And it cannot be judicially assumed that a city ordinance requiring the payment of \$50 every ninety days for the privilege of retailing spirituous liquors in quantities less than one quart in the city of Oakland is a virtual prohibition of the sale of such liquors. *Ex parte Hurl*, 49 Cal. 557 (1875).

And an ordinance exacting a license fee of \$10 from all persons engaged in selling merchandise, enacted under a power to license for the purpose of regulation, will be held to be valid in the absence of anything to show that the amount exacted was unreasonable or in excess of the amount necessary for that purpose. *Van Hood v. Selma*, 70 Ala. 361, 45 Am. Rep. 85 (1881).

Neither will the court say as a matter of law that

S. 507, 31 L. ed. 714, 1 Inters. Com. Rep. 825; *Robbins v. Shelby County Tax. Dist.* 120 U. S. 429, 30 L. ed. 694; *State Freight Tax Case*, *supra*.

The right to tax applies equally as well to the principal as to the agent.

Robbins v. Shelby County Tax. Dist. *supra*.

Interstate commerce cannot be interdicted or regulated under cover of police power.

Leisy v. Hardin, 185 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 36; *Cooley v. Port Wardens*, 53 U. S. 12 How. 299, 13 L. ed. 996; *Robbins v. Shelby County Tax. Dist.* and *Bowman v. Chicago & N. W. R. Co.* *supra*.

Messrs. Milton Remley, Attorney General, and *Thomas A. Cheshire*, for appellee:

The state has power to levy a tax upon occupations.

State v. Blair (Iowa) 60 N. W. Rep. 486; *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754; *Hinson v. Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 387; *Woodruff v. Parham*, 75 U. S. 8 Wall. 128, 19 L. ed. 582; *Nathan v. Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 992; *Brown v. Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Ward v. Maryland*, 79 U. S. 12 Wall. 418, 20 L. ed. 449; *Kirtland v. Hotchkiss*, 100 U. S. 499, 25 L. ed. 562; *Wiggins Ferry Co. v. East St. Louis*, 103 Ill. 574; *Corson v. State*, 57 Md. 268; *Marshalltown v. Blum*, 58 Iowa, 184, 43 Am. Rep. 115; *Pacific Junction v. Dyer*, 64 Iowa, 38.

a license fee of \$100 per boat is not within a power conferred upon a municipality to regulate and license. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419 (1882).

And a license fee of \$5 per annum for each skiff kept for use is not so plainly unreasonable that an ordinance requiring it will be held void, when there is nothing in the record from which it can be seen that such price is not entirely fair and just. *Poyer v. Desplaines*, 22 Ill. App. 576 (1887).

Nor is a license fee of \$12.50, required under a power to regulate the soliciting from travelers of patronage for hotels, conferred upon municipal corporations by Manaf. (Ark.) Dig. § 751, unreasonable. *Fayetteville v. Carter*, 62 Ark. 301, 6 L. R. A. 509 (1890).

So, a license fee of \$60 per annum for each car imposed by ordinance of the city of Chicago on street-car companies occupying its streets under a power to license, is not excessive or unreasonable upon its face. *Allerton v. Chicago*, 9 Biss. 552 (1880).

Neither is a license fee of \$100 for one year, \$60 for six months, \$5 for one month, and \$5 for one day, for peddling within the city of Duluth. *Duluth v. Krupp*, 45 Minn. 435 (1891).

Nor is a license fee of \$10 for conducting an employment agency when the business is limited to the employment of females within designated counties, and of \$150 when the business extends to the employment of males or of females elsewhere than in such counties. *Moore v. Minneapolis*, 43 Minn. 418 (1890).

And a municipal requirement of \$10 per year for the privilege of peddling milk, and an additional fee of \$2 per year for persons owning only two cows and delivering by hand, is not inherently unreasonable. *Littlefield v. State*, 42 Neb. 223, 23 L. R. A. 598 (1894).

There are New Jersey decisions, however, to the effect that the burden of proof of reasonableness rests with the municipality making the imposition.

Thus, an ordinance requiring a fee of 5 cents per load of all persons who sell hay or other produce and deliver the same within the city is unreasonable and illegal where it is not shown on the part of the city how the imposition will tend to promote good order. *Kip v. Patterson*, 26 N. J. L. 296 (1867).

And a license fee of \$5 imposed on each hawker or peddler with the privilege of using one peddler wagon or cart under a police power is invalid, unless shown to be within the limit of the necessary or probable expense of issuing the license and inspecting and regulating the business licensed. *State v. New Brunswick*, 43 N. J. L. 175 (1881). But see *State v. Long Branch Comrs.* *supra*.

So, in *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731 (1894), a license for \$200 for doing express business in a state of 15,000 inhabitants was held not to be excessive when not shown

to be prohibitive or destructive to the business of express companies.

7. What impositions are reasonable.

By unreasonableness the courts do not simply mean that the tax must not be larger than the judges might think wise, though a tax might be held unreasonable because of its oppressiveness, as, for example, when a business of \$1,000 a year was taxed \$900. *Cooper v. District of Columbia*, 4 MacArth. 250 (1880).

Reasonableness cannot be determined by any hard and fast rules, but is relative, depending upon the cost of regulation, the character of the business regulated, and the circumstances of each particular case.

Thus, a city cannot in the exercise of its police powers exact an exorbitant tax from a person engaged in the sale of spirituous or fermented liquors at a place remote from the settled portion of the city, where no police supervision is ever made over such place. *Salt Lake City v. Wagner*, 2 Utah, 400 (1879).

In *Falmouth v. Watson*, 5 Bush, 600 (1880), however, it was held that municipal authority to exact payment of not more than \$300 from any person selling spirituous liquors by retail within 1 mile of the town is a police regulation, and is not unconstitutional as taking private property for public use, though it would be so if it were a mere tax for municipal purposes outside the municipal limits.

But in *Salt Lake City v. Wagner*, *supra*, *Falmouth v. Watson*, *supra*, was distinguished on the ground that in the latter case the vending of ardent spirits was in such proximity to the town as to render its exercise liable to affect the good order of the local community.

So ordinarily a large license fee will be held unreasonable when no regulation is attempted or needed.

Thus, an ordinance entitling the city constable to \$2 for each night of attendance, to be paid by the owners or exhibitors of every theater, is unreasonable and invalid, when his services are unnecessary, and a city tax of \$50 per month was provided for by a previous ordinance under a general charter, the object of which is the preservation of good order within the city. *Waters v. Leech*, 3 Ark. 110 (1840).

And a municipal by-law requiring a license fee of from \$5 to \$30 per month, at the discretion of the president, for keeping a huckster's shop, enacted under a power to make prudential by-laws and regulations not contrary to law, is unreasonable and in restraint of trade where it is not shown that any restriction was necessary or that such shops could be an evil if conducted under proper regulations. *Dunham v. Rochester*, 5 Cow. 462 (1826).

And a license tax of \$20 a year, imposed by a municipality upon proprietors of wash houses un-

The statute under which defendant was indicted does not discriminate against nonresidents.

State v. Gouss, 85 Iowa, 21; *State v. Parsons*, 124 Mo. 486.

The law in question is within the police power of the state as well as the taxing power.

Thorpe v. Rutland & B. R. Co. 27 Vt. 140, 63 Am. Dec. 625; *Com. v. Alger*, 7 Cush. 84; *Slaughter-House Cases*, 83 U. S. 16 Wall. 38, 21 L. ed. 894; *Council Bluffs v. Kansas City, St. J. & O. B. R. Co.* 45 Iowa, 342, 24 Am. Rep. 773; *Tiedeman, Pol. Powers*, §85; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23.

After the box, or barrel, or crate in which goods are shipped is opened, the articles contained therein, because done up in small boxes,

bottles, or cans, cannot be called and treated as original packages.

Keith v. State, 91 Ala. 2, 10 L. R. A. 430; *State v. Parsons, supra*; *Com. v. Schollenberger*, 156 Pa. 201, 22 L. R. A. 155, 4 Inters. Com. Rep. 488; *Re Harmon*, 43 Fed. Rep. 372; *Smith v. State*, 54 Ark. 248; *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432.

Robinson, J., delivered the opinion of the court:

The conviction of the defendant was had under section 10 of chapter 75 of the Acts of the 18th General Assembly, as amended by section 2 of chapter 187 of the Acts of the 19th General Assembly and section 8 of chapter 83 of the Acts of the 21st General Assembly, which

der a power to regulate, is an unreasonable and arbitrary exaction for the purpose of revenue, and invalid where there is nothing in the business or proposed regulation from which the city is likely to incur any special expense. *Re Wan Yin*, 10 Sawy. 532 (1885). But see principal case, *State v. French*, in this connection.

So, a license fee of \$1,000 on the occupation of an emigrant agent, unaccompanied by any police regulation whatever, is unreasonable, prohibitive, and illegal. *State v. Moore*, 113 N. C. 697, 22 L. R. A. 472 (1893).

And an ordinance establishing a license fee of \$3 for each vehicle drawn by two horses, and \$1 for each vehicle drawn by one horse, enacted under a power to regulate and license vehicles, is invalid, as a revenue measure, where no attempt is made to regulate and all classes of business may be carried on by those who pay the license. *Brooklyn v. Nodine*, 26 Hun, 512 (1882).

And as a general rule, at least with reference to employments not requiring restraint, a fee which is disproportionate to the cost of regulation will be deemed unreasonable.

Thus, license fees imposed by municipalities upon a corporation occupying its streets, amounting in all to \$1,600 per annum, is unreasonable and void in the absence of a power to tax, where the cost of supervising and controlling the corporation for the protection of persons and property had for several years been only \$35 per annum. *Philadelphia v. Western U. Tele. Co.* 40 Fed. Rep. 615, 2 Inters. Com. Rep. 728 (1889).

And a municipal ordinance imposing a license tax upon a railroad company of \$15 for every one-horse car, and \$25 for every two-horse car, which would amount annually to about \$1,745, under a police power to regulate, is invalid as a revenue measure where there is nothing to show that such sum would be a reasonable compensation for inspecting and regulating the company's business. *State v. Hoboken*, 41 N. J. L. 71 (1879).

But in *New Orleans v. New Orleans City & Lake R. Co.* 40 La. Ann. 587 (1888), a license fee of \$25 per year for carrying on and operating a horse and steam railway for the transportation of passengers was upheld under attack upon the ground that it was not a business, within the meaning of the law, which could be subjected to the payment of a license.

So, a license fee of 25 cents for every load of vegetables in carts or wagons sold at a public market, to meet the expense of issuing a license authorizing the licensee to back his wagon against the banquette, and of facilities afforded to gardeners of the city, is unreasonable where no shelter is afforded and such payments would amount to about \$91 per year each. *State v. Blaser*, 36 La. Ann. 363 (1884).

And it cannot be deemed an exaction to meet 30 L. R. A.

expenses necessary for the preservation of order among wagons and teamsters where it is only imposed upon persons not occupying stalls therein. *Id.*

And a license fee of \$10 per month, imposed solely on street peddlers of fresh meat selling less than a specified quantity in a village having no market and therefore no market regulations, would be excessive and unreasonable and in restraint of trade. *Chaddock v. Day*, 4 L. R. A. 809, 75 Mich. 527 (1899).

But a license fee of \$15 per year for the right to sell meats in the city of Chicago would be sustained under a power to regulate, even if the narrow rule were followed that under the power to regulate the license fee cannot exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers. *Kinsley v. Chicago*, 124 Ill. 359 (1888).

And a monthly license of \$5 charged by a municipality for vending fresh meats outside of the public markets, at private markets, will not be deemed an abuse of power or an unauthorized attempt to raise revenue, where such sales require daily inspection and supervision for the protection of the public health. *Atkins v. Phillips*, 26 Fla. 231, 10 L. R. A. 158 (1890).

And a license fee of \$5 for keeping a stall for the sale of fresh meats outside of a public market may be required by a municipal corporation in the exercise of its police power for the maintenance of the public health. *Ash v. People*, 11 Mich. 847, 83 Am. Dec. 740 (1863).

And in *Ex parte Heylman*, 92 Cal. 492 (1891), a municipal ordinance taxing a license fee for selling meat from vehicles or baskets at \$75 per quarter, and for selling fish, vegetables, fruit, game, poultry, etc., from vehicles or baskets at \$10 per quarter, was held to be valid, but the ground upon which it was attacked does not appear.

So, a license tax imposed upon water companies without regard to their respective use of the city streets or the labor cast upon the city by such use, or anything to indicate that the fee is exacted for any additional police supervision made necessary by such use, is not authorized by the police power conferred upon the city by the general welfare clause of its charter. *Wilkesbarre v. Crystal Springs Water Co.* 7 Kulp, 81 (1896).

But a city ordinance imposing upon telegraph companies a license tax of \$1 per year for each pole is not so unreasonable in amount as to justify the court in interfering with the discretion of the municipal authorities. *Chester City v. Western U. Tele. Co.* 154 Pa. 464 (1893).

And in *New Orleans v. Louisiana Sav. Bank*, 31 La. Ann. 637 (1879), a license tax of \$1,000, imposed by a city upon banks was upheld under a claim by a savings bank that such tax was included in a charter exemption from taxation except on real estate.

contains the following: "Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind intended for the treatment of diseases or injury, who shall by writing or printing or by any other method publicly profess to cure or treat diseases or injury or deformity by any drug, nostrum, or manipulation, or other expedient, shall pay a license of \$100 per annum, to be paid to the treasurer of the commission of pharmacy. . . . Any person violating this section shall be deemed guilty of a misdemeanor and shall upon conviction pay a fine of not less than \$100 and not more than \$200." In July, 1894, the defendant was engaged in the business of selling on commission proprietary medicines which were manufactured in the state of Minnesota by J. R. Wat-

kins, and were owned by him until sold. He was a resident of Minnesota, and the medicines were placed in glass bottles, securely corked, sealed, and capped, and were brought into the state, and sold in the original packages in which they were placed by the manufacturer. The medicines as prepared, and as received in this state by the defendant, were a legitimate subject of commerce, and were not injurious to the public health. They were transported by Watkins from the place where they were manufactured to Harlan, in this state, where they were received by the defendant, and there offered for sale. In making the sales he traveled from place to place with a team and wagon, and, while so engaged, sold one of the packages to one M. B. Howe, in Shelby county,

And in *Chicago Pkg. & P. Co. v. Chicago*, 88 Ill. 221, 30 Am. Rep. 545 (1878), a charge of \$100 per annum for a license for running a slaughter house was upheld, but the question upon which the case turned was that of the power to require it under a statute giving cities and villages power to regulate the management, etc., of such houses within their limit and to the distance of 1 mile beyond, where the slaughter house in question was situated outside the city but within the mile limit and in another town by which it was required to pay a license.

So, a fee of \$300 for an auctioneer's license is unreasonable as a police regulation in a city of 6,000 or 7,000 inhabitants whose trade is chiefly local and at retail, and where it proves to have prevented all auction sales from the date of its requirement. *Maukato v. Fowler*, 32 Minn. 364 (1884).

And a license tax of \$10 per day for not less than ten days, imposed upon persons selling or exposing for sale at auction any bankrupt or other stock of goods in a city containing more than 5,000 inhabitants, is invalid, as being oppressive, prohibitive, and unreasonable considering the nature of the business. *Caldwell v. Lincoln*, 19 Neb. 569 (1886).

But a license tax of \$5 per day for sales by auction is not so high that the courts will adjudge it unreasonable and oppressive and in restraint of trade when the city contains more than 2,000 inhabitants and it is matter of common knowledge that permanent auction stores are scarcely ever found therein. *Fretwell v. Troy*, 18 Kan. 271 (1877).

And an ordinance authorizing the mayor to fix the amount of a license for selling at auction at not to exceed \$25 for the first day of the auction and \$20 for subsequent days, enacted under a power to regulate and license, is not subject to the objection that it is not definite as to the amount required to be paid, or unreasonable, oppressive, or in restraint of trade. *Decorah v. Dunstan Bros.* 38 Iowa, 96 (1874).

So, a city ordinance imposing a license fee on each carriage used in the streets, varying from \$1 to \$20 according to the kind of carriage and stand kept, is not authorized under a power to adopt rules and ordinances for the regulation of omnibuses, stages, etc., as the dissimilarity in the sums required precludes the assumption that it is required to meet the expenses incident to giving a license. *Com. v. Stodder*, 2 Cush. 522, 48 Am. Dec. 679 (1848).

In *Com. v. Stodder*, *supra*, *Boston v. Schaffer*, 9 Pick. 415 (1830), in which a money license for a theatrical exhibition was held valid, was distinguished upon the ground that power to make the imposition was clearly conferred by statute.

But a license tax on vehicles, graduated at \$5 on those drawn by one horse, and \$8 on those drawn by two horses, and \$12 on those drawn by three or 30 L. R. A.

more, is not unreasonable. *Gibson v. Cornopolla*, 22 Pitts. L. J. N. S. 64, 8 Lanc. L. Rev. 359 (1891).

And \$3 will not be deemed an unreasonable fee for issuing a license to a drayman or hackman and keeping the necessary registers, in the absence of any showing on the subject. *Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593 (1846).

And a license tax imposed by a municipality, of \$10 for each vehicle drawn by more than two animals, is not unreasonable or in restraint of trade as to one who constantly uses heavy wagons with four-horse teams heavily loaded in the streets. *Gartside v. East St. Louis*, 48 Ill. 47 (1867).

And an ordinance requiring a license fee not otherwise unreasonable is not rendered unreasonable by the fact that the law requires the fees provided for to be used for other purposes and not for the purpose of enforcing the ordinance, funds for which are provided by taxation. *Littlefield v. State*, 42 Neb. 223, 28 L. R. A. 538 (1894).

So, a prohibitive license tax is usually deemed unreasonable, though it may be large enough to act as a restraint when the business is one which might become an evil if unrestrained.

Thus, an ordinance fixing a license fee for selling goods at retail from house to house at not less than \$1 nor more than \$25 for a fixed time, in the discretion of the mayor, is void for unreasonableness as the time for which the sum fixed may be changed is left wholly with the mayor, and he might fix so short a time as to amount to a refusal to license at all. *State Center v. Barenstein*, 65 Iowa, 249 (1885).

And an ordinance requiring a license fee of \$25 per day for selling goods, wares, and merchandise at auction is invalid as being unreasonable, prohibitive, and in restraint of trade, and opposed to public policy. *Sipe v. Murphy*, 49 Ohio St. 536, 17 L. R. A. 184 (1902).

So, a municipal ordinance requiring a hawker or peddler who travels on foot to pay a license of \$10 for the first day and \$5 for each subsequent day, and if he travels with one horse, \$20 for the first day and \$15 for each subsequent day, and if he travels with two or more horses \$25 for the first day and \$15 for each subsequent day,—is invalid as unreasonable and in restraint of trade. *Brooks v. Mangan*, 36 Mich. 676 (1891).

And an ordinance requiring the payment of a license fee of \$50 per day from each transient dealer doing business in the city, enacted under a police power, is invalid as being unreasonable, prohibitive, in restraint of trade, and against public policy, and tending to create a monopoly. *Glaser v. Cincinnati*, 81 Ohio L. J. 243 (1893).

And in *People v. Russell*, 49 Mich. 617, 48 Am. Rep. 473 (1883), it was held that a license fee of \$15 per year, imposed upon peddlers by municipal ordinances, is unreasonable and excessive where the charter gives power to license and regulate but not to tax them.

in the condition in which it was sent from Minnesota. He did not at that or any other time represent himself to be a physician; nor assume to determine the ailments of the people; but he distributed printed circulars of Watkins', which represented the medicines to be a cure for certain diseases named in the circulars, and the defendant represented that the medicine sold by him was as stated in the circular. At the time the business described was carried on, and the sale specified was made, the defendant did not have a license as contemplated by the statute, nor was he a physician or registered pharmacist. At that time Howe was a resident of this state.

The appellant contends that the acts under which he was convicted are repugnant to that

part of section 8 of article 1 of the Constitution of the United States which provides that the Congress shall have power to regulate commerce among the several states, and the only question we are required to determine is whether the claim thus made is well founded. The record clearly shows that it must be regarded, for the purposes of this case, as conceded that the defendant was an itinerant vendor of drugs and nostrums, without a license, within the meaning of the statutes of this state which we have set out, and that the medicines he sold were in the original packages in which they were shipped into this state. It is true that the power vested in Congress to regulate commerce among the several states is a power complete in itself to prescribe the rules

But in *Re White*, 48 Minn. 250 (1890), it was held that a license fee of \$3 a day, required of hawkers or peddlers, cannot be said to be excessive in view of the character of the business and the short period for which such business usually runs.

And in *Cherokee v. Fox*, 34 Kan. 16 (1886), an ordinance requiring a license fee of \$2.50 per day of professional hawkers and peddlers for selling or offering for sale any article of merchandise or traffic kept by any merchant or manufacturer in the city, at retail, was upheld when attacked as class legislation, and as partial and oppressive in its operation, and as making unjust discriminations and being inconsistent with public policy.

And in *Chicago v. Barte*, 100 Ill. 61 (1881), a license fee of \$5 per annum, imposed upon persons engaged in selling and delivering milk from wagons or other vehicles was upheld, but the ground of attack was that it was not authorized by a charter conferring power to license and regulate hawkers and peddlers. See also, in this connection, the principal case, *STATE v. WHEELLOCK*.

So, a by-law of a town fixing the price of a license for retailing liquors at \$1,000, is prohibitory in its nature and cannot be justified under a power to grant licenses, or as an exercise of one of the incidental powers of a municipal corporation. *Craig v. Burnett*, 32 Ala. 728 (1858); *Ex parte Burnett*, 30 Ala. 461 (1867).

But a municipal ordinance establishing a license tax of \$25 per month for the sale of spirituous and fermented liquors is not void because unreasonable, oppressive, or in restraint of trade. *Ex parte Benninger*, 64 Cal. 202 (1883).

And a municipal ordinance of the city of Eureka, requiring a license fee of \$30 per quarter or \$200 per year for the sale of spirituous liquors, is not oppressive or unreasonable, or prohibitory of the business of retailing intoxicating liquors. *Ex parte McNally*, 73 Cal. 632 (1887).

So, a license tax of \$150, imposed upon groceries, confectioneries, and coffee houses opened for the purpose of retailing spirituous liquors, under a power to tax privileges, will not be held to be oppressive or unequal where it does not appear that extensive improvements are not in progress and that other privileges are not also paying high taxes. *Columbia v. Bealy*, 1 Humph. 232, 34 Am. Dec. 646 (1839).

And a license fee of \$100 for keeping a saloon, placing no restrictions upon the saloon keeper as to the stock he deals in, will not be held to be excessive, although the sale of liquor is prohibited by general law. *Wolf v. Lansing*, 63 Mich. 387 (1884).

And in *Mason v. Lancaster*, 4 Bush, 406 (1868), a fee of \$125 exacted by a municipality for a liquor license under a charter provision conferring the right to license and providing that the tax therefor shall be fixed at not to exceed \$200 per annum, was upheld, but the question considered was as to 30 L. R. A.

the constitutionality of the charter provision by which the power was delegated.

So, a license fee of \$300 exacted by a municipality for keeping billiard tables, is not subject to the objection that it is extravagant, unreasonable, and prohibitive, as the business licensed is not a matter of necessity, but of mere pleasure or luxury. *Re Neilly*, 37 U. C. Q. B. 239 (1875).

And in *Church v. Richards*, 6 U. C. Q. B. 569 (1849), a municipal charge of £10 for keeping billiard tables in addition to the provincial duty was not looked upon as too burdensome.

So, a provision of a city ordinance imposing a license fee of \$50 per day upon every transient dealer or person who opens a store or place for the temporary sale of goods, wares, and merchandise is an unreasonable exercise of a power granted to a city to provide for licensing transient dealers or persons opening temporary stores or places of sale, and is invalid. *Glaser v. Cincinnati*, 31 Ohio L. J. 243 (1899).

But in *Wynne v. Wright*, 1 Dev. & B. L. 19 (1834), a license tax of \$20 on every vehicle employed by a person in carrying jewelry from county to county for sale was upheld under attack as being unconstitutional and invalid, but the question of amount was not raised.

And a requirement by a municipality that persons owning vehicles for hire within its limits, and who have paid their city licenses, shall obtain from the city plates which are required by ordinance for the convenient identification of the vehicles and pay therefor from 8 to 150 times their cost, is another license in disguise and is exorbitant and unreasonable. *Walker v. New Orleans*, 31 La. Ann. 828 (1879).

And a license fee of \$50 per day, charged by the city of Chicago for the privilege of operating the Ferris Wheel, is unreasonable and invalid. *Ferris Wheel Co. v. Chicago* (Ill.) 27 Chicago Leg. News, 399 (1894).

But a license tax of \$5 per month, imposed as a police regulation on each stall in a public market, is not excessive. *Jacksonville v. Ledwith*, 26 Fla. 163, 9 L. R. A. 69 (1890).

And a license tax of \$63.50 for permission to give theatrical exhibitions for six months, and a fee of \$1 for the officer issuing the license, is not an illegal exaction under power to license and regulate, as such exhibitions require inquiry as to their character, and may require additional attention to prevent disorder and disturbances. *Baker v. Cincinnati*, 11 Ohio St. 534 (1860).

In *Baker v. Cincinnati*, *supra*, *Mays v. Cincinnati*, 1 Ohio St. 268 (1853), was distinguished upon the ground that the extent of the power of taxation vested in the general assembly was not drawn in question in that case.

So, a license fee of \$200 imposed upon pawnbrokers, will not be deemed unreasonable because of

by which that commerce is to be governed; that it is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but enters it, and is capable of authorizing a disposition of articles of commerce so that they become a part of the common mass of the property within the state. *Leisy v. Hardin*, 185 U. S. 100, 84 L. ed. 128, 8 Inters. Com. Rep. 86. But it has been held that state laws which do not discriminate between residents and products of a state and those of another state; which are not designed to interfere in any manner with interstate commerce, as those which are in the nature of a simple tax upon sales of merchandise, imposed alike upon all persons, whether residents or nonresidents of the state,—are not repugnant

to the constitutional provision in question. Thus, in *Hinson v. Lott*, 75 U. S. 8 Wall. 148, 19 L. ed. 887, a statute which imposed a tax of 50 cents per gallon on each gallon of spirituous liquors offered for sale in the state, to be paid by the dealer introducing it, was sustained, it appearing that a like tax on such liquors produced in the state was exacted. In *Woodruff v. Parham*, Id. 128, 19 L. ed. 883, a tax imposed by the city of Mobile on auction sales and sales of merchandise was sustained as to sales of property brought from other states, and sold at wholesale in unbroken packages. In *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, a statute of the state of Missouri requiring all peddlers of sewing machines, without regard to the place of growth or produce of

its magnitude, as the question of amount does not admit of nice calculations, and the business of pawnbroking gives rise to heavy city expense. *Van Baalen v. People*, 40 Mich. 258 (1879).

And in *Grand Rapids v. Brandy* (Mich.), 64 N. W. Rep. 29 (1895), it was held that a license fee of \$50 upon pawnbrokers, and of \$25 upon junk dealers, under a power to license and regulate pawnbrokers, junk dealers, and dealers in second-hand goods, is not unreasonable.

And in *Moore v. St. Paul*, 48 Minn. 381 (1892), it was said that a uniform license fee of \$150 per year for carrying on the business of an intelligence office for males would not be so excessive or unreasonable as to justify holding it void, but the ordinance in question was held invalid because it required that amount until the first of January next following the day of the application.

And in *Ex parte Burnett*, 80 Ala. 461 (1887), it was said that a municipal corporation may, in the exercise of its incidental powers, transcend the limit fixed by the general law upon the price of a license to retail liquors, provided its ordinances are not in their nature prohibitory.

The business of a railroad ticket broker or scalper, however, is not *per se* injurious to the public, and a license tax of \$500 imposed upon it, which would have the effect to prohibit the business, is excessive and illegal. *Hirshfield v. Dallas*, 29 Tex. App. 242 (1890).

It is thought that a growing tendency on the part of the courts may be discovered from the cases, particularly the later ones, throughout this whole subject of limitations under a power to regulate, to break away from the strict rule that the fee must not exceed what is necessary for regulation. And to adopt the more liberal one that it must be reasonable in view of all the circumstances including the character of the business and the value of the privilege.

d. Under a power to restrain or prohibit.

The number of cases in which the question of the existence or extent of a limit upon the amount of license fees fixed under a power to restrain or prohibit is so small as to render it impossible to locate any general rules comprising the subject. It would seem, however, that it must necessarily be considerably wider than the limit under a mere power to regulate.

Thus, a municipal ordinance imposing a penalty for selling intoxicating drinks without a license, which exceeds that fixed by the general law, is not unreasonable or invalid under a charter provision empowering the municipality to suppress and prohibit the sale thereof as well as to license. *Deits v. Central*, 1 Colo. 323 (1871).

And an ordinance requiring hawkers and peddlers of meat to pay a license fee of \$30, enacted under a power to restrain, regulate, or license hawk-

ing and peddling, is not an invalid exercise of the power, though the fee exacted is also a tax. *Ballston Spa v. Markham*, 58 Hun. 238 (1890).

And a license tax of \$30 per annum, imposed upon bowling saloons under a power to regulate and restrain, is authorized. *Smith v. Madison*, 7 Ind. 86 (1855).

So, a considerable license fee imposed upon saloons is not an unreasonable restraint of trade although the sale of intoxicating liquors is prohibited by law, where it is required under a charter contemplating that public policy requires the business of keeping places of resort for eating and drinking to be restrained. *Kitson v. Ann Arbor*, 26 Mich. 325 (1873).

And a license fee may be required for keeping a saloon, of such an amount as will produce a considerable revenue in excess of the amount required for regulation, where the object is to restrain the number of places and keep the business within control. *Ibid*.

And an ordinance requiring a license fee of \$800 per year for the sale of intoxicating liquor by the measure will not be declared invalid as unreasonable and amounting to a prohibition under a power to suppress and levy a license tax on liquor sellers, when there are no statutory restrictions as to the amount. *Elk Point v. Vaughn*, 1 Dak. 113 (1875).

So, the amount charged for a license to wholesale liquor dealers under a power to license, regulate, and prohibit the selling or giving away of any intoxicating or spirituous liquors is not a tax but a burden imposed as the price of a privilege which a municipality has power to restrict or deny altogether. *Dennehy v. Chicago*, 120 Ill. 627 (1887).

But authority under a municipal charter to license, control, regulate, or prohibit a business or traffic gives no power to impose a tax for revenue purposes,—especially where such tax discriminates against nonresidents. *State v. Long Branch Comrs.*, 42 N. J. L. 364, 36 Am. Rep. 518 (1880).

And a license fee of \$100 per quarter, exacted by a municipality for the privilege of selling spirituous and fermented liquor within a city but 3 or 3 miles away from the settled portion, where there are no streets, lots, or blocks, and where no police or other supervision is exercised, is not valid under a power to license, regulate, or restrain. *Salt Lake City v. Wagner*, 2 Utah, 400 (1879).

e. Under a power to tax and license.

The general assembly may constitutionally impose, or authorize the county courts to impose, a tax by conferring on them the power to grant licenses as a means of raising revenue for county purposes. *Washington v. State*, 18 Ark. 752 (1858).

And the state may confer power upon cities to require a license fee for carrying on a particular branch of business for revenue purposes, and such a license required by the city for such purpose is valid

material of manufacture, to pay a tax, was sustained as against a peddler who sold machines made in Connecticut. In *Webber v. Virginia*, 103 U. S. 844, 26 L. ed. 565, it was said that there is no objection to state legislation requiring a license for the sale of sewing machines, by reason of the grant of letters patent for the invention, when there is no discrimination against nonresidents or their agents. In *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, the power of a state to levy a tax on coal mined outside the state and brought within it to be there sold, was affirmed. In *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, a statute of the state of Massachusetts which prohibited the manufacture and sale of imitation butter, in imitation of yellow butter,

produced from pure, unadulterated milk, or cream of such milk, was sustained, and held to apply to the prohibited article when brought for sale from another state, where it was manufactured. Some of these cases arose under the provision of the Federal Constitution which forbids states, without the consent of Congress, to lay any imposts or duties on imports or exports, but all are applicable to the facts in this case. Some of the cited cases recognize the rule that state laws of the general nature of those approved are invalid so far as they discriminate in favor of the residents and products of the state, and against the residents and products of other states. There is no discrimination in the statutes of this state under consideration. They apply alike to itinerant

though it operates incidentally as a tax upon the dealer or consumer. *Wiley v. Owens*, 39 Ind. 429 (1872).

So in *United States Distilling Co. v. Chicago*, 112 Ill. 19 (1884), citing *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560 (1882), it was said that license fees may be imposed for substantial municipal revenue.

And municipalities have power to impose licenses for the purpose of regulation or revenue or both, under Cal. Const. art. 11, § 11, 12, providing that they may make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws, and that the legislature may by general laws vest in the corporate authority thereof power to assess and collect taxes for municipal purposes. *Re Guerrero*, 69 Cal. 88 (1896).

And a statute authorizing municipal authorities to license and regulate empowers the municipality to exact licenses for the purpose of revenue as well as for the purpose of regulation, when the whole charter and the general legislation of the state warrant such construction. *Ex parte Frank*, 53 Cal. 606, 28 Am. Rep. 642 (1878); *San José v. San José & S. C. R. Co.*, 53 Cal. 481 (1879).

So, a charter provision empowering a municipal body to regulate and prohibit the sale of spirituous liquors and fix the amount of the assessment to be paid for a license, but directing that it be paid into the city treasury for the use of the city, confers power to tax and fix the fee with a view to revenue as well as regulation. *State v. Plainfield*, 44 N. J. L. 118 (1882).

And a charter provision empowering a municipal body to regulate and prohibit the sale of spirituous liquors and fix the amount to be paid for a license, directing payment into the city treasury for the use of the city, confers power to tax for revenue purpose. *Ibid.*

And a city may lawfully charge a license fee fixed with the view to raise revenue for the franchise or privilege of keeping a ferry for transporting persons across a river upon which it is situated, under a power to license, continue, and regulate ferries, and to prescribe a sum of money to be paid for licenses. *Chilvers v. People*, 11 Mich. 43 (1862).

If a power be granted with a view to revenue, the amount of the tax if not limited by charter is left to the discretion and judgment of the municipal authorities. *State v. Hoboken*, 41 N. J. L. 71 (1879) (*dictum*).

The taxing power knows no limit except the necessities of the public treasury and the discretion of the taxing power, and the amount of a license tax imposed for the purpose of revenue does not prove its invalidity. *Fretwell v. Troy*, 18 Kan. 271 (1877).

Before an authorized ordinance for the raising of revenue by license will be declared void on account of the amount thereof, it must appear that the ne-

cessities of the city do not require so large a revenue, or that there has been an unjustifiable attempt to discriminate against certain kinds of business by casting the whole burden of taxation upon them. *Fretwell v. Troy*, *supra* (*dictum*).

Thus, an ordinance imposing a license tax, the amount of which is graduated, being greater upon some employments than upon others, enacted under a power to tax as well as to regulate, cannot be judicially declared invalid because it is impracticable, unjust, or unequal. *Hadtner v. Williamsport*, 15 W. N. C. 138 (1883).

So, a power to license, tax, regulate, and restrain bar rooms and drinking shops authorizes municipal authorities to fix the terms and conditions upon which licenses shall issue, and fix the amount of the tax to be imposed. *Portland v. Schmidt*, 18 Or. 17 (1885).

And a city ordinance requiring the payment of a license fee of \$30 per month for carrying on the business of selling intoxicating liquor, enacted under a power to license either for revenue or regulation, cannot be determined as a matter of law, from the amount thereof, to be oppressive, unreasonable, or prohibitory of trade. *Re Guerrero*, 69 Cal. 88 (1896).

Nor is a license fee of \$300 for a saloon and \$200 for a hotel invalid when required under such a power. *State v. Plainfield*, 44 N. J. L. 118 (1882).

And in *Portland v. Schmidt*, 18 Or. 17 (1885), it was held that the amount required to be paid for a liquor license under a power to regulate and tax is left to the determination of city authorities and cannot be controlled by courts unless it be of so large a sum as to make it evident that it was intended as a prohibition; and an exaction of \$500 per year for a license to sell liquor was upheld.

And a license fee of \$500 per annum imposed by ordinance upon each brewery and distillery, is valid under a statute authorizing cities and villages to tax, license, and regulate brewers, distillers, etc., and not subject to the objection that it is unreasonable, as under such a grant of power payment may be required for the privilege, and the amount would seem to be within the discretion of the body imposing it. *United States Distilling Co. v. Chicago*, 112 Ill. 19 (1884).

So, a license fee of \$50 per year, required by a city of any person or corporation carrying on insurance business therein, is valid though charged for revenue purposes, where the power to tax as well as to license is given in express terms. *St. Joseph v. Ernst*, 95 Mo. 380 (1888).

And a municipal ordinance requiring every life and fire insurance company intending to do business in the city to first obtain a license to be paid for at the rate of \$50 for fire insurance companies and \$100 for life insurance companies is authorized and valid under the Kansas act of 1870 giving cities of the first class power to levy and collect a license tax

vendors of drugs and nostrums produced in this state, and to those which come from without it; to residents and nonresidents of the state; to those who sell their own wares; and to those who act for others. The primary object of the acts is not to derive a revenue for the use of the state, but in large part, at least, to protect its citizens against solicitations and harmful practices of irresponsible and unknown traveling vendors of drugs and other articles intended for the treatment of diseases or injury, who, in carrying on their business, publicly profess to cure or treat diseases, injuries, or deformities, and thus promote the sale of their wares to the credulous. The prohibited act may be committed without any actual sale. *State v. Blair* (Iowa) 60 N. W. Rep. 486.

on fire or life insurance companies or agencies. *Leavenworth v. Booth*, 15 Kan. 637 (1875).

So, a license fee required of a ferry, of \$50 for each boat for one year, is a charge for the privilege of carrying on a ferry business in the jurisdiction, and not a tax within constitutional restrictions upon the power to tax, and is justified under a charter provision giving the city power to license, tax, and regulate ferries. *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 500 (1882). *Dickey, J.*, dissented on the ground that the city had no power to exact such a license fee for the mere purpose of revenue, for a privilege already held by irrevocable grant from the state.

And an ordinance requiring a license fee of \$200 per annum of auctioneers, and requiring a bond with two sureties in the penal sum of \$1,000 for the due observance of the conditions of the ordinance, and providing for forfeiture for violation thereof, is reasonable and valid under a charter provision giving power to tax, license, and regulate. *Wiggins v. Chicago*, 68 Ill. 372 (1873).

And N. J. act May 2, 1885, providing that the fees for certain licenses may be imposed for revenue, includes hawkers and peddlers, and authorizes the passage of ordinances imposing such fees for revenue. *State v. Orange*, 50 N. J. L. 369 (1888).

So, in *Ex parte Miranda*, 73 Cal. 365 (1897), it was held that a county ordinance of Mono county requiring all persons engaged in raising, grazing, herding, or pasturing sheep therein to annually procure a license and pay therefor at the proportionate rate of \$50 for every 1,000 sheep in their possession or under their control, and providing that a violation thereof shall constitute a misdemeanor punishable by fine not exceeding \$200, is not unjust, excessive, oppressive, discriminating, special, unequal, or partial, and is valid whether imposed for the purpose of revenue or regulation, or both.

And in *Ex parte Gregory*, 20 Tex. App. 210, 54 Am. Rep. 516 (1886), it was said that a license fee of \$8 annually for each hack, imposed upon owners of hacks under a power both to license and tax, cannot be held to be excessive or unreasonable where it provides numerous regulations the enforcement of which must necessarily demand the constant services of the police and the careful attention and supervision of the municipal government.

But even under such a power it would seem that, at least so far as callings which are not obnoxious are concerned, the municipality must stop short of prohibition.

Thus, a county cannot impose a prohibitive license tax under a power to impose license taxes upon a business for the purposes of revenue and regulation. *Merced County v. Helm*, 102 Cal. 159 (1894).

And prohibitive ordinances are not authorized 30 L. R. A.

That the enactment of the laws in question was within the police power of the state is affirmed in principle by numerous authorities, some of which are of long standing, and cannot now be successfully questioned. In *Re Bahrer*, 140 U. S. 545, 35 L. ed. 572, it was said that "the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation legitimately for police purposes, as not, in the sense of the Constitution necessarily interfering upon any right

under a power to tax, license, and regulate, nor are such as would be oppressive or highly injurious. *Wiggins v. Chicago*, 68 Ill. 372 (1873).

And a license tax of \$500 per year, levied by ordinance upon druggists having a permit from the probate judge to sell intoxicating liquors, enacted under authority to levy and collect a license tax upon druggists which shall be just and reasonable, is not for revenue but for destruction, and is unreasonable and void when imposed in a city containing only 1,600 inhabitants, and in which the gross receipts of such a druggist are only about \$1,000 per year. *Lyons v. Cooper*, 36 Kan. 324 (1888).

A charter provision authorizing a municipality to provide for licensing, taxing, and regulating vendors of lottery tickets, however, justifies the imposing of a license tax, although it may be so high as to amount in effect to a prohibition. *Franco v. Washington*, 5 Cranch, C. C. 607 (1840).

So, in *Hirshfield v. Dallas*, 29 Tex. App. 242 (1890), it was said that power to tax occupations for revenue seems to be limited in amount only by the nature and character of the occupation sought to be taxed and the extent to which the occupation may be injurious to the public.

1. When discretion is expressly conferred.

It is competent for the legislature within proper limits to leave the sum which should be required for licenses to the discretion of the municipal authorities. *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278 (1866) (*dictum*).

And a license tax imposed by a municipality endowed with discretion on the subject will not be declared unreasonable by the courts merely because they deem it unwisely large. *Cooper v. District of Columbia*, 4 MacArth. 250 (1880).

And evidence that the amount fixed by them is not reasonably necessary to regulate the business is not admissible, and it cannot be shown that it was imposed solely for the purpose of revenue. *St. Paul v. Colter*, *supra*.

So, a municipal requirement of a license fee is not invalid because excessive, or oppressive, or in restraint of trade, where it is authorized by the legislature and not forbidden by the Constitution. *Ibid*.

And it is not subject to the objection that it is so large as to be in restraint of trade where full power to impose it is granted. *Cooper v. District of Columbia*, *supra*.

And when the legislature confers upon a municipal corporation the power to pass ordinances of a special and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed in pursuance thereof cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation or un-

which has been confided expressly or by implication to the national government." The cases of *Bourman v. Chicago & N. W. R. Co.*, 125 U. S. 465, 81 L. ed. 700, 1 Inters. Com. Rep. 823, and *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 8 Inters. Com. Rep. 86, upon which the defendant relies in this case, were considered, and the fact noted that the laws on which they were based "inhibited the receipt of an imported commodity or its disposition before it had ceased to be an article of trade between one state and another, or another country and this." In *Plumley v. Massachusetts*, *supra*, the case of *Leisy v. Hardin*, was again considered, and held not to be an authority for the claim that oleomargarine—a recognized article of commerce—may be introduced into a state, and there sold in original

packages, without any restriction being imposed by the state upon such sale. The recent case of *Emert v. Missouri*, 156 U. S. 206, 39 L. ed. 430, fully sustains the conclusion we now reach. That case involved the validity of a statute of the state of Missouri which provided that no person should deal as a peddler without a license, as applied to a peddler of sewing machines manufactured in another state; and the review of the authorities, and the interpretation placed upon the constitutional provision involved, are in point.

The amount of the license fee required by the statutes under consideration is not excessive, and the regulations adopted by them are reasonable. The sale of drugs, nostrums, and other articles manufactured in another state, and brought into this state, whether brought

der a grant of power general in its nature. *Ex parte Chin Yan*, 60 Cal. 78 (1882).

A municipal charter granting power to license certain callings and authorizing the municipal council to charge such sums therefor as they shall deem fit and reasonable, authorizes the use of the power for the purpose of taxation, and justifies an ordinance requiring a license fee larger than is necessary for the purpose of regulation, though it enumerates useful occupations which cannot usually be taxed under a power to license, and those of amusement without distinction. *Adams Exp. Co. v. Owensboro*, 85 Ky. 265 (1887).

Thus, a municipal ordinance fixing \$500 as the fee for a retail liquor license is authorized and valid under a charter provision authorizing the passage of any by-law, regulation, or ordinance that shall appear necessary and proper for the welfare and interest of the city and for preserving peace, health, and good order, and the licensing of the sale at retail of intoxicating liquors and prohibiting such sale without a license, it being manifest that the intent was to entrust the whole matter to the city authorities. *Perdue v. Ellis*, 18 Ga. 586 (1856).

So, an ordinance prohibiting the sale of spirituous or intoxicating liquors within the city without having first obtained a license, enacted under a charter provision that licenses for vending spirituous liquors shall not be less than \$75 nor more than \$200 per year, is not invalid as in restraint of trade. *Rochester v. Upman*, 19 Minn. 108 (1872).

And in *Goldsmith v. New Orleans*, 31 La. Ann. 646 (1879), it was held that as the law lays down no rule by which the amount of a license tax upon bar rooms or coffee houses in which concert saloons are conducted shall be fixed, it is a question of expediency and of police regulation of which the city authorities are the sole judges, and the judicial tribunals have no power to control them in the exercise of this discretion.

So, a license fee of \$200, imposed upon the business of vending butcher's meats, is not unauthorized, oppressive, or in restraint of trade, when required under a statute empowering municipalities to fix the fee for licenses at from \$5 to \$500. *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278 (1868).

And a fee of that amount for selling meat in a private stall, in addition to the 7½ per cent business tax levied upon all traders under another by-law, is not objectionable as being excessive in amount where the legislature authorized the city council to impose such charges as it should think reasonable without any reference to the payment being by way of indemnity for the trouble and expense of issuing the license. *Pigeon v. Montreal Recorder's Ct.* 17 Can. S. C. 496 (1890).

So, a municipal requirement of a license fee of \$1,000, for theatrical exhibitions is authorized by a power to license such exhibitions on such terms 80 L. R. A.

and conditions as to the mayor and aldermen may seem just and reasonable. *Boston v. Shaffer*, 9 Pick. 415 (1830).

And there is no limit to the power of a city to impose fees for a license upon foreign insurance companies under a charter authorizing it to regulate agencies of all insurance companies and to license and regulate agents of insurance companies doing business in it, unless it might be that the ordinance imposing them should be reasonable. *Walker v. Springfield*, 94 Ill. 364 (1880) (*dictum*).

So, in *Wiley v. Owens*, 39 Ind. 429 (1872), it was held that when the statute conferring the authority does not limit the amount to be charged for a license, it may charge any amount deemed proper by the council, unless controlled by other considerations.

And in *Wolf v. Lansing*, 58 Mich. 367 (1884), it was held that where the power to fix a license fee is given by law to a municipal council, its discretion in fixing the amount is not reviewable by the courts.

And in *Van Baalen v. People*, 40 Mich. 268 (1879), it was held that municipal discretion in fixing the amount of a license fee will not be reviewed by the court, unless made a pretext for a violation of constitutional rights.

Some of the cases, however, have stopped slightly short of the broad rules above announced, on the theory that such a power can be abused and does not authorize absolute prohibition.

Thus, in *St. Paul v. Colter*, 12 Minn. 41, 90 Am. Dec. 278 (1868), and *Denver City R. Co. v. Denver*, 3 Colo. App. 34 (1892), it was held that the courts will not interfere with the discretion of municipal bodies in fixing the amount of license fees, unless there is an evident abuse of power.

So, that the discretion of the city authorities in fixing the amount of the license fee required of insurance companies doing business in the city, conferred by a power to grant or refuse licenses and charge such sums as they may deem expedient and just, will not be interfered with unless an abuse thereof clearly appears, was held in *Burlington v. Putnam Ins. Co.* 31 Iowa, 102 (1870).

In *Marlon v. Chandler*, 6 Ala. 309 (1844), however, it was held that an ordinance of a town prohibiting the retailing of spirituous or fermented liquor without first paying \$1,000 for a license for one year, and providing for a penalty of \$10 per day for selling without a license, is prohibitory in nature, but is authorized under a charter provision authorizing the corporation to grant licenses to retailers of spirits and liquors and to regulate and restrain them when deemed a nuisance.

And in *Perdue v. Ellis*, 18 Ga. 586 (1856), an ordinance imposing a license fee was upheld upon the ground that it was authorized by charter, although it was in effect a prohibition. F. H. B.

into this state in original packages or otherwise, is not prohibited; but such medicines may be brought into the state and sold freely. Their importation and sale are not in any manner prohibited. But if its owner select as their agent an itinerant who, to promote sales, publicly professes to cure and treat diseases, injuries, and deformities, it is proper that some evidence and guaranty of his responsibility be required. It was said in *Brown v. Maryland*, 25 U. S. 19 Wheat. 448, 6 L. ed. 687, that "The right of sale may very well be annexed to importation, without annexing to it also, the privilege of using the officers licensed by the state to make sales in a peculiar way." So it

may be said in this case that the right to sell, in original packages, medicines brought into this state from another, does not include the right to have it sold by an unlicensed itinerant, who, to make sales, professes knowledge of the art of healing. The statutes which apply to such sales are not, in any sense, regulations of interstate commerce, but a reasonable exercise of the police power of the state, which may be applied as well to articles of interstate commerce in the hands of a vendor, and offered for sale in the original packages, as to articles produced within the state.

We conclude that the judgment of the District Court is right, and it is affirmed.

MISSISSIPPI SUPREME COURT.

Ellen BAUM, Exec., etc., of J. F. Baum,
Deceased, App't.,

v.

Mary Grace Devine LYNN.

(73 Miss. 982.)

1. Oral evidence as to the consideration recited in a written agreement is inadmissible when the stipulation as to the consideration is contractual, as in a case where a conveyance expressly recites that it is made for the settlement and release of specified claims.
2. Oral proof of a separate agreement, to show that the consideration of a conveyance which recited that it was in settlement and release of the claims of a guardian and ward against the grantor included also a release of the ward's claim against the guardian, is inadmissible.
3. An appellant cannot assign for error matters which affect other defendants who refused to join in the appeal.

(April 8, 1895.)

APPPEAL by defendant, administratrix of one of the sureties on plaintiff's guardian's bond, from a decree of the Chancery Court for Warren County in favor of plaintiff in an action brought to enforce the sureties' liability on the bond. *Affirmed.*

The facts are stated in the opinion.

Mr. M. Marshall for appellant.

Mr. L. W. Magruder for appellee.

Cooper, Ch. J., delivered the opinion of the court:

In May, 1873, John A. Klein was appointed guardian to the appellee by the chancery court of Warren county, and gave bond as guardian in the penalty of \$2,000, with George M. Klein and J. F. Baum, appellant's testator, as sureties. In May, 1874, the appellee became entitled to receive in distribution from the estate of a relative another considerable sum of

money, and the chancellor required the guardian to execute an additional bond in the penalty of \$6,100, which he did with the said George M. Klein and one D. W. Flowerree, now deceased, as sureties. The guardian, John A. Klein, died without having made a final account as guardian, and the appellee exhibited her bill in the chancery court of Warren county against the executrix of the guardian, and against George M. Klein, the surviving surety, and the personal representatives of the deceased sureties. The prayer is that the executrix of the guardian be required to render his final account as guardian, and that a decree be rendered against her therefor, and that decrees be made against George M. Klein, the surviving surety, and against the representatives of the deceased sureties, according to their liability. Upon final hearing the court found the guardian to be indebted to his ward in the sum of \$6,247.80, for which a decree was entered against his representatives; and decrees were made against George M. Klein and Ellen Baum, executrix of J. F. Baum, for \$2,000, the penalty of the bond on which they were sureties, and against George M. Klein and L. M. Lowenburg, administrator of the estate of D. W. Flowerree, for \$6,100, the penalty of the bond on which they were sureties. From this decree Mrs. Baum alone appeals, and assigns error.

The objection most strenuously urged to the decree rests upon the following facts, proved or offered to be proved by appellant: The guardian had loaned a part of his ward's money to Mrs. Mary Irving. In June, 1884, the guardian being then dead and his estate hopelessly insolvent, the appellee, who then resided in the state of Texas, came to this state to look after the estate. On the 16th of June, Mrs. Irving made to her a conveyance in the following language: "This indenture made and entered into this day, the 16th of June, 1884, by and between Mary Irving, of the city of Vicksburg, county of Warren, and state of

NOTE.—As to the admissibility of oral evidence respecting the consideration of a written contract, see note to *Durkin v. Cobleigh* (Mass.) 17 L. R. A. 270, presenting a large number of the authorities on the question.

As to such evidence of the consideration of a deed, see note to *Velten v. Carmack* (Or.) 30 L. R. A. 101.

Mississippi, party of the first part, and Mary Grace Lynn, of the state of Texas, party of the second part, witnesseth: That whereas, John A. Klein, late of the city of Vicksburg, did, on or about the 14th day of February, 1874, loan the said Mary Irving certain moneys then in his hands as guardian of the said Mary Grace Lynn, then Mary Grace Devine; and whereas, the said Mary Irving now desires to settle in full any balance that may be due her; Now, therefore, for and in consideration of the premises, and the consideration of the full acquittal, discharge, and release of the said Mary Irving from any and all liability to the said John A. Klein as guardian, or the said Mary Grace Lynn for and on account of said loans, and the further consideration of \$10 in hand paid, the receipt of which is hereby acknowledged, the said party of the first part does hereby convey and warrant to the party of the second part, her heirs and assigns, in fee simple, the following-described real estate in the said city of Vicksburg,—describing the property, and concluding with the usual habendum. The appellant took the deposition of Mr. Irving, who was the husband of the grantor, she being now dead, and that of George M. Klein, and of Mr. Smith, the attorney who prepared the conveyance, all of whom testified that the conveyance was made by Mrs. Irving, and accepted by Mrs. Lynn, in full satisfaction and settlement, not only of the debt due by Mrs. Irving to Klein as guardian, but also in discharge and settlement of liability on the part of the guardian to his ward, which liability Mrs. Lynn agreed to discharge and release as a part of the consideration for the conveyance. The complainant moved to suppress these depositions, and objected to them when offered in evidence, upon the ground that it was incompetent to vary by parol proof the written contract of the parties as shown by the deed. It does not appear that the chancellor made any order on the motion to suppress, or ruled upon the objection interposed to the evidence when offered. As the note of evidence, however, shows that these depositions were read on the hearing, we assume that the chancellor held them to be competent. In opposition to this evidence the complainant introduced her own testimony and that of her husband, by which it is denied that the conveyance was accepted in discharge of any other obligation than that of Mrs. Irving and that of the guardian for the amount loaned to her. The defendant in turn objected to the testimony of the complainant on the ground that she was not a competent witness in a suit against the estate of a deceased person to establish her claim resting upon a transaction occurring in his lifetime. As the court below did not rule upon these objections, we cannot know whether it disregarded all the testimony, or, considering it, thought the fact not proved that Mrs. Lynn agreed to accept the conveyance in discharge and satisfaction of her entire demand against her guardian. The complainant is, however, entitled to the decree if, upon either of these reasons, it is correct. The textbooks and decisions abound in confused and confusing writing upon the subject of the admissibility of parol evidence introduced for the purpose of showing the consideration of writ-

ten contracts, or of proving what are called "collateral contracts," *i. e.*, contracts not evidenced by the written one, but which constitute the consideration upon which the written one in turn rests, or which are separate and disconnected from the written one, not covered by nor inconsistent with its terms. Mr. Stephen, in his admirable Digest of the Law of Evidence, p. 104, thus formulates the rule and its limitations: "When any judgment of any court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. . . . Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence. Provided that any of the following matters may be proved: (1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law, or any other matter which, if proved, would produce any effect upon the validity of any document, or any part of it, or which would entitle any person to any judgment, decree, or order relating thereto; (2) the existence of any separate oral agreement, as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them," etc. It is evident that the proffered testimony for the defendant is competent, if at all, either, (1) because it goes only to prove what was the real consideration of the conveyance, and therefore contradicts, not the contract, but a mere fact recited or admitted in the writing; or (2) because it tended to prove a separate oral agreement within the limitation expressed in clause 2 of the proviso as quoted from Mr. Stephen.

In *Gully v. Grubbs*, 1 J. J. Marsh. 387, Judge Robertson in an admirable and concise manner states the true principle upon which is based the rule of permitting oral evidence to be introduced to show the true consideration of a deed in opposition to that recited, as well as the limitation of the rule. In *2 Devlin on Deeds*, § 880, this opinion is given at length as containing an accurate statement of the law. The writers upon evidence have strangely omitted any reference to it. Somewhat compressed, Judge Marshall's opinion may be thus stated: Wherever, in a deed, the consideration, or an admission of its receipt, is stated merely as a fact, that part of the deed is viewed as a receipt would be, and the statement is subject to be varied, modified, and explained; but, if the stated consideration is in the nature of a contract,—that is, if by it a right is vested, created, or extinguished,—the terms of the contract thereby evidenced may not be varied by parol proof, but the writing is its own sole exponent. Judge Robertson illustrates his own views by noting the difference between the

mere statement of a fact (e. g. the admission of the receipt of the purchase price) and the vesting, creating, or extinguishing a right (e. g. by the execution of a release), in the following language: "A party is estopped by his deed. He is not to be permitted to contradict it. So far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed, nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations; and, by analogy, the acknowledgment in a deed is not conclusive of the fact. This is but a fact, and testing it by the rationality of the rule we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by proof, because it extinguishes a pre-existing right. But no receipt can have the effect of destroying *per se* any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguishment itself." The deed now under examination contains, as is clearly to be seen, no mere recital of a consideration paid or to be paid. Its recital is only of the facts necessary to be stated to intelligently apply the contract of the parties to the subject-matter. Having set out the relationship of debtor and creditor, and the history of the transaction from which it arose, the deed then proceeds to state what the parties agreed, contracted, and did in reference to the dissolution of the relationship. Mrs. Irving did something. She conveyed the land to Mrs. Lynn. Mrs. Lynn did something. She released the debt to Mrs. Irving. One transferred a right; the other released a right. If it be said that the release was a mere recited consideration for the conveyance, it may with equal accuracy be replied that the conveyance was a mere recited consideration for the release; and therefore, if one of the terms of the contract may be varied by parol, because it is a consideration, so also may the other for the same reason, and by this process a solemn and executed written contract would be totally eaten away. The true rule is that a consideration recited to have been paid or contracted for may be varied by parol, while the terms of a contract may not be, though the contract they disclose may be the consideration on which the act or obligation of the other party rests. When the stipulation as to consideration becomes contractual, it, like any other written contract, is the exclusive evidence, and cannot be varied by parol. *Hubbard v. Marshall*, 50 Wis. 322; *Van Wy v. Clarke*, 50 Ind. 259.

The testimony was not admissible for the purpose of proving a separate oral agreement as to which the writing was silent. In the 30 L. R. A.

multitude of cases in which the question of the admissibility of extrinsic evidence to prove a separate oral agreement, made before or contemporaneously with a written contract is determined, decisions may be found which would warrant the introduction of the evidence offered by the defendant; but such decisions, we think, rest upon a misapplication of legal principles to the facts of the particular transaction. A very full collection of the authorities, accurately grouped, may be found in the note to *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 88. We refer to only a few, which will illustrate the principle we are considering. Before referring to these cases, it is well to note that the rule excluding extrinsic evidence is "directed only against the admission of any other evidence of the language employed by the parties in making the contract, than that which is furnished by the writing itself." 1 Greenl. Ev. § 277. In *Lindley v. Lacey*, 17 C. B. N. S. 578, there was a written sale of the fixtures, furniture, and goodwill of a business. The seller was indebted to one Chase, who had entered an action against him. The written contract contained a clause authorizing Lacey, the buyer, "to settle the case of *Chase v. Lindley*." The plaintiff was permitted to prove that there was a distinct and separate promise by Lacey, in consideration of the plaintiff's signing the agreement, that he, the defendant, would pay the debt to Chase; the court saying that this was a distinct collateral agreement, not inconsistent with the written contract, and in fact constituting the consideration or condition on which Lindley executed the written agreement. In *Ayer v. Ball Mfg. Co.* 147 Mass. 46, a written order for goods, signed by the lawyer only, set forth the kind of goods, and the price, and contained stipulations for rebates. It was held that the writing was not intended to set forth the whole contract of the parties, and that evidence might be given of a parol contemporaneous contract by the seller to advertise the goods as inducing cause of the purchase. To the same effect are *Honney v. Morrill*, 57 Me. 868; *Morgan v. Griffith*, L. R. 6 Exch. 70; *Singer Mfg. Co. v. Norwath*, 108 Ind. 834; *Basshor v. Forbes*, 86 Md. 154; *Wels v. Rhodius*, 87 Ind. 1, 44 Am. Rep. 747. In some cases evidence of a parol contemporaneous agreement has been permitted to be proved, even though its effect was to vary, change, or reform the written agreement. In *Erskine v. Adeane*, L. R. 8 Ch. App. 756, the landlord executed a written lease, in which he reserved the right to keep game on the leased land. The tenant was permitted to recover damages for breach of contemporaneous oral agreement on the part of the landlord to kill some of the game. But in such cases it is said the oral agreement must be clearly and indisputably and precisely established. *Thomas v. Loose*, 114 Pa. 35; *Cullmans v. Lindsay*, 114 Pa. 166. This seems to be upon the principle of reforming the written agreement, and it may be doubted whether the evidence would be competent at law, in those jurisdictions in which legal and equitable proceedings are yet distinct. But if the parties have reduced their contract to writing in all its parts, it is not competent to add to its terms by extrinsic evidence; and the presumption is that a

formal written contract was intended by the parties, nothing to the contrary appearing on its face, to contain their whole agreement. In *Langdon v. Langdon*, 4 Gray, 186, one Goodenow received the note sued on from the payee thereof, and executed the following writing: "Received a note [describing it] for which I am to collect and account to the said payee the sum of \$110 when the note is collected, or return said note back to said payee, if I choose." After notice that the note was held by Goodenow, the maker paid the same to the payee. Goodenow sued on the note in the name of the payee for his use, and on the trial offered parol evidence of conversations had between the payee and himself, tending to explain and qualify the writing, and to show what the parties intended thereby. The court held the evidence incompetent, saying: "This paper, though called a receipt, and beginning with the word 'received,' is not a receipt for money, within the rule allowing a receipt to be controlled or explained by parol evidence. It was a written instrument stating the terms on which the possession of the note was intrusted to Goodenow." *Parker v. Morrill*, 98 N. C. 382, presented circumstances much like those of the present case. In that case, on a settlement between a court ward and her guardian, a release was executed in consideration that the guardian should invest a certain sum—agreed to be the balance due by him—in lands in his own name as trustee for the separate use of the ward. This the guardian did. After his death the ward brought an action to recover a balance claimed to be due in addition to the sum named in the release. The plaintiff alleged that the guardian in truth had in lands at the time of the release \$2,500 belonging to her, but represented that he only had \$1,500; that upon the guardian's agreement to invest this sum for the plaintiff, as stated in the written agreement, and that he would by his last will settle other property upon her, the plaintiff agreed to release him; and that he had died, not having made the provision in his will as stipulated. Evidence of the agreement to make provision by will for the plaintiff was excluded, the court saying: "When the parties to a contract in writing thus refer in it to matters constituent of it, it must be taken that the whole of the material parts of such matters are mentioned, nothing to the contrary appearing; and parol evidence will not be received to contradict, add to, take from, or modify what the parties have thus put in writing." The subject is fully discussed with great clearness by Judge Finch, in *Elghmie v. Taylor*, 98 N. Y. 288. The recitals of the conveyance now under consideration show very clearly that the minds of the parties were directed to the precise matter to which their negotiations referred. It was a settlement of a sum due by Mrs. Irving that was in view, and the language of the writing, while consisting perfectly with their understanding, when applied to this matter, is incapable of being so enlarged as to include the release of the general liability of the guardian, without importing a new element into the contract. No more precise and accurate statement of the rule has been made than that contained in the opinion of Judge Campbell in *Cooke v. Blackburn*, 58 Miss. 587, that: "Where parties

80 L. R. A.

embody their mutual agreements in a formal written instrument, it must be taken as containing all they then desired to preserve the evidence of, and that it is not competent afterwards, in a trial at law, to add to or subtract anything from it, by parol evidence of something which it should have contained or omitted." While the present proceeding is in chancery, the pleadings do not seek a reformation of the instrument, nor suggest any circumstances that would entitle the defendant to that relief. The same rule is therefore applicable as would be in a legal action. The appellant's contention that the rule excluding oral evidence to vary the terms of the contract cannot be applied here because her testator was not a party to the contract, is answered by the fact that the claim she asserts is under the contract. If appellant is a stranger to the contract, while she is not bound, she can take nothing by it. If she claims under the contract, she must take under and according to its terms. The first guardian's bond was not discharged by the second one, directed to be given when the ward's estate was augmented by a new inheritance. *McWilliams v. Norfleet*, 60 Miss. 987. The appellant cannot assign for errors matters which affect other defendants who refuse to join in the appeal. Code, § 4373.

We find no error in the decree, and it is affirmed.

J. A. SHINGLEUR & COMPANY *et al.*,
Appts.,
v.
WESTERN UNION TELEGRAPH COMPANY.

(73 Miss. 1080.)

A mistake in a telegram directing an agent to sell property, in reliance on which he makes a contract for such sale in his own name and not binding on the principal, will not give the latter a right of action, where he voluntarily carries out the contract after notice of the mistake, in order to protect his agent, instead of leaving the latter to his remedy against the telegraph company.

(June 3, 1896.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Hinds County in favor of defendant in an action brought to recover damages for defendant's negligence in changing a telegram which had been delivered to it for transmission. *Affirmed.*

Plaintiffs were cotton brokers and had 500 bales of cotton for sale; they delivered a cipher message to defendant directed to their agents in Boston authorizing a sale at 8½ cents per

NOTE.—The decision in the above case, while somewhat unusual, is clearly based on the theory that the sender of a telegram has a right of action against the company for damages sustained on account of errors in the transmission of the message. On this point, see *Western U. Tele. Co. v. Adams* (Tex.) 6 L. R. A. 844; *Milliken v. Western U. Tele. Co.* (N. Y.) 1 L. R. A. 281; *International Ocean Tele. Co. v. Saunders* (Fla.) 21 L. R. A. 810 and (limiting the right) *Western U. Tele. Co. v. Wood* (C. C. App. 5th C.) 21 L. R. A. 706.

pound; the company altered the word which signified 8½ so that as delivered it meant 8¼; the agents entered into a contract at that price and plaintiffs considering themselves bound by the contract delivered the cotton under it, thereby losing \$470.

Further facts appear in the opinion.

Messrs. Calhoun & Green, for appellants:

Prior to the Constitution of 1890 declaring telegraph companies common carriers and liable as such, it was held that the telegraph company was liable for an injury resulting from the delivery of an altered message.

Western U. Teleg. Co. v. Allen, 66 Miss. 555.

The declaration that a telegraph company owed and performed a duty to the public in the reception and transmission of messages brings it clearly within the principle applied to common carriers, that it is contrary to public policy to permit a stipulation limiting liability for negligence, or for a smaller amount than the real injury.

Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 1011, 45 Am. Rep. 428; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1017; *Southern Exp. Co. v. Seide*, 67 Miss. 609.

Alexander v. Western U. Teleg. Co. 66 Miss. 161, 3 L. R. A. 71; *Western U. Teleg. Co. v. Allen*, *supra*; and *Western U. Teleg. Co. v. Clifton*, 68 Miss. 307,—all arose prior to the Constitution of 1890, and under these the principle of defendant's liability is established.

See also *Gray, Communication by Telegraph*, §§ 104 *et seq.*

But the case at bar is governed by § 195, Const. 1890, whereby telegraph companies are declared to be common carriers and liable as such.

The settled construction of the law of common carriers in this state at the time of the promulgation of the Constitution was that they could not stipulate by special contract against damages caused by their own negligence.

Chicago, St. L. & N. O. R. Co. v. Moss, and *Chicago, St. L. & N. O. R. Co. v. Abels*, *supra*.

That the telegraph company was a foreign corporation is immaterial.

Paul v. Virginia, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Fire Assn. of Philadelphia v. New York*, 119 U. S. 110, 30 L. ed. 342; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Runyan v. Coster*, 89 U. S. 14 Pet. 129, 10 L. ed. 886; *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 595, 10 L. ed. 311; *Sutherland, Stat. Constr.* § 471, p. 618; *Louisiana Bank v. Williams*, 46 Miss. 624.

Either party injured can recover.

Gray, Communication by Telegraph, § 104, and cases; *Western U. Teleg. Co. v. Allen*, 66 Miss. 549; *Daughtery v. American U. Teleg. Co.* 75 Ala. 170, 51 Am. Rep. 435.

The rule of liability should be enforced in favor of the sender.

Rose's Case, *Allen, Teleg. Cas.* p. 337.

Nor does it avail if the message was in cipher. *Southern Exp. Co. v. Seide*, 67 Miss. 609; *Alexander v. Western U. Teleg. Co.* 66 Miss. 173, 3 L. R. A. 71; *Daughtery v. American U. Teleg. Co.* 75 Ala. 168, 51 Am. Rep. 435; *Western U. Teleg. Co. v. Fatman*, 78 Ga. 285, 54 Am. Rep. 877; *Western U. Teleg. Co. v. McLaurin*, 70 Miss. 26; *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 883.

Messrs. Mayes & Harris for appellee.

30 L. R. A.

Whitfield, J., delivered the opinion of the court:

The first contention of appellee is that the sender does not make the telegraph company his agent in such sense that it renders him liable to the sendee in case an altered message is delivered to the sendee. The negative of this proposition is maintained by the English courts, which hold that the liability of the telegraph company arises out of the contract, and hence that the sendee, not being in privity with the company, can never sue the company.

Playford v. United Kingdom Electric Teleg. Co. *Allen, Teleg. Cas.* 437; *Henkel v. Pape*, *Id.* 567. This view is also urged with great clearness and power in *Gray, Communication by Telegraph*, §§ 63, 104 *et seq.*, and in *Bigelow, Torts*, pp. 621-626, but the strongest reasoning in support of this view which we have found in any case, English or American, is in *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 660, decided in 1889. This case contains an exhaustive review of the authorities, and holds that the minds of the parties in case of an altered message have never met, and that neither can be bound to the other unless the telegraph company is the agent of the sendee, and this is repudiated on principle and authority. The English view, in so far as it predicates the right of the sendee to sue on contract alone, leads to one very manifestly unjust result, to wit, that since the sendee cannot sue the company (as held in *Playford's Case*, *supra*), nor the sender (as held in *Henkel's Case*, *supra*), he is remediless. According to what is called the "American doctrine" (*Gray, Communication by Telegraph*, § 104, note 3; *Thompson, Electricity*, § 426), the affirmative of the proposition under discussion is maintained; representative among the cases so holding being *Rose's Case*, *Allen, Teleg. Cas.* p. 337, in which case the principal was disclosed, and the agent not bound. In *De Rutte v. New York, A. & B. Electro-Magnetic Teleg. Co.* 30 How. Pr. 408, it was held that the party interested in the despatch, whether sender or sendee, was the one who really contracted with the company, and that such person could sue in contract. In *Dryburg's Case*, 35 Pa. 298, 78 Am. Dec. 388, the supreme court held that the company was the agent of both sender and sendee (upon very unsatisfactory reasoning), and hence either could sue in contract.

Turning from this view of the right of the sendee to sue the company in contract, and putting the right to sue on the ground that, in case of delivery of an altered message, upon which the sendee has acted to his damage, the sendee's right to sue is in tort for the injury to him, the wrong and the consequent damages, we find this view clearly and universally upheld by the American authorities. *Gray, Communication by Telegraph*, § 78; *Thompson, Electricity*, §§ 437, 428, 430, 448; *Dryburg's Case*, *supra*; *Shawwood's Opinion*; *Rose's Case*, *Allen, Teleg. Cas.* p. 340; *Bigelow, Torts*, pp. 614 *et seq.*; *Pepper v. Western U. Teleg. Co.* 87 Tenn. 554, 4 L. R. A. 660. *Rose's Case*, in so far as it held that the sendee could not sue in that case because the principal was the injured party, and could himself alone sue, is said by Mr. Gray (sec. 78) to be open to criticism, and is held unsound on that ground by

other authorities. Mr. Thompson suggests in section 424 an additional reason why the sendee should be allowed to sue, and in section 427 puts the matter on the true ground. He says: "The true view, which seems to sustain the right of action in the receiver of the message, or in the person addressed, where it is not delivered, is one which elevates the question above the plane of mere privity of contract, and places it where it belongs upon the public duty which the telegraph company owes to any person beneficially interested in the message, whether the sender, or his principal, where he is agent, or the receiver, or his principal, where he is agent." This is the doctrine of this court in *Allen's Case*, 66 Miss. 549. This review of the authorities will sufficiently indicate how the courts, in dealing with this purely modern agency, have been groping their way in their search for the true ground of liability, uselessly conjuring up analogies that do not exist, and misled by the apparent applicability of the doctrine of agency as existing between private individuals. This view last above given discards absolutely the doctrine of agency, as applicable between private individuals, as suiting the case of the liability of the telegraph company to sendee or to sender. It treats the telegraph company as an institution *sui generis*, a system unto itself, an independent transmitter of intelligence, an independent contractor, or (as Mr. Bigelow and Judge Sherwood most simply and best put it) as an independent principal. It is liable to the sendee in tort alone, as principal. It is liable to the sender in contract or in tort, as principal. It is not liable to either as agent in any proper sense. *Western U. Teleg. Co. v. Brown*, 108 Ind. 538; *Western U. Teleg. Co. v. Hope*, 11 Ill. App., at page 289, and authorities cited. "Whether the agency is general or special, the authority delegated governs in all questions arising between the principal and his agent, out of the agency. Whether the agency is general or special, a principal is responsible to a third person dealing bona fide with his agent, either where the agent acts within the scope of the authority actually conferred upon him by the principal, or where the agent acts within the scope of the authority which he has been held out by the principal as possessing. But whether the agency is general or special, a principal is not responsible to a third person dealing with his agent, where that agent acts beyond the scope of both these authorities. . . . It is clear that a telegraph company is actually authorized by its employer to communicate a certain message (and a certain message) only. It is also clear it seems that it is not held out by him as possessing an authority to communicate any, as distinguished from a certain message." Gray, *Communication by Telegraph*, § 105. The delivery, therefore, of an altered message, is the delivery of a message which the company, neither as general nor special agent, had, or was held out as having, any authority to deliver; and the liability to the sender is that of an independent principal. It is perfectly obvious that the company is not the servant of the sender; the sender has no authority to control the company as to the manner in which it does the act. Gray, *Communication by Telegraph*, §§ 104 et 30 L. R. A.

seq. The steady growth of this view is shown by the statutes of all the states imposing upon the company the duty of receiving and sending messages for all persons, with the various regulating provisions embraced in these statutes; thus making what had been, prior to such statutes, merely the duty imposed by the law from the peculiar nature of the business of telegraphy, after such statutes, a statutable public duty. And now we have gone the further and completer step indicated in section 195 of the Constitution of 1890; all which enforces the justness of the declaration in *Western U. Teleg. Co. v. Allen*, 66 Miss. 555: "The courts then [in the early history of the English law, dealing with the common carriers], as the courts now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public."

It is also true that the sender may sue the company in tort as well as in contract, in the case of an altered message. Mr. Cooley says: "In many cases an action as for a tort or an action as for a breach of contract may be brought by the same party, on the same state of facts." Cooley, *Torts*, pp. 103, 104. So Mr. Bigelow says: "The fact that a contract existed, and was broken at the same time and by the same act or omission by which the plaintiff's cause of action arose, is only one of the accidents of the situation. The defendant owed, in respect of the same thing, two distinct duties; one of a special character to the party with whom he contracted, and one of a general character to others. . . . The duty, therefore, does not grow out of the contract, but exists before and independently of it." Again: "What does it mean when it is said that even this contractee [appellant here answering to the contractee] may sue in tort or in contract for his damages? Certainly nothing, unless that the original duty which the defendant, before the contract, owed to all alike still survives, even towards his contractee." And without prolonging this opinion on this point, it is sufficient to refer to Bigelow, *Torts*, pp. 586, 587, 614, and to the elaborate discussion in *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382. But, whether looked at in the light of contract or of tort, plaintiff's case comes inevitably to this: That plaintiff, at a time when he knew fully of the mistake in the telegram, and when he could have delivered or refused to deliver the cotton, and when the minds of plaintiff and of Appleton, Dickson & Co. never having met, and there being, as to this sale, no contract made between them, plaintiff was, therefore, under no legal liability to deliver the cotton, nevertheless, acting on the "sentiment" that he would himself protect his agent (already fully protected by the liability in tort of the company to such agent), and maintain his business credit, did deliver the cotton, anyhow, and having done so, now seeks to hold the company,—can the action be maintained? The only case holding that the action can be maintained, so far as our research has gone, is *Western U. Teleg. Co. v. Shottor*, 71 Ga. 767, 768. The facts in this case are identical with those in *Pepper v. Western U. Teleg. Co. supra*,

where the court, after an elaborate review of the American authorities, says: "As already stated, Mr. Gray not only shows that upon principle the English holding is the correct one, but, while listing the cases above mentioned as indicating a contrary view, he states that most of them are *dicta*. There is but one case referred to by him, . . . which directly adjudges that the sender of a telegram is bound to the receiver by the terms of the message as negligently altered by the company. That is the case of *Western U. Teleg. Co. v. Shotton*, 71 Ga. 760. With great respect for the high character of that learned tribunal, we cannot approve the line of reasoning pursued, nor the conclusion therein reached. . . . The learned judge delivering the opinion places his conclusion in part on the fact that in England the government has charge of the telegraph lines, and upon the idea that a merchant, or business man, would lose credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message as delivered. We cannot see how the fact of governmental charge of the telegraph system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the government. . . . Nor can we see how the commercial standing of the sender who remits his correspondent to his recourse on the telegraph company for such injury as may result from the erroneous message can be affected." So the case of *Harrison v. Western U. Teleg. Co.* (Tex.) 10 Am. & Eng. Corp. (as, 600, is a case directly in point, and stronger in its facts for plaintiff than this case. There plaintiffs, in Texas, wired Latham, Alexander & Co., in New York, to purchase 100 bales of cotton. As delivered, the telegram directed them to sell 100 bales. Latham, Alexander & Co. sold without plaintiff's knowing anything of the error, and a loss resulted of \$129.50, which later, on settlement with Latham, Alexander & Co., plaintiffs paid, claiming they were compelled to pay. The court says: "The mistake which occasioned the loss . . . was a mistake of the telegraph company, and not of plaintiffs, and plaintiffs were not bound to pay or make good said loss to Latham, Alexander & Co.

and if they made such payment, were not responsible or liable therefor: they could not hold the company liable over to them for repayment." This, too, in a case where the loss had been sustained without knowledge on plaintiff's part of the error. To the same effect are *Henkle v. Pape*, Allen, Teleg. Cas. p. 567, and *Verdin v. Robertson*, Id. 697. It is not necessary to go so far, and we express no opinion as to what would be the law had plaintiff here not known, before he acted, all about the mistake. In *Pepper's Case* and *Shotton's Case* the goods had been shipped to the place of residence of the sendee, and loss to some extent was inevitable to the sendee. As held in *Pepper's Case*, it was the plaintiff's duty, in view of all the circumstances, to make the loss as small as possible, and that he could then recover for such loss, as being himself to that extent—a loss thus legally sustained—the injured party. Mr. Gray correctly remarks (*Communication by Telegraph*, p 185, note) that *Shotton's Case* put the liability upon a "moral and not a legal, ground." Here appellant had shipped no goods, had incurred no legal liability, had merely to refuse to comply with the terms of a contract he had never made, and remit Appleton, Dickson & Co. to their adequate remedy against the company. His payment was voluntary and gratuitous, and cannot, on any sound or just principle, create for him a cause of action where none existed prior to such voluntary payment. The declaration in this case recognizes the fact that plaintiff would have to be legally bound to Appleton, Dickson & Co., and alleges that plaintiff was so bound. Appellant, in his testimony, says: "There was no agreement that they (Appleton, Dickson & Co.) could or could not enforce a contract with us to deliver cotton where there was a mistake in a telegram. That is a mere business obligation, and we had to fulfil or lose our credit. It was a moral sentiment. It was to our interest to do it." Under the view we have taken, it becomes unnecessary to consider the stipulations in the telegram, nor section 195 of the Constitution. *The judgment is affirmed.*

Cooper, Ch. J., dissents.

NEBRASKA SUPREME COURT.

AMERICAN WATERWORKS COMPANY, *Pfif. in Err.*,

v.

STATE of Nebraska *ex rel.* W. L. WALKER.

(.....Neb.....)

*1. A demurrer to a pleading admits the truth of the facts well pleaded, for the purpose

*Headnotes by RAGAN, C.

NOTE.—For power to compel corporation to furnish water supply to individual, see *note* to *Rushville v. Rushville Nat. Gas Co.* (Ind.) 15 L. R. A. 321; also *Wood v. Auburn* (Me.) 29 L. R. A. 376, 30 L. R. A.

of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader.

2. A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use, and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant, for water furnished, the same price as

charges every other inhabitant for the same service under the same or similar conditions.

3. Such a corporation has a right to adopt all such rules for its convenience and security as are reasonable and just, and to decline to furnish water to any inhabitant who refuses to comply with such reasonable rules.

4. For such a rule to be valid and enforceable, it must, in itself, be lawful and just, and must not be discriminatory in its nature.

5. A rule of a private corporation engaged in supplying a city and its inhabitants with water in pursuance of a franchise granted by such city provided: "Water rents will be due and payable on the first days of January and July of each year, in advance, at the company's office. . . . If not paid within thirty days after they fall due, the water will be turned off, and not turned on again until all back rents are paid, including a charge of \$1 for turning the water off and on." Held, that so much of said rule as required a patron in default for water rents to pay \$1 as a condition precedent to his right to again be furnished with water was unreasonable and discriminatory and void.

6. A patron of such corporation failed to pay his water rent on July 1. His default continued to August 17, when the corporation shut the water off from the patron's premises. August 18 the patron tendered the corporation the water rent fixed by its rules from July 1 to December 31, and requested that the water might again be turned on, but refused to pay the \$1 required by the rule for turning on and off the water. Held, (1) that the corporation would be compelled, by mandamus, to turn the water on the patron's premises; (2) that the inability of the corporation to collect the \$1 from the patron by the ordinary process of law, because of the latter's insolvency, afforded no excuse to the corporation for not supplying the patron with water.

7. State v. Nebraska Teleph. Co. 17 Neb. 126, 53 Am. Rep. 404, followed and reaffirmed.

(October 15, 1895.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in a mandamus proceeding to compel defendant to furnish relator with water for use at his residence. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Connell & Ives for plaintiff in error.

Mr. Charles A. Goss, for defendant in error:

A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom.

Branham v. San Jose, 24 Cal. 585; *Smith v. Henry County*, 15 Iowa, 385; *Griggs v. St. Paul*, 9 Minn. 246; *Bliss*, Code Pl. 2d ed. 418.

The courts reserve the right to say, in any particular case, whether or not the rules are reasonable.

Shiras v. Ewing, 48 Kan. 170; *Shepard v. Milwaukee Gaslight Co.* 6 Wis. 539, 70 Am. Dec. 479; 11 Wis. 234, 15 Wis. 318, 82 Am. Dec. 679.

When a dispute arises between a gas company and a consumer, the latter is entitled to have his rights investigated by the courts, and in 80 L. R. A.

such case an injunction will be granted to prevent the cutting off of the supply of gas until the cause can be tried.

Sickles v. Mahattan Gaslight Co. 64 How. Pr. 33.

The *Webster Telephone Case* is in point.

State v. Nebraska Teleph. Co. 17 Neb. 126, 53 Am. Rep. 404.

Ragan, C., filed the following opinion:

The state of Nebraska, upon the relation of W. I. Walker, filed an application in the district court of Douglas county against the American Waterworks Company (hereinafter called the "water company") for a peremptory writ of mandamus to compel the water company to furnish the relator water for use at his residence in the city of Omaha. The relator alleged in his application that the water company was a corporation doing business in the city of Omaha; that it was a common carrier and furnisher of water to the city of Omaha and its inhabitants; that it had secured a franchise from the city, in and by which it had the right to use the streets, alleys, and public grounds thereof for laying its water mains and erecting its hydrants; that it was in the possession and use of the streets and alleys of said city for the purpose of supplying said city and its inhabitants with water; that the relator occupied a dwelling on Davenport street, in said city, near which dwelling the water company had a water main; that the water company had furnished him water at his premises since the 10th of February, 1890, at the rate charged by the water company, of \$11 per year; that he had always paid his water rents promptly on the 1st days of January and July in each year, as required by the rules of the company until the 1st day of July, 1891; that his water rents were paid up to the last day mentioned; that on said date there became due to the water company \$5.50, being the water rents from that date to the 1st day of January, 1892; that he was absent from home on the 1st of July, 1891, and remained absent until about the 1st of August of that year; that, by reason of the press of business, he forgot, after his return, to pay his water rents, until the 17th day of August, when the water company shut the water off from his residence; that on the 18th of August he went to the office of the water company, in the city of Omaha, and tendered it the rent from the first day of July, 1891, to the 1st day of January, 1892, and requested the water company to turn on the water at his residence; and that the water company refused to do so. The answer of the water company to the relator's application, so far as material here, alleged that the relator had actual notice of the rules and regulations of the water company; that these rules were reasonable; that they were proper and necessary for carrying on its business and supplying water to its customers, and were enforced against all citizens and customers alike; that among such rules and regulations was the following: "Water rents will be due and payable on the first days of January and July of each year, in advance, at the company's office. . . . If not paid within thirty days after they fall due, the water will be turned off, and not turned on again until all back rents and charges are paid, in

cluding a charge of \$1 for turning the water off and on;" that the relator refused to comply with this rule by paying the sum of \$1, as required by it, for turning the water off and on at his premises; and that relator was insolvent. The relator submitted a demurrer to this answer, which the district court sustained, and issued the writ prayed for.

1. It is insisted that the judgment of the district court is wrong because the answer alleges, and the demurrer admits, that the charge of \$1 demanded of relator for turning off and on the water was a reasonable charge; that the rule itself was reasonable and proper, and necessary to the carrying on of respondent's business; and that relator was insolvent. But we are of opinion that all these averments of the answer, except the one as to the insolvency of the relator, are mere conclusions of law. "A demurrer to a pleading admits the truth of the facts well pleaded, for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law therein set out." *Smith v. Henry County*, 15 Iowa, 385; *Branham v. San José*, 24 Cal. 585.

2. The allegation in the answer that the relator was insolvent, we think, tendered an immaterial issue, as will be seen further on.

3. The water company, though a private corporation, by virtue of the franchise granted it by the city of Omaha, and its user of such franchise, became affected with a public use. By accepting such franchise, and entering upon the business of furnishing water to the city and its inhabitants, it assumed a public duty. That duty was to furnish water at reasonable rates to all the inhabitants of the city, and to charge each inhabitant of the city, for water furnished, the same price it charged every other inhabitant for the like service under the same or similar conditions. *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 386; *Shepard v. Milwaukee Gas Light Co.* 6 Wis. 539, 70 Am. Dec. 479. And we have no doubt but that the water company had and has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just; and to refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But such rules must be reasonable, just, lawful, and not discriminatory. *Shepard v. Milwaukee Gas Light Co. supra*. Is the rule pleaded by the respondent in its answer a reasonable and valid one, with which relator must have complied, as a condition precedent to his right to compel respondent to furnish him water? It is to be observed that the rule provides that, if default shall be made in the payment of water rents, the water shall be turned off, and that it will not be again turned on until two things are done: First, all back rents and charges paid; second, the payment of \$1 extra for turning off and on the water. As the relator in this case tendered to the respondent the water rents from the 1st of July, 1891, to the 1st of January, 1892, the question whether that part of the rule requiring one in default for water rents to pay such rents, as a condition precedent to his right to have the water turned on again, is not necessarily involved in this case. The precise inquiry here

is whether that part of the rule is reasonable which requires one in default for water rents, in order to procure the use of water, to pay this charge or penalty of \$1. To be valid and enforceable, it must, in itself, be lawful and reasonable and just, and it must not discriminate between persons similarly situated. The reasonableness and validity of the rules of private corporations which had assumed the performance of public duties, or by reason of the acceptance of franchises, and engaging in the business of serving the public by supplying it with water, gas, etc., had thereby become public-service corporations, have been frequently before the courts; but, so far as we know, no court has suggested a test for determining whether or not the rules of such a corporation are reasonable. In *Tacoma Hotel Co. v. Tacoma Light & W. Co.* 8 Wash. 816, 14 L. R. A. 969, 28 Pac. Rep. 517, it is said in the syllabus: "A rule of a water company which requires water rates to be paid quarterly, adds a penalty of 5 per cent in case of default of payment for ten days, and provides that after a default for fifteen days the water shall be shut off from the premises, is a reasonable regulation." In *Williams v. Mutual Gas Co.* (Mich.) 18 N. W. Rep. 236, it was held: "The requirement of a deposit of money to guarantee the payment of the price of the gas used is not an unreasonable one, and the company may discontinue furnishing the gas unless complied with." In *Shiras v. Ewing*, 48 Kan. 170, it was held that "a rule of a water company, giving it the right to shut off water from the premises of a consumer who wastes it, is reasonable." In *People v. Manhattan Gas Light Co.* 45 Barb. 136, the right of a gas company to refuse to furnish a customer with gas until he paid his past-due gas bills was affirmed. In *Shepard v. Milwaukee Gas Light Co. supra*, the reasonableness of several rules of the gas company was considered. The ninth rule authorized the company, by its inspector, to have free access, at all times, to buildings and dwellings, to examine the whole apparatus, and for the removal of the meter and service pipe. The court said: "This regulation is too general and cannot be upheld, or at least a party cannot be required to subscribe to it, to entitle him to be furnished with gas." Rule 14 provided that the company should have the right at any time to shut off the gas, if it should find it necessary to do so to protect itself from fraud. The court said: "Here the company assumes the whole power to decide upon the question of abuse or fraud, either in fact or anticipation without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case, but upon the most urgent emergency. . . . It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud as the law provides for individuals." Rule 16 provided that, after the admission of gas into the fittings, they should not be disconnected or opened, either for alteration or repairs or extensions, without a permit from the company, which might be obtained at the company's office free of expense, "and any . . . person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby."

The court said: "It is not to be allowed that the gas company can impose penalties in this way, or make the submission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without its assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so." In *Gas Light Co. of Baltimore v. Colliday*, 25 Md. 1, it was held that the gas company could not refuse to furnish gas to a person because he refused to pay a former gas bill, or a bill contracted for gas used on other premises. See *Lloyd v. Washington Gas Light Co.* 1 Mackey, 381; *New Orleans Gas Light Bkg. Co. v. Paulding*, 12 Rob. (La.) 878. In *Sickles v. Manhattan Gas-Light Co.* 64 How. Pr. 38, a dispute arose between the gas company and the consumer; and it was held that the latter was entitled to have his rights investigated by the courts, and that the company would be enjoined from cutting off the gas until a trial of the case could be had. In *Rockland Water Co. v. Adams*, 84 Me. 472, a rule of the water company provided that users of water should be liable to pay rent for the whole year, whether they actually used it for that length of time or not, and the payments for water should be made yearly in advance; and this rule was held to be unreasonable and void.

In *State v. Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404: "During the year 1888, Webster had a telephone in his office, but the telephone company, for some reason, neglected to furnish him a list of its subscribers residing in the city of Lincoln, and other cities and villages reached by its telephone lines. When Webster's telephone rent became due, he refused to pay for that part of the time he had used the telephone, and during which he had been deprived of the list of subscribers. A dispute arose between Webster and the telephone company and the company removed its telephone from Webster's office. Some time after that, Webster requested the telephone company to put a telephone in his office, and tendered the company the sum charged its regular subscribers for such work. It does not appear that Webster tendered his telephone rents in advance, nor that the rents were payable in advance, but it appears from the report of the case that Webster was financially able to pay the telephone rents when they matured. The telephone company refused to put in the telephone, alleging that the telephone had been removed from Webster's office by reason of his refusal to pay his rents. Webster then applied to this court for a mandamus to compel the telephone company to furnish him a telephone, and the court awarded the writ. The court said: "It is insisted that the conduct of the relator—the refusal of Webster to pay the rent of the telephone which had been removed from his office—now relieves respondent from any obligation to furnish the telephone. We cannot see that the relations of the parties to each other growing out of their past transactions, can have any influence upon their rights and obligations in this action. If relator

is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone company has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not, alone, relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action." This case is decisive of the question under consideration, and also disposes of the issue of relator's insolvency, tendered by the answer of respondent. In the *Webster Telephone Case* respondent refused to furnish a telephone because it alleged that Webster was indebted to it for the rent of a telephone previously furnished to and used by him, and which had been removed because of his failure to pay the rent. In the case at bar the water company refused to furnish relator water because it alleged that the relator was indebted to it for having turned off the water from his premises while he was in default in paying his water rent. The cost and expense of turning off and on the water for a patron enters into, and forms a part of, the semi-annual water rent paid in advance by such patron under the rules of the company. It would be unjust to permit the water company to exact payment for this service a second time. An enforcement of the rule would compel a citizen who had once made a default in his water rent, though he afterwards paid all such rents, to pay a greater price or rate for water than that paid by another citizen for the same water under the same conditions.

We reach the conclusion that the respondent in this case has shown no sufficient excuse for not furnishing the relator with water, and that the rule invoked by it to stay the process of the courts is unreasonable and discriminatory in its nature, and therefore void.

The judgment of the District Court is affirmed.

Irvine, C., did not sit.

Petition for rehearing denied January 10, 1896.

Barney MCGINN, *Pff. in Err.*,

v.

STATE of Nebraska.

(.....Neb.....)

*1. The term "calendar month" is used in section 24, article 3, of the Constitution in the sense in which it was understood prior to the adoption of that instrument.

*2. The term "calendar month," whether employed in statutes or contracts, and

*Headnotes by POST, J.

NOTE.—As to the meaning of the word "month," see also *Guaranty Trust & S. D. Co. v. Buddington* (Fla.) 12 L. R. A. 770, and *note*.

As to computation of time in general, see brief annotation to *Pearce v. Denver* (Colo.) 6 L. R. A. 541; *Kuhn v. Brownfield* (W. Va.) 11 L. R. A. 700; *Merritt v. Mora* (D. C. E. D. Pa.) 11 L. R. A. 724.

not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.

3. The provision of section 895 of the Code of Civil Procedure, for the exclusion of the first day in computing the time within which an act is to be done, was intended to establish a uniform rule, applicable alike to the construction of statutes and to matters of practice.

4. The penalty for murder in the first degree was, by section 8 of the Criminal Code, as originally adopted, death by hanging. By an act approved April 8, 1893, passed without an emergency clause, said section was so amended as to provide that the penalty for the crime therein denounced shall be death by hanging or imprisonment for life, in the discretion of the jury. The legislature of 1893 having adjourned on the 8th day of April of that year.—Held, that said amendment took effect on the 9th day of July following.

5. When the defendant in a criminal prosecution is adjudged guilty of the crime charged, and subsequently procures a reversal of the judgment of conviction on account of error by the trial court, he will be held to have waived his right to object to further prosecution on the ground that he has been once put in jeopardy.

6. While the practice of confining persons convicted of capital offenses from the date of sentence until the day of execution has prevailed from time immemorial, such confinement is not a part of the penalty, although a necessary incident thereof, and the power of the court in that regard does not rest upon any positive provision of statute.

(November 19, 1893.)

ERROR to the District Court for Douglas County to review a judgment convicting defendant of murder. Reversed.

The facts are stated in the opinion.
Messrs. Mahoney, Minahan, & Smith and Estelle & Hoeppner, for plaintiff in error:

It was the duty of the jury, in the event that they should find the defendant guilty of murder in the first degree, to state in their verdict whether the punishment should be death or imprisonment for life.

Laws 1893, chap. 44.

If the act of 1893 governs this case, the pretended verdict returned is no verdict and cannot support a sentence.

In the absence of constitutional or legislative restrictions, all laws take effect as soon as they are approved.

Cooley, Const. Lim. 6th ed. p. 187.

Section 24, article 8, of our Constitution provides that "no act shall take effect until three calendar months after the adjournment of the session at which it passes, unless in case of an emergency, etc."

The session at which the act of 1893 was passed adjourned April 8, 1893, and the act in question therefore took effect on the 9th day of July, 1893.

Glore v. Hare, 4 Neb. 181; 1 Bl. Com. 61; 2 Bl. Com. 141; *Migotti v. Colvill*, L. R. 4 C. P. 30 L. R. A.

Div. 233; *Lacon v. Hooper*, 6 T. R. 224; Bis Cont. § 1339.

At the time of the adoption of our Constitution the term "month," used alone, would have been ambiguous, and it was to avoid that ambiguity that the phrase "calendar month" was used. The ambiguity pertains, however, wholly to the length of the period and not to the time when it commenced running.

The provision itself very clearly indicates when the period should commence running. It says, "three calendar months after the adjournment of the session." This can only mean three calendar months after the day of adjournment.

French v. English, 7 Neb. 124; *Roesink v. Barnett*, 8 Neb. 146; *Glore v. Hare*, 4 Neb. 181; *Brown v. Williams*, 84 Neb. 876; *Horn v. Miller*, 20 Neb. 98; *Snyder v. Warren*, 2 Cow. 518, 14 Am. Dec. 519; *Gross v. Fowler*, 21 Cal. 893; *Savings & L. Soc. v. Thompson*, 32 Cal. 847; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 187, 35 L. ed. 116; *McGuire v. Ulrich*, 2 Abb. Pr. 28 (1855); *Com. v. Maxwell*, 27 Pa. 444; *Lester v. Garland*, 15 Ves. Jr. 248; *Hardy v. Ryle*, 9 Barn. & C. 608; *Migotti v. Colvill*, L. R. 4 C. P. Div. 233; *Castle v. Burditt*, 3 T. R. 628; *Young v. Higgon*, 6 Mees. & W. 49; *Watson v. Pears*, 2 Campb. 294 (1809); *South Staffordshire Tramways Co. v. Sickness & Acci. Assur. Assn.* [1891] 1 Q. B. 403; *Raddcliffe v. Bartholomew* [1892] 1 Q. B. 161.

On the 29th of December the court pronounced sentence on plaintiff in error, by the terms of which he was to be confined in the county jail of Douglas county, in solitary confinement until the 6th of April, 1894, and then hanged. Under that sentence he was taken to the jail of Douglas county and kept in solitary confinement until the following day, when he was brought into court, the sentence vacated and a new sentence pronounced, fixing his execution at a later date, and his imprisonment at solitary confinement for a different period. This second sentence was absolutely without authority, for the reason that the punishment prescribed by the first being partly borne, the power of the court over it was exhausted.

Re Fuller, 84 Neb. 581; *People v. Kelley*, 79 Mich. 320; *People v. Meservey*, 76 Mich. 228; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872; *Re Jones*, 85 Neb. 499; *People v. Kelley*, *supra*; *State v. Gray*, 37 N. J. L. 368; *King v. Ellis*, 5 Barn. & C. 395; *Re v. Bourne*, 7 Ad. & El. 58; *Shepherd v. Com.* 2 Met. 419; *Stevens v. Com.* 4 Met. 860; *Christian v. Com.* 5 Met. 580; *McDonald v. State*, 45 Md. 90.

That the judgment of December 29, whereby the prisoner was sentenced to be hanged on the 6th of April, 1894, is erroneous, is not open to debate. Section 503 of the Criminal Code contains the following provision: "When any such conviction is of an offense the punishment whereof is capital, at least 100 days shall intervene between the date of such sentence and judgment, and the day appointed for the execution thereof." The sentence pronounced gave the prisoner but 97 days intervening between the day of sentence and the date fixed for execution.

This error did not occur during the trial; it was an error in the pronouncing of the judg-

ment itself. A new trial, therefore, could not cure it.

King v. Ellis, 5 Barn. & C. 896; *Rez v. Kenworthy*, 1 Barn. & C. 711; *Rez v. Bourne*, 7 Ad. & El. 58 (1837); *Shepherd v. Com.* 2 Met. 419 (1841); *Stevens v. Com.* 4 Met. 860 (1842); *Christian v. Com.* 5 Met. 580 (1843); *People v. Taylor*, 8 Denio, 91; *Shepherd v. People*, 25 N. Y. 406; *State v. Gray*, 87 N. J. L. 863; *McDonald v. State*, 45 Md. 90.

Since there is no legal verdict under the law in force at the time of the homicide, the court can have no authority to pronounce sentence.

Plaintiff in error was informed against, was placed on trial, and was put in jeopardy of his life.

To put him on trial again before another jury would be a second jeopardy unauthorized by the law.

State v. Shuchardt, 18 Neb. 454; *Conklin v. State*, 25 Neb. 784; *Jackson v. State*, 102 Ala. 76.

Messrs. A. S. Churchill, Attorney General, **George A. Day**, and **George H. Hastings**, for defendant in error:

The effect of legislation has led to the common use of the word "month" in the sense of the calendar month, without the use of the word "calendar."

The word calendar then must have been used in the Constitution for a different purpose than simply to designate a solar month. The purpose and intent were that three months as enumerated in the calendar should elapse after the month in which the session of the legislature which passed the act should adjourn.

See the law dictionaries, and 11 Am. & Eng. Enc. Law, p. 789; *Roesink v. Barnett*, 8 Neb. 146; *State v. Babcock*, 22 Neb. 87; *State v. Yellow Jacket Silver Min. Co.* 5 Nev. 480; *Steinle v. Bell*, 12 Abb. Pr. N. S. 172; *Guaranty Trust & S. D. Co. v. Buddington*, 27 Fla. 215, 12 L. R. A. 771; *Re Tyson*, 18 Colo. 482, 6 L. R. A. 472; *Ronkendorf v. Taylor*, 29 U. S. 4 Pet. 361, 7 L. ed. 886.

Weight should be given the opinion of General Hastings upon this question.

Bishop. Written Laws, § 89; *United States v. Lytle*, 5 McLean, 9; *Mathews v. Shores*, 24 Ill. 27; *United States v. Moore*, 95 U. S. 760, 25 L. ed. 568; *Brown v. United States*, 118 U. S. 568, 28 L. ed. 1079; *Hahn v. United States*, 107 U. S. 402, 27 L. ed. 527; *Cooper Mfg. Co. v. Ferguson*, 118 U. S. 727, 28 L. ed. 1187; *Stuart v. Laird*, 5 U. S. 1 Cranch, 299, 2 L. ed. 115; *Peabody v. Stark*, 16 Wall. 240, 21 L. ed. 811; *Atty. Gen. v. Glasser*, 102 Mich. 896, 406; *Westbrook v. Miller*, 56 Mich. 151; *Malonny v. Mahar*, 1 Mich. 26; *Britton v. Ferry*, 14 Mich. 53; *Continental Imp. Co. v. Phelps*, 47 Mich. 299; *Pease v. Peck*, 59 U. S. 18 How. 595, 15 L. ed. 518; Sedgw. Stat. & Const. L. 214; *Coutant v. People*, 11 Wend. 511; *Jackson v. Washington County*, 84 Neb. 688.

The error in the first sentence occurring after the trial would not necessitate a new trial.

The supreme court would have set aside the sentence and remanded the case for sentence.

State v. Shea, 95 Mo. 85; *Lacy v. State*, 15 Wis. 14; *State v. Shaw*, 23 Iowa, 316; *State v. Nicholson*, 14 La. Ann. 798; *Daniels v. Com.* 7 Pa. 871; *King v. Kenworthy*, 1 Barn. & C. 80 L. R. A.

711; *Reg. v. Holloway*, 5 Eng. L. & Eq. 310; *Benedict v. State*, 12 Wis. 314; *Beale v. Com.* 25 Pa. 11; *People v. Riley*, 48 Cal. 549; *State v. Child*, 42 Kan. 611; *State v. Redman*, 17 Iowa, 329; *State v. Knouse*, 83 Iowa, 365; *State v. Tweedy*, 11 Iowa, 350; *People v. Olweil*, 28 Cal. 456; *Sutcliffe v. State*, 18 Ohio, 469, 51 Am. Dec. 459; *Dodge v. People*, 4 Neb. 220; *Bohanan v. State*, 18 Neb. 57, 53 Am. Rep. 791; *Vaughan v. State*, 83 Ala. 55; Chitty, Crim. L. 722; *Dodge v. People*, 4 Neb. 226.

If the latter sentence is void for want of jurisdiction in the court, then the sentence must be set aside and the prisoner remanded for sentence, unless reversed and a new trial granted upon some other ground.

Re Jones, 35 Neb. 459.

The sentence is valid.

State v. Tresevant, 20 S. C. 863, 47 Am. Rep. 840; *State v. Hoyt*, 47 Conn. 542, 36 Am. Rep. 89; *Kinder v. Territory*, 1 Wyo. Terr. 112.

There is nothing in the statute requiring the party convicted of murder in the first degree to be sentenced to confinement at all.

The statute fixes no such punishment in capital cases, and the retention of the prisoner in the county jail of Douglas county was but an incident to the punishment pronounced by law, and formed no part of the sentence.

King v. Price, 6 East, 823; *King v. Leicestershire*, 1 Maule & S. 442; *People v. Sadler*, 3 N. Y. Crim. Rep. 471; *Com. v. Weymouth*, 3 Allen, 144, 79 Am. Dec. 776.

The record of a court may be changed or amended at any time during the same term of the court in which a judgment is rendered.

Co. Litt. 260; Comyns' Dig. Title *Record, F*; Bacon, Abr. title, *Sessions of Justices*; 2 Gabbett, Crim. L. 564; 1 Chitty, Crim. L. 722; *Reg. v. Fitzgerald*, 1 Salk. 401; *Turner v. Barnaby*, 2 Salk. 587; *King v. Price*, 6 East, 827; *King v. Leicestershire*, 1 Maule & S. 442; *Darling v. Gurney*, 2 Dowl. P. C. 101.

Upon due proof that some error has been made in drawing up the record, amendments have been allowed after the final entry of judgment and the adjournment of the court for the term.

Tilden v. Johnson, 6 Cush. 854; *Balch v. Shaw*, 7 Cush. 282; *Fay v. Wenzell*, 8 Cush. 815; *Stickney v. Davis*, 17 Pick. 169; *Rez v. Fletcher*, Russ. & R. C. C. 58; *Reg. v. Fitzgerald*, *supra*; *Com. v. Foster*, 129 Mass. 323, 23 Am. Rep. 826; *Brown v. Rice*, 57 Me. 57, 2 Am. Rep. 11; *Jobs v. State*, 28 Ga. 235; *Lee v. State*, 32 Ohio St. 115; 1 Chitty, Crim. L. 722; *King v. Price*, *supra*; *Ex parte Lange*, 85 U. S. 18 Wall. 168, 21 L. ed. 873; *Bassett v. United States*, 76 U. S. 9 Wall. 88, 19 L. ed. 548; *Miller v. Finkle*, 1 Park. Crim. Rep. 374.

A court of criminal jurisdiction may vacate or modify a judgment at the same term at which it is pronounced, and before the sheriff has proceeded to execute it.

State v. Redman, 17 Iowa, 329; *State v. Mead*, 4 Blackf. 809, 30 Am. Dec. 661; *Wright v. State*, 5 Ind. 527; *Marshall v. Com.* 5 Gratt. 668; *State v. Moran*, 7 Iowa, 236; *Wilson v. State*, 20 Ohio, 26; *Ray v. State*, 15 Ga. 223; *Webber v. State*, 10 Mo. 4; *State v. Sutton*, 4 Gill, 494; *Com. v. Halton*, 3 Gratt. 623; *Lawrence v. People*, 3 Ill. 414; *People v. Olcott*, 2 Johns. Cas. 801, 1 Am. Dec. 168; *Rez v. Kestle*,

1 *Ld. Raym.* 138, *Holt*, 141, *Comb.* 406; *Com. v. Percavi*, 4 *Leigh*, 696; *State v. Duncan*, 2 *McCord*, L. 80; 1 *Chitty, Crim. L.* 641; 1 *Bishop, Crim. L.* § 673; *State v. Callendine*, 8 *Iowa*, 288; *Ree v. Huggins*, 2 *Ld. Raym.* 1585; *Ree v. Burridge*, 3 *P. Wms.* 439; *Dodge v. People*, 4 *Neb.* 220; *State v. Redman*, 17 *Iowa*, 829; *State v. Knouse*, 33 *Iowa*, 865.

Post, J., delivered the opinion of the court:

The plaintiff in error, Barney McGinn, was at the September, 1898, term of the district court for Douglas county adjudged guilty of the crime of murder in the first degree, which judgment has been removed into this court for review by means of a petition in error, to which further reference will hereafter be made. The prisoner is by the information charged with feloniously and maliciously wounding with intent to kill one Edward McKenna, on the 29th day of July, 1898, from which he, the said McKenna, died two days later, on the 31st day of July. It is unnecessary to examine at length the evidence adduced in support of the allegations of the information. It is sufficient for the purpose of this investigation that the dates of the assault and the death of the deceased were proved as charged by the state. The jury, at the close of the trial, returned a general verdict of murder in the first degree, without assessing the penalty therefor, to which exception was taken both by way of motion for a new trial and in arrest of judgment, and which suggests the first questions presented for our consideration. Prior to the act approved April 8, 1898, entitled "An Act to Amend Section Three (3) of the Criminal Code . . .," the only penalty for murder in the first degree was death by hanging. But by section 1 of the act above mentioned, section 3 of the Criminal Code was so amended as to read thus: "And upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." By section 2 of said act the original section is repealed, with a saving clause in the following language: "Provided, however, that such repeal shall not be construed to apply to any offenses committed prior to the taking effect of this act nor shall the same affect any convictions or prosecutions held under said original section." *Sess. Laws* 1898, p. 886, chap. 44, § 2. The contention of counsel for the prisoner is that the act of 1898 took effect previous to the date charged in the information; hence the district court should have required the jury to fix the penalty, and that it accordingly erred in receiving the verdict over their objections. The constitutional provision which bears upon the subject is found in section 24 of article 8, as follows: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall by a vote of two thirds of all the members elected to each House otherwise direct." The twenty-third session of the legislature adjourned on the day the act in question was approved, to wit, April 8, 1893; therefore the precise question presented is, When did the constitutional period of three calendar

months after the adjournment of that session terminate? The term "month," at common law, whether employed in statutes or contracts, unless a different meaning was apparent from the context, was held to mean a lunar month of twenty-eight days, except in ecclesiastical affairs and as applicable to commercial paper. 2 *Bl. Com.* 141; *Bishop, Cont.* § 1839; *Migotti v. Coleill*, L. R. 4 C. P. Div. 283; *Lacon v. Hooper*, 6 T. R. 224; *Churchill v. Merchants' Bank*, 19 *Pick.* 533; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 189 U. S. 187, 35 L. ed. 116. In this country many of the earlier cases follow the rule of the common law. *Vide Ellis's Case*, 8 N. J. L. 286; *Loring v. Halling*, 15 *Johns.* 119; *Stackhouse v. Halsey*, 8 *Johns. Ch.* 74; *Redmond v. Glover*, *Dudley (Ga.)* 107. Later cases have, as a rule, construed the word "month," when it does not appear to have been used in a different sense, to mean a calendar month. *Glore v. Hare*, 4 *Neb.* 183; *Brown v. Williams*, 84 *Neb.* 876, and cases cited. In order to avoid the confusion arising from conflicting constructions of the term, thirty-five states and territories have by legislative enactment declared the term "month," when used without qualification, to mean a calendar month; and in England the common-law rule was abolished by statute in 1860 (13 & 14 *Vict. chap.* 21). It is said by counsel for the prisoner, referring to the facts of this case, that "the authorities without exception support our contention that the three calendar months should be computed as commencing to run on the 9th day of April and terminating on the 8th day of July." And as that proposition presents the issue to be determined, we will proceed to examine some of the cases cited as bearing upon the subject. In *Glore v. Hare*, *supra*, it was held that an appeal taken on the 22d day of August from a judgment rendered February 21 is not within the six months prescribed by the act governing appeals to this court. In *Brown v. Williams*, *supra*, a note executed on the 2d day of January was held within the exception contained in section 44 of the assignment law (*Comp. Stat. chap.* 6), being a debt created within nine calendar months previous to a general assignment made on the 2d day of October following. In *Snyder v. Warren*, 3 *Cow.* 518, 14 *Am. Dec.* 519, fifteen calendar months was computed from August 15, 1823, to November 15, 1823. In *McGuire v. Ulrich*, 2 *Abb. Pr.* 28, the statute required one month's notice to quit before suit brought. The notice was given April 18 and it was held that a calendar month had intervened before the commencement of the action, to wit, May 25. In *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co. supra*, the first publication of notice was made August 9, the answer day named being December 1 following. After computing the time at 114 days, the court says the time is "more than four lunar months, but eight days less than four calendar months."

We now come to a class of cases having a more direct bearing upon the question at issue. In *Com. v. Maxwell*, 27 *Pa.* 444, the statute provided that in case of vacancy in the office of judge of the common pleas, a successor should be chosen "at the first general election which shall happen more than three calendar

months after the vacancy shall occur." Act April 27, 1852, p. 465. The presiding judge died July 15, 1856, and the general election for that year occurred October 14. It was held that the statutory period had not intervened, and that the respondent, who was chosen at the election held on the day last mentioned, was not entitled to the office. In *Minard v. Burtis*, 88 Wis. 267, we observe this language: "It is also said that the notice was not given one calendar month before the action was commenced; that, having been given April 4, it would not be complete until June 1. We cannot adopt this view. If given the proper number of days before action brought, as contained in the calendar month in which it was given, as in this case, it was sufficient." The leading case of *Lester v. Garland*, 15 Ves. Jr. 248, arose under the will of Sir John Lester, providing that the testator's sister, Sarah Pointer, should, within six calendar months after his death, give security that she would not at any time intermarry with A, or that in case she did so intermarry, she would within six calendar months thereafter pay certain bequests therein made. The testator died January 12, and the security given July 12 was held to satisfy the requirement of the will, Grant, M. R., saying: "The question is whether the day of Sir John Lester's death is to be included in the six months or to be excluded. If the day is included she did not, if it is excluded she did, give the required security before the end of the last day of the six months: and therefore did comply sufficiently with the conditions." *Hardy v. Ryle*, 9 Barn. & C. 603, was an action against a justice of the peace for illegally detaining the plaintiff after the expiration of his term of imprisonment. The defendant relied upon a statute of limitations which required the action to be brought "within six calendar months after the act committed." The court, after a review of the authorities, says: "The question . . . depends upon this: whether the 14th day of December—the last day of the plaintiff's imprisonment—is to be included or excluded. . . . If it is to be included, the action was not commenced in time; if it is to be excluded, it was." *South Staffordshire Tramways Co. v. Sickness & Acci. Assur. Assn.* [1891] 1 Q. B. 402, was an action on a policy of insurance for twelve calendar months from November 24, 1888. It is said that November 25, 1887, was the first, and November 24 1888, the last day covered by the policy. And to the same effect are *Young v. Higgon*, 6 Mees. & W. 49; *Watson v. Pears*, 2 Campb. 294; *Radcliffe v. Bartholomew* [1892] 1 Q. B. 161; *Gross v. Fowler*, 21 Cal. 393; *Savings & L. Soc. v. Thompson*, 82 Cal. 347. But perhaps the most satisfactory of reported cases is *Migotti v. Colvill*, L. R. 4 C. P. Div. 238, which was an action against the governor of the Middlesex house of correction for false imprisonment. It appears that the plaintiff was on the 31st day of October sentenced to imprisonment for the period of one calendar month, and to the further term of fourteen days, to commence on the expiration of the first sentence. The decision turned upon the question when the first sentence terminated, and Lord Denman, after an exhaustive examination of the subject, con-

30 L. R. A.

cludes as follows: "On the whole, I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month is to be held to begin to run from the first moment of that day and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as in the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to expire at the last moment of its last day." The other judges, Cotton, Bramwell, and Brett, concur in separate opinions; the latter using the following language: "I am of opinion that the term a 'calendar month' is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar, and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one." It is true the precise question was not presented in every case cited, as the same result would, in some instances, have been reached by extending the period to the end of the month. But they are nevertheless instructive, as tending to sustain the assertion of counsel that in no case except in *Minard v. Burtis*, *supra*, was the rule applied by the district court contended for. The natural and necessary deduction from the authorities above cited is that the term "calendar month," as used in the Constitution, had, prior to the adoption of that instrument in 1875, received a definite interpretation, and is to be computed, not by counting days, but by looking at the calendar, and terminates with the day numerically corresponding to the day of its commencement, less one, in the following month; and such is evidently the sense in which it is employed in the Constitution.

The authorities are not, as will be observed, harmonious upon the question whether the first day—in this instance, the day of the adjournment of the legislature—is to be included in the prescribed period. That question is, however, not an open one in this state. Indeed, it is clear that section 895 of the Code of Civil Procedure, providing that "the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last," was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice. *Monell v. Tervilliger*, 8 Neb. 860; *McGavock v. Pollock*, 13 Neb. 585; *Spencer v. Haug*, 45 Minn. 231. It follows that the period of three calendar months after the adjournment of the legislature of 1898 terminated at midnight of the 8th day of July of that year. It follows, too, that the act amendatory of the Criminal Code relating to the penalty for murder in the first degree was the law of the state on the 29th day of July, and should have governed in the trial of this cause. The attorney general, however, relies upon a practical construction of the pro-

vision under consideration adverse to the view above stated. That contention has for its basis the opinion of Hon. George H. Hastings, attorney general, in response to an inquiry addressed to him by the secretary of state on the 29th day of April, 1891. We have examined with care the opinion referred to, but are unable to accept the conclusion of the learned author, for reasons already appearing. A practical exposition of a constitutional provision by the officers charged with its execution is, as said by us in *State v. Holcomb*, 46 Neb. 88, entitled to great weight, and will, in case of doubt or ambiguity, especially when long acquiesced in, generally be adopted by the courts. But that rule can have no application to the case at bar. There is not alone an absence of evidence tending to prove that the construction of the attorney general was acquiesced in by the executive officers or the people of the state, but it is a fact, verified by the records of this court, and of which we are required to take notice, that the question has, ever since the date of the opinion mentioned, been the subject of judicial controversy.

Of the many questions presented during the able and instructive arguments with which we have been favored in this case, it is necessary to notice two only, in addition to those already examined, and which are both included in the proposition that it is our duty to discharge the plaintiff in error, instead of remanding the cause for trial *de novo*. It is asserted by counsel that the plaintiff has been once in jeopardy, within the meaning of the bill of rights, and that the trial then had is a bar to further prosecution for the crime charged. If the question were an open one, to be determined by the application of fundamental principles, the argument of counsel could not be lightly disregarded. Indeed, we can conceive of no course of reasoning which does not lead logically to the conclusion contended for. As said by Mr. Bishop (1 Bishop, Crim. L. 1044): "The court is the power that brings the jeopardy upon him [the prisoner]; and, when the Constitution declares that this power shall not put him in jeopardy twice, it is a mockery to say that it may bring him into as many jeopardies as it will, provided it violates the law each time." But the author, at sections 998 and 999 of the same volume, admits the contrary to be the firmly established rule. To attempt an examination of the cases holding that the accused in a criminal prosecution, by procuring a reversal of the judgment of conviction, waives his right to object to a second trial on the ground that he has been once put in jeopardy, would be a work of supererogation. It is sufficient that the question has been definitely determined by this court in *Bohanan v. State*, 18 Neb. 57, 58 Am. Rep. 791. See also *United States v. Harman*, 68 Fed. Rep. 472. The other contention, that the prisoner should be discharged, is based upon the following facts: On the 29th day of December, 1893, the district court, on overruling the motion for a new trial, pronounced its judgment, by which the prisoner was to be executed on the 6th day of April following, and in the meantime remain in solitary confinement in the jail of Douglas county. On the next day, to wit, December 30th, he was again brought into court, and an

order made setting aside the judgment previously entered, and a second sentence pronounced, by which April 13, 1894, was named as the day of execution. The second sentence, like the first, provided that the prisoner should, from the date thereof until the day of his execution, be confined in the jail of Douglas county. It is argued that the second sentence is not irregular merely, but absolutely void, for the reason that the punishment prescribed by the first had been suffered in part by the prisoner, and the power of the court over the subject thereby exhausted. In the brief of counsel for the prisoner his position is thus tersely stated: "The solitary confinement imposed upon the prisoner was as much a part of his sentence as was his execution. The only authority that the sheriff had to imprison him during that day and until called into court the following day was the sentence pronounced on the 29th of December. All previous commitments had expired. Their purpose had been served. The judgment and sentence of the court were the only authority on which the imprisonment could be legally justified from the 29th to the 30th of December, and the imprisonment of plaintiff in error under that sentence from the 29th to the 30th of December was the infliction of a part of the punishment covered by the sentence, and a part, too, that the court had legal authority to impose." That argument, although plausible, is not convincing. The first sentence was, it is conceded, irregular, the time intervening between the date thereof and the day of execution being less than 100 days, as prescribed by law. Crim. Code, § 503. But, having reached the conclusion that the verdict was also irregular, and should have been set aside on the motion of the prisoner, the power of the district court to correct its judgment in prosecutions for felonies will not now be examined. This court in *Re Fuller*, 34 Neb. 581, held that the term of imprisonment of one sentenced to the penitentiary runs from the date of sentence, and not from the date of his delivery to the warden. But that was a construction of section 518 of the Criminal Code, and not involving the question now under consideration. It is by section 547 provided, in substance, that the death penalty shall be inflicted in the immediate vicinity of the jail, in an inclosure to be prepared under the direction of the sheriff. Although the confinement of the prisoner from the time of sentence until the day of his execution is a practice which has prevailed from time immemorial as a necessary incident to the judgment, it is, strictly speaking, no part thereof, and the power of the court in that regard does not rest upon any positive provision of statute. The precise question appears to have been seldom raised, and the cases cited cannot be said to sustain the proposition contended for. In *People v. Meservoy*, 76 Mich. 223, as well as *People v. Kelley*, 79 Mich. 320, the sentence was imprisonment in the penitentiary, and, in accordance with the rule adopted by this court in *Fuller's Case*, *supra*, was held to have commenced on the day it was imposed. In *Re Tyson*, 18 Colo. 482, 6 L. R. A. 472, the statute of 1889 provided that all persons convicted of crimes punishable by death should be delivered to the warden of the penitentiary,

and by him kept in solitary confinement until the day of execution. The statute in force at the time of the homicide, like ours, provided merely that every person convicted of murder in the first degree should suffer death. Tyson, having been convicted of murder in the first degree, was delivered to the warden under the act of 1889, whereupon he sought his discharge by means of a writ of habeas corpus, alleging that the provision for solitary confinement was in the nature of an *ex post facto* law. In disposing of that contention the court says: "Aside from this, the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object." The same statute was before the Supreme Court of the United States in *Re Medley*, 184 U. S. 160, 88 L. ed. 885, where it was held, but without controverting the proposition that the imprisonment is not a part of the sentence proper, that the provision therein for solitary confine-

ment was in the nature of an *ex post facto* law as to crimes previously committed. We are satisfied with the reasoning of the Colorado court, and do not hesitate to adopt the conclusion reached by it, so far as applicable to the facts of the case before us.

Although it has been our endeavor to examine the merits of the question presented, we must not be understood as conceding it to be an open one at this time. We have, on the other hand, no reason to doubt the soundness of the practice long prevailing in this state, by which one committed to the penitentiary is, by procuring a reversal of the judgment of conviction, considered to have waived his right to insist that the partial execution of the sentence is a bar to further prosecution. And such, while not expressly decided, logically follows from the rule asserted in *Bohanan v. State*.

The judgment is reversed and the cause remanded for further proceedings by the district court.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

ST. LOUIS TRUST COMPANY *et al.*,
Appts.,
v.

W. H. H. RILEY, by Next Friend.

(70 Fed. Rep. 82.)

Preference over a mortgage debt in respect to the receiver's earnings cannot be given a claim for damages caused by negligence of a street-railway company before the appointment of the receiver, in a suit to foreclose the mortgage on the street-railway property.

(September 30, 1896.)

APPPEAL by the representatives of the mortgage bondholders from an order of the Circuit Court of the United States for the Eastern District of Arkansas rendered in the suit by the St. Louis Trust Company *et al.* against the Capital Street-Railway Company *et al.* for the foreclosure of certain mortgages, which order directed the receivers to pay out of the earnings of the property in their possession the amount of a judgment which had been recovered by petitioner against the owners of the mortgaged property. *Reversed*.

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Messrs. U. M. Rose, W. E. Hemingway, and G. B. Rose for appellants.

Mr. William G. Whipple, for appellee:

Being clearly within the conventional period of six months prior to the appointment of the

receiver, this claim was properly directed to be paid out of the earnings of the railroad during the receivership.

Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 389; *Hale v. Frost*, 99 U. S. 389, 25 L. ed. 419; *Miltenberger v. Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co. v. Souther*, 107 U. S. 591, 27 L. ed. 488; *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 696; *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 484, 29 L. ed. 963; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. ed. 825; *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 882; *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 34 L. ed. 879; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.* 187 U. S. 171, 34 L. ed. 625; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 34 L. ed. 1028; *Kneeland v. Bass Foundry & M. Works*, 140 U. S. 592, 35 L. ed. 548; *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 36 L. ed. 632; *Thomas v. Western Cur. Co.* 149 U. S. 95, 37 L. ed. 663; *Re Dexterioville Mfg. & Boom Co.* 4 Fed. Rep. 873; *Hiles v. Case*, 14 Fed. Rep. 141; *Dow v. Memphis & L. R. R. Co.* 20 Fed. Rep. 260; *Central Trust Co. v. Texas & St. L. R. Co.* 22 Fed. Rep. 185; *Central Trust Co. v. East Tennessee, V. & G. R. Co.* 30 Fed. Rep. 898; *Farmers' Loan & T. Co. v. Kansas City, W. & N. W. R. Co.* 53 Fed. Rep. 183; *Phinney v. Augusta & K. R. Co.* 63 Fed. Rep. 923; *Central Trust Co. v. Charlotte, C. & A. R. Co.* 65 Fed. Rep. 268; *Frazier v. East Tennessee, V. & G. R. Co.* 83 Tenn. 138; *Clay v. East Tennessee & V. R. Co.* 6 Heisk. 421; *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 389;

NOTE.—As to receiver's liability for damages caused by his negligent operation of road, see note to *Turner v. Cross* (Tex.) 15 L. R. A. 282.

As to power to prevent receiver of a mere private corporation to create liens on its property, see *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* (C. C. S. D. Ill.) 16 L. R. A. 603, and note, also *Hanna v. State Trust Co.* (C. C. App. 8th C.) *ante*, 201.

Gilman v. Illinois & M. Teleg. Co. 91 U. S. 603, 28 L. ed. 405; *Galveston, H. & H. R. Co. v. Coudrey*, 78 U. S. 11 Wall. 459, 20 L. ed. 199; *Parkhurst v. Northern C. R. Co.* 19 Md. 472, 81 Am. Dec. 648; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1.

Every railroad mortgagee takes subject to an implied understanding that current expenses are to be paid out of current income.

Burnham v. Bowen, 111 U. S. 776, 28 L. ed. 596; *Gilman v. Illinois & M. Teleg. Co.* and *Fosdick v. Schall*, *supra*; *Hale v. Frost*, 90 U. S. 389, 25 L. ed. 419; *Williamson v. Washington City, V. M. & G. S. R. Co.* 83 Gratt. 624; *Gilbert v. Washington City, V. M. & G. S. R. Co.* 83 Gratt. 645.

It cannot be maintained that the same policy and doctrine are not equally applicable to street railways.

1 Wood, *Railway Law*, p. 2; *Price v. State*, 74 Ga. 378; *Katsenberger v. Lawo*, 90 Tenn. 238, 13 L. R. A. 185; *Birmingham Mineral H. Co. v. Jacobs*, 93 Ala. 187, 12 L. R. A. 880; *Johnson v. Louisville City R. Co.* 10 Bush, 281; *St. Louis Bolt & I. Co. v. Donohoe*, 3 Mo. App. 559; *Brown v. Buck*, 54 Ark. 453; *Chicago v. Evans*, 24 Ill. 35; *Hestonville, M. & F. Pass. R. Co. v. Philadelphia*, 89 Pa. 219.

Sanborn, Circuit Judge, delivered the opinion of the court:

Is a claim for damages caused by the negligence of a street-railway company, a mortgagor, five months before a receiver was appointed in a suit to foreclose a mortgage upon its property and income, entitled to be preferred to the mortgage debt in payment out of the earnings of the railroad during the receivership? This is the question presented in this case. It arises in this way. The Capital Street-Railway Company, a corporation, which owned and operated a street railway in Little Rock, in the state of Arkansas, mortgaged its property, franchises, and income on April 2, 1890, to secure the payment of certain bonds it issued. On April 1, 1893, it made default in the payment of interest on these bonds, and on April 19, 1893, upon a proper bill for the foreclosure of the mortgage, a receiver of its property and income was appointed by the court below, and that court subsequently appointed a coreceiver. This corporation had, on March 8, 1891, leased its railroad to the City Electric Street-Railway Company, a corporation, which thereafter operated the railway under the lease. On December 1, 1891, the latter company mortgaged its property, franchises, and income to secure the payment of certain bonds which it issued. On June 1, 1893, it made default in the payment of interest on these bonds, and on a bill for the foreclosure of this mortgage the same court directed the receivers of the Capital Street-Railway Company to hold the property and income of the electric company under this bill. In December, 1892, \$9,000 was paid by the electric railway company on the interest secured by its mortgage. On October 31, 1892, W. H. H. Riley, the appellee, was injured by the negligence of a motorman of the electric company in operating his car, and on June 19, 1894, he recovered a judgment for \$5,000 on account of this negligence against both these corporations.

30 L. R. A.

On an intervening petition in the foreclosure suits, and upon the answers of the mortgagees, which disclosed the foregoing facts, the court below held that the claim of the appellee upon the earnings of the property of the railway companies during the receivership was superior to that of the mortgagees, and ordered the receivers to pay it in preference to the mortgage debts. This decision and order are assigned as error.

The proposition that the negligence of a mortgagor may create a claim, and secure that claim by an equitable right to its property and income superior to the lien of a mortgage of the same property and income which it made and recorded years before, is not without interest to those who are accustomed to uphold the obligations of contracts and the validity of contract rights. The counsel for the appellee argues that damages for the negligence of a railroad company are necessary expenses of the operation of its railroad, and rests his proposition chiefly upon the following decisions of the Supreme Court, and particularly upon this quotation from the opinion delivered by Chief Justice Waite in *Fosdick v. Schall*, 90 U. S. 235, 252, 253, 25 L. ed. 339, 343, 348: "When [railroad] companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgage is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For, even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken or something equivalent done, the whole earnings belong to the company and are subject to its control. . . . We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings

which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors, to whom such debts are due, have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights."

It is an interesting fact that these remarks of Chief Justice Waite, upon which courts are constantly urged to base orders for the preference of unsecured to secured creditors in the distribution of the incomes earned during receiverships, and of the proceeds of foreclosure sales, did not lead to the preference of any such claim in that case. The decision in *Fosdick v. Schall* was that a claim of the vendor of cars, which had subsequently reclaimed them under its contract, for their rent for six months immediately prior to the receivership, which was by the contract to be paid as a part of the purchase price of the cars, had no equitable claim upon the proceeds of the mortgaged property superior to that of the mortgage bondholders, and the decree of the circuit court which gave it such a preference was reversed. 99 U. S. 255, 25 L. ed. 843.

In *Fosdick v. Southwestern Car Co.* 99 U. S. 256, 25 L. ed. 844, the Supreme Court held that the claim of a vendor of cars upon the proceeds of the foreclosure sale was superior to that of a mortgagee, where the cars had been sold under the foreclosure, and the mortgagee had thus received the benefit of their value.

In *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, 25 L. ed. 844, an order directing the payment, in preference to the mortgage debt, of an amount found due on account of the purchase of locomotives that had been used by the railway company before the receivership, but had afterwards been reclaimed by the vendor, was reversed by the Supreme Court.

In *Hale v. Frost*, 99 U. S. 889, 892, 25 L. ed. 419, 420, that court held that a claim for current supplies, furnished to the machinery department of a railroad company just preceding the receivership, was entitled to a preference over the mortgage debt in payment out of the income earned during the receivership, but that a claim for material for construction purposes was entitled to no such preference.

In *Mittenberger v. Loganport, C. & S. W. R. Co.* 106 U. S. 286, 808, 811, 27 L. ed. 117, 126, 127, the Supreme Court sustained a decree which directed the receivers operating the mortgaged property to pay, out of the proceeds of its sale, the arrears due for operating expenses for a period not exceeding ninety days prior to the appointment of a receiver, and an amount not exceeding \$10,000, to several connecting lines of railroad in settlement of ticket and freight balances, and for materials and re-

pairs, that had accrued in part more than ninety days before the bill for foreclosure was filed.

In *Union Trust Co. v. Souther*, 107 U. S. 591, 598, 595, 27 L. ed. 488, 489, 490, it was held that the court appointing a receiver might properly order him, before paying the mortgage debt, to pay out of the proceeds of the mortgaged property all amounts owing by the railroad company for labor or supplies that accrued in the operation and maintenance of the railroad within six months prior to the appointment of the receiver, in a case in which the receiver had used the income in making permanent repairs and improvements upon the property, instead of discharging these claims.

In *Burnham v. Bowen*, 111 U. S. 776, 783, 28 L. ed. 596, 598, the decision was that, in a case in which the income of the receivership had been diverted to pay for the right of way, the court might charge a claim for fuel necessarily furnished to and used by the railroad company in operating its railroad within twelve months prior to the receivership upon the income or proceeds of the mortgaged property in preference to the mortgage debt; but Chief Justice Waite added: "We do not now hold, any more than we did in *Fosdick v. Schall* or *Huidekoper v. Hinckley Locomotive Works*, 99 U. S. 258, 260, 25 L. ed. 844, 845, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In *Union Trust Co. v. Illinois Midland R. Co.* 117 U. S. 484, 29 L. ed. 968, it was held that the wages of employees for a limited time before the receivership might be preferred to the mortgage bondholders in the distribution of the proceeds of the mortgaged property.

In *Porter v. Pittsburgh Bessemer Steel Co.* 120 U. S. 649, 671, 30 L. ed. 830, 839, the decision was that claims for the construction of a railroad were entitled to no lien upon the proceeds of the property of the railroad company superior to that of a prior recorded mortgage.

In *Penn. v. Calloun*, 121 U. S. 251, 30 L. ed. 915, a claim of a bank for money which was borrowed and used by the mortgagor to pay current expenses and pressing debts, shortly before the foreclosure, was refused a preference in payment over the mortgage debt.

In *Union Trust Co. v. Morrison*, 125 U. S. 591, 612, 31 L. ed. 825, 831, a preference in the distribution of the proceeds of the sale of mortgaged property was allowed to a surety, who had executed a bond for an injunction that enabled the railroad company to prevent the sale of its rolling stock on execution, two years and ten months before the receiver was appointed; but Mr. Justice Bradley in the opinion quoted the remark of Chief Justice Waite in *Burnham v. Bowen*, which appears above, and declared that it was not the intention of the court to decide anything in conflict with that declaration.

In *St. Louis, A. & T. H. R. Co. v. Cleveland*.

C. C. & I. R. Co. 125 U. S. 658, 678, 31 L. ed. 832, 886, the Supreme Court refused to make the amount due for the rental of track used by the mortgagor before the appointment of the receiver a preferred claim to that of the bondholders upon the proceeds of the mortgaged property. In the opinion Mr. Justice Matthews thus enumerates the claims that may be preferred in the distribution of the income: "It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on the mortgage bonds." Page 678, 125 U. S., and page 887, 31 L. ed.

In *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 296, 301, 33 L. ed. 905, 908, it was held that one who had constructed a dock upon the land of the railroad company at its instance, after the execution and recording of its mortgage, had no equitable claim superior to that of the mortgage bondholders on the property or its proceeds.

In *Kneeland v. American Loan & T. Co.* 186 U. S. 89, 96, 34 L. ed. 379, 383, the Supreme Court refused to prefer to the mortgage debt a claim for the rental of rolling stock for the three months immediately prior to the filing of the bill for foreclosure, in the distribution of the proceeds of the sale of the property, although the rolling stock was used during that time by a receiver of the railroad company appointed on a creditors' bill.

In *Morgan's L. & T. R. & S. Co. v. Texas C. R. Co.* 137 U. S. 171, 198, 34 L. ed. 625, 635, that court held that a claim for money loaned and used to pay operating expenses and interest and to keep the company a going concern was entitled to no preference in payment out of the income or proceeds of the mortgaged property over the mortgage debt.

In *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 508, 34 L. ed. 1023, 1026, it was held that the claim of an attorney for services that inured to the benefit of the mortgagee was entitled to a preference over the claim of the latter in payment from the proceeds of the foreclosure sale, but that a claim for services that did not inure to the benefit of the mortgagee was entitled to no such preference.

In *Thomas v. Western Car Co.* 149 U. S. 95, 110, 112, 37 L. ed. 663, 668, 669, a preference in the distribution of the proceeds of a mortgaged railroad was denied to a claim for the use of cars for six months immediately prior to the receivership.

From this brief review of the decisions of the Supreme Court bearing upon this question, we think these propositions may properly be deduced:

First. There are certain claims against a mortgaged railroad company, accruing before the appointment of a receiver, which are entitled to a preference over a prior mortgage debt in payment out of the earnings of the railroad during the receivership and out of the proceeds of the sale of its property.

Second. It is an indispensable element of every such claim that it is founded upon property furnished or services rendered to the mort-

gagor which either preserved or enhanced the value of the security of the mortgage debt, and thereby inured to the benefit of the mortgagee.

Third. Claims of this character have been given a preference over the mortgage debt by these decisions on one of two grounds,—either on the ground that the mortgage is a lien on the net, and not on the gross, income of the railway company, and where that part of the income that is applicable to the payment of current expenses of operation, proper equipment, and necessary improvements has been diverted to pay interest on the mortgage debt or to otherwise benefit the security, and this diversion has left claims for these expenses unpaid, it is the province and duty of the chancellor to restore the diverted fund by taking an equal amount from the earnings of the railway company during the receivership, and applying it to the payment of these claims in preference to the mortgage debt (*Fosdick v. Schall*, *Burnham v. Bowen*, *St. Louis, A. & T. H. R. Co. v. Cleveland*, *C. C. & I. R. Co., Toledo, D. & B. R. Co. v. Hamilton*, and *Morgan's L. & T. R. & S. Co. v. Texas Cent. R. Co.* *supra*); or on the ground that the payment of the claims is necessary to preserve the mortgaged railroad, and to keep it a going concern. It is indispensable that the operation of a railroad be uninterrupted in order that the travel and traffic of the public may be accommodated, and in order that the franchises of the railroad company may be preserved from forfeiture. Hence the wages of employees, who might otherwise cease from their work, the amounts due to connecting lines of railroad that might otherwise cease their business relations with the managers of the mortgaged property, and the claims for supplies and materials necessary to keep the mortgaged railroad a going concern, may, in proper cases, be paid out of the earnings during the receivership, or out of the proceeds of the sale of the mortgaged property, in preference to the mortgage debt. *Mittenberger v. Logansport, C. & S. W. R. Co., Union Trust Co. v. Souther*, and *Union Trust Co. v. Illinois Midland R. Co.*, *supra*.

But a claim for damages for the negligence of the mortgagor lacks the indispensable element of a preferential claim. It is not based upon any consideration that inures to the benefit of the mortgage security. Wages, traffic balances, and supplies produce or increase income, and preserve the mortgaged property. Repairs and improvements increase the value of the security of the bondholders. But the negligence of the mortgagor neither produces an income nor enhances the value of the property. The wages, traffic balances, and claims for materials and supplies accrue under and pursuant to the contract between the mortgagor and mortgagee that the former will properly operate the railroad. The damages for negligence accrue in violation of that contract, and for a breach of the duty of the mortgagor to operate the railroad carefully. Many preferential claims are for property or services that were necessary to make or keep the railroad a going concern, necessary to its operation. The negligence that is the foundation of this claim did not tend to keep the railroad in operation, but, if repeated and continued, would inevitably stop it. It was not necessary, but

was deleterious, to its operation. For these reasons this claim for damages cannot, in our opinion, be allowed a preference over the mortgage debt in payment out of the income earned by the receivers appointed under the bills for the foreclosure of these mortgages.

The orders appointing these receivers did not require them to pay claims of the character of that which we have been considering out of the income or proceeds of the mortgaged property in preference to the mortgage debts. The cases cited by counsel for appellee in which such an order was made do not rule this case. *Dow v. Memphis & L. R. Co.* 20 Fed. Rep. 260; *Central Trust Co. v. Texas & St. L. R. Co.* 22 Fed. Rep. 185.

There is a statute in Arkansas which provides in terms that all persons injured by any railroad through actionable negligence shall have a lien on the railroad and appurtenances paramount to that of all other persons interested in it, whether their interest is prior in time to the injury or not. *Sand. & H. Dig. (Ark.)* § 6251. But we have not considered that statute, or its legal effect, because at the final hearing in the court below counsel for the appellee stated that he did not rely upon it further than to show the policy of the state in that regard, and the circuit court evidently did not consider it.

The order appealed from must be reversed, with costs, and it is so ordered.

CALIFORNIA SUPREME COURT

Re ESTATE of Ozias WALKER, Deceased.

(.....Cal.....)

An inadvertent mistake by a witness to a will in writing testator's surname with his own initials when attempting to sign his name as a witness makes his signature insufficient under a statute requiring witnesses to the will.

(*McFarland, Garoutte, and Van Fleet, JJ., dissent.*)

(December 10, 1895.)

A PPEAL by the legatees under the will of Ozias Walker, deceased, from a judgment of the Superior Court for Butte County granting the petition of Lydia A. Lane to revoke the probate of the will. *Affirmed.*

The facts are stated in the opinion.

Messrs. C. G. Warren and F. C. Lusk for appellant.

Messrs. William H. Schooler and Rear-dan & White, for respondent:

In *Martin's Estate*, 58 Cal. 532, this court said: "We are not at liberty to hold that the legislature intended any one of these requirements to be of greater or less importance than the others. If we may omit one, why not either of the others."

See also *Billing's Estate*, 64 Cal. 427; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85, 40 Am. Dec. 228.

Every one of these four requisites, in contemplation of the statute, is to be regarded as essential as another; there must be a concurrence of all to give validity to the act, and the omission of any is fatal.

Remsen v. Brinkerhoff, 26 Wend. 825, 37 Am. Dec. 258.

Each witness must sign his name.

Re O'Neil's Will, 91 N. Y. 520; *Grabill v. Barr*, 5 Pa. 441, 47 Am. Dec. 418.

A signature in any method not permitted by the statute would be as fatal to the validity of the paper as a will as would the entire absence of the signature of the testator.

Martin's Estate, 58 Cal. 532; *Re McCabe*, 68 Cal. 520.

NOTE.—For signature by mark or cross, see note to *Re Guilfoyle's Will* (Cal.) 22 L. R. A. 370. 30 L. R. A.

"C. G. Walker" was not the name of the witness; it was then something intended by the witness to represent his name, or it was not. If it was intended as something to represent his name, then it was equivalent only to a mark or cross.

Goods of Redding, 2 Rob. Eccl. Rep. 3.

If it is considered as a mark or cross, it is insufficient, because not attested as required by § 17, C. C. P. and § 14, Civil Code.

Oliver's Goods, 2 Spinks' Eccl. & Adm. Rep. 57; *Re O'Neil*, 91 N. Y. 521; *Martin's Estate*, *supra*; *Rand's Estate*, 61 Cal. 474; *Billing's Estate*, 64 Cal. 427; *Chaffee v. Baptist Missionary Convention*, 10 Paige, 85, 40 Am. Dec. 228.

Henshaw, J., delivered the opinion of the court:

Appeals from the judgment revoking the probate of a will and from the order denying a motion for a new trial. The facts disclosed by the evidence without conflict are as follows: The will of Ozias Walker, deceased, was written by C. G. Warren, the attorney at law of the testator, and was executed in the presence of H. C. White and C. G. Warren, who were requested by the testator to attest, as witnesses, its execution. The requirements of the statute were complied with in all respects saving that the witness C. G. Warren, in signing his name as a witness at the end of the will, inadvertently wrote the name "C. G. Walker," thus employing his own initials but the testator's surname. Upon this showing the court revoked the probate of the instrument, and the propriety of its action in so doing is the sole question presented upon this appeal.

At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the Constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes. In conferring that right the legislature has seen fit to prescribe certain exactions and requirements looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise. As has been said (*Re O'Neil's Will*, 91 N. Y.

521): "While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but of the legislature." As a prerequisite to the exercise of the testamentary right in this state, the legislature has prescribed for the execution and authentication of wills such as this the following requirements: "(1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto. (2) The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority. (3) The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will. And (4) there must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator's request and in his presence." Civ. Code, § 1276. It is not for courts to say that these requirements, or any of them, are mere formalities, which may be waived without impairing the status of the instrument. It is not for courts to say that a mode of execution or authentication, other than that prescribed by law, subverts the same purpose, and it is equally efficient to validate the instrument. The legislative mandates are supreme, and there is no right to make testamentary disposition except upon compliance with those mandates. It may be freely conceded that the question under consideration is of a nature purely technical, but it is to be remembered that the whole subject-matter of the execution and authentication of wills is technical, and nothing else; and it must not be forgotten that the technicalities are those which the lawmaking power has the right to impose, and has imposed, upon the maker of a will.

It will be noted in the section of the Code above quoted that the duty enjoined upon the testator is to subscribe the will, while that imposed upon the attesting witnesses is that each must sign his name as a witness. The difference is neither immaterial nor accidental. A testator may be illiterate, or he may, by reason of paralysis, or other disabling cause, be incapacitated from signing his name, and the law has wisely and liberally provided for the due execution of a will by one so situated. It has required of him that he shall subscribe, and, while the word unquestionably has for one of its significations the signing of a name, it is a verb of comprehensive meaning. Any form or kind of underwriting is a subscription, and generally it has been held that any mark or writing by the testator meant by him to be his name, or to take the place of his signature, or to serve for his identification, will answer the requirements of a statute which calls merely for subscription or signing. The same liberality of construction, and interpretation has been put by the courts upon statutes which require the witnesses merely to subscribe or to sign. There are thus numerous cases under such statutes which hold, in effect, that any

signing by which alone, or by which, aided by parol evidence, the identity of the subscriber may be ascertained, substantially complies with the statute. The case of the appellant upon this proposition cannot be more strongly stated than in the following extracts from the learned work of Mr. Jarman, discussing the Victorian wills act: "Examining the requirements common to the statute of frauds and the wills act in their order, the next condition prescribed for the validity of a will is that it should be signed, which suggests the inquiry, What amounts to a 'signing' by the testator? It has been decided that a mark is sufficient, and that notwithstanding the testator is able to write, and though his name does not appear on the face of the will. A mark being sufficient, of course the initials of the testator's name would also suffice. And it would be immaterial that he signed by a wrong or assumed name (since that name would be taken as a mark), or that against the mark was written a wrong name." 1 Jarm. Wills, 6th ed. *79. "The next statutory requisition, which is common to the old and the present law, is, that the will be 'attested and subscribed' by the witnesses. A mark has been decided to be a sufficient subscription. . . . The initials of the witnesses also amount to a sufficient subscription, if placed for their signatures, as attesting the execution. . . . A witness need not sign his own name if the name actually subscribed be intended to represent his name; or a description (without any name) is sufficient if intended to identify him as witness.

In fact there seems to be no distinction in these respects between the words 'sign' and 'subscribe': any act, therefore, which, as before noticed, would be a good signature by a testator, would be a good signature by a witness." Id. *85, *86. An examination of the cases bearing upon the interpretation of the English statute shows that the text of the learned author is fully supported. The reasoning by which the conclusions are reached may be thus summarized: To "subscribe" is to attest or give consent or evidence knowledge by underwriting, usually (but not necessarily) the name of the subscriber. But the place of the writing is immaterial, since a still more general meaning of the word "subscribe" is to attest by writing, in which definition the locality is wholly disregarded. This is the reasoning of the leading English case of *Roberts v. Phillips*, 4 El. & Bl. 450. To "sign" in the primary sense of the word is to make any mark. To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, "signature" has come generally to mean the name of a person written by himself, and thus to be nearly an exact synonym of "autograph," that signification is derivative, and is not inherent in the word itself, any more than it is in "autograph," which strictly conveys no more than the idea of a specimen of an individual's writing. Any "mark" may be a signature, and that species of mark which we call a "cross" (independent of an accompanying name) was early used as a signature of assent, and indeed was designated "*signum*." While marksmen have become fewer with the spread

of education, the mark of the cross is still recognized by statute law as a method of signing. Therefore, as the wills act required only a signing by the testator, and as this requirement of signing only was also found in the statute of frauds, the courts early decided not to be bound by any narrow definition of "signing" or "signature" as meaning the writing of one's name, but to give to the word its broadest possible scope and significance, and thus held that any mark or signature made with the intent to bind the maker (in the case of the statute) or to be a sign (in the case of wills) should be deemed sufficient. As the English courts had still further obliterated from the word "subscription" the idea of place or locality, there was left no measurable distinction between the requirement upon the testator to sign and that upon the witness to subscribe.

In the decisions this broad rule is repeatedly asserted. In *Goods of Clarke*, 27 L. J. P. 18, the will of an illiterate person was executed by her mark, against which was written her maiden name instead of that properly borne by her in marriage. Says the court: "There is enough to show that the will is really that of the person whose it proposes to be. Her mark at the foot or end of it is a sufficient execution, and what somebody else wrote against the mark cannot vitiate it." In *Goods of Clarke*, 2 Curt. Eccl. Rep. 329, the testator had made his mark, and requested the vicar to sign for him, which he did with his own name, and not that of the deceased. Says the court: "The statute allows a will to be signed for the testator by another person, and does not say that the signature must be in the testator's name. Here this gentleman, at the testator's request, signed the will for him; not in the testator's name, but using his own name. I incline to think this is a sufficient compliance with the act." In *Goods of Bryce*, Id. 325, the testatrix signed her will by a mark, her name nowhere appearing. Says the court: "Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed. The statute does not say that the name of the testator shall appear at the foot of the will. The paper is identified as being the will of the deceased. . . . I am of opinion that the statute is sufficiently complied with." The foregoing cases deal with the "signing" by the testator. Coming to the subscribing by the witness, it is said in *Goods of Eynon*, L. R. 3 Prob. & Div. 92: "No particular form of attestation is necessary, but the act done by the witness must be intended by him to evidence his attestation of the will. I must find that I can draw an inference from what occurred that the witness made a mark of some kind, with the intention to evidence his attestation." In *Goods of Christian*, 2 Rob. Eccl. Rep. 110, it is said: "The attesting witnesses to the so-called 'codicil' have affixed their initials only. However, I have no doubt in the matter, although I believe this is the first instance under the act of the witnesses so signing. I am not aware that the witnesses can be required to sign their names. I am of opinion that there is a sufficient subscription on their parts, and therefore I decree probate as prayed." In *Goods of Oliver*, 2 Spinks, Eccl. & Adm. 30 L. R. A.

Rep. 57, it is said: "The statute says the witnesses 'shall attest and subscribe the will.' It does not say 'shall write their own names,' so that a mark is held to be a good subscription." These cases are quoted that there may be no room for misunderstanding of the English decisions or of the text of the book writers. But, as the matter is wholly statutory, they have no value as authority unless there be an identity in the statutory requirements of this state and England. But there is no such identity. Indeed, our statute seems to have been drawn with the express intent to foreclose and shut out the interpretation given to the English law. Thus, the English statute requires subscription. That word had been judicially declared not to have reference to the place of writing. Our statute says that the will shall be subscribed at the end thereof, thus expressly making locality of writing an element of the subscription. The English statute required a signing. As interpreted by the court, this did not necessitate the signing of the name. By express language our statute commands that a witness shall sign his name. In England, therefore, a witness may sign in any one of a multitude of ways; by our law his signing is limited to the expression of his name. The case of *Meehan v. Bourke*, 2 Bradf. 885, is in no way opposed to, but rather is in full accord with, this view. The statute of New York, from which ours was taken, likewise requires that the witnesses should sign their names. Eliza Green, one of the witnesses to the will under consideration, was unable to write. Her name was correctly written by the doctor, and she then made her mark across it, and acknowledged it to be her mark and signature. The court said that before the Revised Statutes a witness might attest a will by a mark; as in this state it may be done under section 14 of the Civil Code. The opinion declares: "Our statute requires the witness to 'sign his name.' . . . Where another person writes the name of the witness, and then the witness acknowledges the signature,—puts his mark to it, his *signum*,—he literally signs; and what he signs is his name,—i. e., he signs his name,—while a mark alone [the learned judge significantly adds] would not be sufficient." Yet a mark alone is held sufficient under the English statute.

I conclude, therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way,—that is to say, by affixing their names. It cannot be said that some other mode of subscription will answer the purpose, or subserve the statutory requirement, when in truth it does not. As well could it be said that the requirement of two attesting witnesses is not mandatory, and that this will, having been duly attested by one witness, should be admitted to probate. That the overthrowing of any will works a hardship upon the devisees and legatees is obvious; but the law is no more tender of their claims than it is of the rights of the natural heirs. In the absence of any will, the law makes a wise, liberal, and beneficent distribution of the dead man's estate; so wise, indeed, that the policy of permitting wills at all, is often gravely questioned.

When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with. If not, then the law makes the will, and it is often a better one, embracing a more equitable disposition of his property, than that which the deceased attempted but failed to execute.

The judgment and order appealed from are affirmed.

We concur: **Beatty, Ch. J.; Harrison, J.; Temple, J.**

McFarland, J., dissenting:

I dissent. In my opinion there was in this case a sufficient compliance with the formalities prescribed by the Code for the attestation of a will. It is true that the right to make testamentary disposition of property—like most other rights—rests upon the legislative will; but that legislative will has been uniformly exercised in favor of the right in all English-speaking countries, and in nearly all others, from time immemorial, so that the right has come to be a usual, well-established, and most important attribute of ownership. Therefore, in dealing with an attempt to exercise that right, the general rules of construction should be applied; that is, the provisions of the Code "are to be liberally construed with a view to effect its objects." The signature of the witness Warren, in this case, as shown beyond question, would be held good if any written instrument or paper known to the law were involved other than a will, and I see no good reason why the same rule should not apply here. To allow a will to be defeated by the careless (or intentional) misspelling of his name by a subscribing witness would lead, I fear, to great abuses. If a man should not have the right to make a will, let the legislature take it away; but, as long as he has it, let it be protected as other rights. I think that the judgment should be reversed.

Garoutte, J., dissenting:

I dissent. I do not think a man's testamentary disposition of his property should be defeated for the reasons here given. The argument requires a too technical analysis of terms and statutes in order to arrive at such a result. While the right to dispose of property by will is purely statutory, still it can hardly be said to be a mere matter of legislative grace, for it has become almost an inalienable right, made so by reason of its long practice and approval in all civilized nations. It is conceded that, if the testator, Walker, had made a like mistake, and signed his name "Warren," it would not have defeated the will; but it is now held that, the witness Warren having made the mistake in signing his name "Walker," the will is avoided. I have no idea that the legislature, in formulating the statute as to the character of the signatures, ever intended such results to follow; and I am satisfied it never intended to attach any different meaning to the two phrases, namely, "sign his name as a witness," and "subscribed by the testator," or that the legislature ever intended to bar a man from

being a witness to a will who was unable to sign his name, any more than it intended to bar a man from making his will who was likewise so unfortunate. I believe that for the purposes of this statute the person's mark, properly witnessed, is his name; and further, I believe any name that the party should attach to the will as a witness is his name. I do not think it is for a contestant of the will to say to a witness, "That is not your name;" and neither is it for the witness to appear upon the stand and say, "That is not my name." If we are to be so technical in this matter, the statute should have said "true name." The true names of witnesses are often unknown to the testator, and to say that a person could intentionally and corruptly sign a false name to a will as a witness, and thereby defeat it, is to go to great lengths. No case in the books has ever gone that far, to my knowledge. Still that doctrine would seem to be declared by the main opinion of the court in the present case. A name signed by mistake of the witness is no different from one signed in fraud. The knave wrote the name as his name, and for the purposes intended by the testator it was his name. In the present case the attorney, as a witness, unintentionally wrote a name which was not his true name, but he intended the writing to be his name, and he made the writing for his name, and for the purposes intended by the testator; and as to those purposes it should be held to be his name. If, one hour previous to the signing of the will, he had concluded to change his name to C. G. Walker, and had so signed it, or, for the very purpose of concealing his true name, had signed the will "John Brown," to my mind the will would be legally witnessed; and in the present case the same conclusion should be declared.

Van Fleet, J., dissenting:

I dissent from the conclusion reached by the majority of the court, and agree with what is said by Justices McFarland and Garoutte. I think by a too close adherence to the mere letter of the statute the court, in the main opinion, loses sight of the evident purpose intended to be subserved by the provision in question. When the witness Warren, intending in perfect good faith, as is conceded, to write his own name, wrote his own initials, but inadvertently added the name of the testator instead of his own, it was, to all essential intents and purposes, a signing of his name within the spirit and intent of the statute, since it met every purpose designed to be subserved thereby. And this view, in my judgment, is sustained by the case of *Meehan v. Rourke*, 2 Bradf. 385, cited in the main opinion. There the name of the witness was written by another, and merely visé by the mark of the witness himself, although the requirement of the statute, like our own, was that the witness should sign his name. But it is said by the surrogate, in addition to the language quoted in the majority opinion: "I think the requisition of the statute sufficiently complied with by the name of the witness being written at the end of the will, and the witness putting his mark thereto. This construction meets the design of the legislature in having the name of the witness, and excluding wills attested only

by marks, and does not shut out the attestation of wills by illiterate persons, when a penman can be found to record the transaction. I should come to any other conclusion with regret, as otherwise I should be compelled very frequently to reject wills attested by marksmen, the experience of this office showing the mode of execution to be very common. But, aside from the consequences, I do not think the rule contended for justified by the language of the statute, or consistent with the distinction made between a witness writing his name when he has subscribed the testator's name, and being required in all other cases only to 'sign his name.' I think the record shows a sufficient compliance with the requirements of the statute, and that the deceased should not, by any such slight lapse as is here disclosed, be deprived of the right of testamentary disposition of his property.

Whatever may be our personal views as to the provisions of the law for the distribution of the property of intestates, whether they meet with our approval or otherwise, cannot affect our consideration here. The sole question is whether the testator, in endeavoring to avail himself of the privilege of the law to so

dispose of his estate as to meet his own cherished desires, has so far complied with the statute as to make his purpose effectual; and this, I think, he has done, and that the judgment of the lower court should be reversed.

A petition for rehearing was subsequently filed, in response to which, on January 6, 1896, the following opinion was handed down:

Per Curiam:

The opinion heretofore rendered herein is modified by eliminating from the paragraph preceding the judgment the first and last sentences, so that the same will read: "When a will is proved, every exertion of the court is directed to giving effect to the wishes of the testator therein expressed, but in the proving of the instrument the sole consideration before the court is whether or not the legislative mandates have been complied with." As so amended, the petition for a rehearing is denied.

McFarland, Garoutte, and Van Fleet, JJ., dissent from the order denying the petition for rehearing.

MICHIGAN SUPREME COURT.

PEOPLE of the State of Michigan
v.
Edward C. GAY.

(.....Mich.....)

There is no unwarranted discrimination against citizens of other states in a statute declaring it to be unlawful for any person to solicit insurance within the state on property within the state for any nonresident persons without procuring from the commissioner of insurance the certificate of authority provided for by the statute.

(December 17, 1896.)

EXCEPTIONS by defendant to rulings of the Circuit Court for Kalamazoo County made during the trial of a proceeding against him for the violation of the statute against soliciting insurance for a nonresident without a certificate of authority from the insurance commissioner, which resulted in conviction. *Affirmed.*

Defendant was soliciting insurance for an association of individuals doing an insurance business under the name of Lloyds, and claimed that the statute under which the conviction was had could not be made applicable to individuals.

Further facts appear in the opinion.

Messrs. Frank E. Knappen and Myron H. Beach for appellant.

NOTE.—For restrictions on business of foreign insurance companies, see *note* to *State v. Ackerman* (Ohio) 24 L. R. A. 298. See also *Seamans v. Temple Co.* (Mich.) 28 L. R. A. 490, and *note* thereto, 30 L. R. A.

Mr. E. M. Irish, with Mr. Alfred S. Frost, for appellee:
The statute is valid.

Olney F. & M. Ins. Co. v. Huron Salt & L. Mfg. Co. 81 Mich. 354; *People v. Howard*, 50 Mich. 289; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410, 19 L. ed. 972.

A state may extend such restrictions to individuals doing business as individuals.

Greene v. People (Ill.) 21 N. E. Rep. 606; *State v. Ackerman*, 51 Ohio St. 163, 24 L. R. A. 298; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 243.

It was not necessary for the people to prove the incorporation or association of the Lloyds.

The subject-matter of the averment lies peculiarly within the knowledge of the defendant, and even in criminal cases the people need not prove such an averment.

1 Greenl. Ev. § 79, and cases cited.

Montgomery, J., delivered the opinion of the court:

By Act No. 74 of the Session Laws of 1893, it was enacted that it shall be unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity, to transact, or to aid in any manner, directly or indirectly, in the transacting or soliciting within this state any insurance business for any person, persons, firm, or copartnership who are nonresidents of this state, or for any fire or inland navigation insurance company or association not incorporated by the laws of this state, or acting for or in behalf of any person or persons, firm or copartnership, as agent or broker, or in any other capacity, or procure or assist to procure a fire or inland marine policy or policies of insurance on property situated in this state, for

any nonresident person, persons, firm, or co-partnership, or for any company or association, without this state, whether incorporated or not, without the procuring or receiving from the commissioner of insurance the certificate of authority provided for in section 38 of an act entitled "An Act Relative to the Organization of Fire and Marine Insurance Companies Transacting Business within This State," approved April 8, 1869, as amended. Such certificate of authority shall state the name or names of the person, persons, firm, or co-partnership, or the location of the company or association, as the case may be, showing the party named in the certificate has complied with the laws of this state regulating fire and inland navigation insurance, and the name of the duly appointed attorney in this state on whom process may be served. By section 5 of the act of which the above is amendatory, it is provided: "In any suit brought under this act it shall not be necessary to prove the legal incorporation or association of any corporation or association of individuals, the policies of which have been solicited or issued contrary to this act. It shall be sufficient to show that the policy of insurance has been solicited or issued, directly or indirectly, by or through the defendant company or association, not authorized to do business in this state."

Respondent was charged and convicted in the Kalamazoo circuit court of a violation of this act. He has brought the record here for review on exceptions before sentence. While the record contains numerous assignments of

error, we have not been favored with any brief on behalf of the respondent. We have, however, looked through the record, and discovered no error. The only question meriting discussion is whether the law in question is unconstitutional. It appears from the defendant's requests that it was contended below that the statute contained an unwarranted discrimination against the citizens of other states. It has been repeatedly held that it is within the power of the state to exclude corporations or other states from doing business in this state, except on such terms as the legislature may see fit to prescribe for the protection of its citizens. *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148. This naturally carries with it the right to prohibit individuals within this state from acting for such inhibited corporations. *People v. Howard*, 50 Mich. 289; *Paul v. Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357. But it appears to have been insisted below that, while it may be competent to prohibit corporations from doing business within this state, the legislature cannot deny the right to individuals. But an answer to this is that there is no discrimination against individuals of other states under the insurance laws of this state. See *State v. Ackerman*, 51 Ohio St. 168, 24 L. R. A. 298; *State v. Stone*, 118 Mo. 388, 25 L. R. A. 248.

Conviction affirmed, and the court is instructed to proceed to sentence.

The other Justices concur.

ILLINOIS SUPREME COURT.

WEARE COMMISSION CO., *Appt.*,

v.

Mary A. DRULEY, Admr., etc., of William M. Druley, Deceased, et al.

(156 Ill. 35.)

1. A conveyance by a debtor, legally or constructively fraudulent as to cred-

itors, as contradistinguished from fraudulent in fact, is not ground for attachment by them under the Illinois attachment law.

2. A judgment against an insolvent estate will not be reversed at the instance of the administratrix where the reversal would result in no benefit to her or the estate from the fact that the claim has been allowed by the probate court.

NOTE.—What intent to defraud will sustain an attachment.

- I. Generally.
- II. Actual as distinguished from constructive fraud.
- III. Fraudulent contraction of debts.
- IV. Against absconding debtors.
- V. For removal of property.
- VI. For assignment, disposal, or secretion of property.
 - a. The intent to defraud.
 - b. Participation in fraudulent intent by transferee.
 - c. Gifts.
 - d. Sales of property.
 - e. Mortgaging or pledging property.
 - f. Assignments for the benefit of creditors.
 - g. Threats to assign or dispose of property.
 - h. Making preferences.
 - i. Transfers in payment of debts.
 - j. Confession of judgment.
 - k. Transfers and withdrawals by partners.
 - l. Formation of and transfer to corporation or partnership.

VI.—(Continued.)

- m. Overbuying.
- n. Refusal to pay.
- o. Statements and misrepresentations by debtor.
- p. Conversion of property.
- q. Miscellaneous cases.

I. Generally.

The right to attach as it exists in most of the United States is a statutory one, and the question as to what intent to defraud will sustain it is one of the construction of the particular statute conferring the right and the determination as to whether the facts of the case bring it within the statute, and is confined to questions as to the fraudulent contraction of debts, the absconding of the debtor, his removal of his property, and his assignment, disposition, or secretion of property, the question of intent not entering into the right of attachment against nonresidents.

II. Actual as distinguished from constructive fraud

A decided preponderance of authority supports the rule that a mere constructive fraud,—that is a

(January 15, 1895.)

APPPEAL by plaintiff from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County dissolving an attachment which plaintiff had levied upon property of its debtor on the ground that he had attempted to transfer his property in fraud of creditors. *Affirmed.*

The facts are stated in the opinion.

Meers. Osborne Bros. and J. M. H. Burgett, for appellant:

The burden of proof was on defendant to show that the deed was executed in good faith.

See *Hollenback v. Todd*, 119 Ill. 543; *Hubbard*

v. Allen, 59 Ala. 283; *Harrell v. Mitchell*, 61 Ala. 271; *Clements v. Nicholson*, 73 U. S. 6 Wall. 299, 18 L. ed. 786; *Callan v. Statham*, 64 U. S. 28 How. 477, 16 L. ed. 582; *Alexander v. Todd*, 1 Bond. C. C. 175; *Knight v. Capito*, 28 W. Va. 639; *Goshorn v. Snodgrass*, 17 W. Va. 717; *Smith v. Brown*, 84 Mich. 455; *Henderson v. Henderson*, 55 Mo. 534; *Great Western R. Co. v. Bacon*, 30 Ill. 847, 83 Am. Dec. 199; *King v. Atkins*, 83 La. Ann. 1057; *Ford v. Simmons*, 13 La. Ann. 397; *Lovell v. Payne*, 30 La. Ann. 511; *Apohecaries Co. v. Bentley*, Ryan & M. 159; *Huggins v. Ward*, 21 Week. Rep. 914.

If the deed was intended as a mortgage, the

act involving no positive wrong, the invalidity of which arises entirely from the provisions of the law,—will not warrant an attachment upon the ground of a disposition of property with intent to defraud.

This is the rule adopted by the principal case, and it was also expressly held in *Standard Oil Co. v. Morrison, A. & A. Co.* 54 Ill. App. 531 (1894); *First Nat. Bank v. Kurtz*, 22 Ill. App. 213 (1896); *Shove v. Farwell*, 9 Ill. App. 256 (1881); *Market Nat. Bank v. Bethel*, 32 Ohio L. J. 135 (1894); *Heidenheimer v. Ogborn*, 1 Disney (Ohio) 261 (1857); *Chamberlain v. Strong*, 3 W. L. G. 231 (1859), as given in *Walker & Bates' (Ohio) Dig.* 101; *National Bank v. Puroell*, 8 Rec. 744 (1880), as given in 3 *Bates' (Ohio) Dig.* 62; *Union Rolling Mill Co. v. Packard*, 13 Bull. 591, 1 C. C. 76, as given in 4 *Bates' (Ohio) Dig.* 34.

It is not sufficient, though the actual or even necessary consequence of the act would be to hinder and delay creditors. *Heidenheimer v. Ogborn, supra.*

The right to attachment is based upon the supposed existence of fraud in fact, and not upon what is merely voidable because against equity and good conscience, sometimes denominated fraud in law. *Holbrook v. Peters & M. Co.* 8 Wash. 344 (1894) (*dictum*).

And an actual personal intent to defraud, hinder, and delay creditors is necessary to uphold an attachment. *McPike v. Atwell*, 34 Kan. 142 (1886); *Union Rolling Mill Co. v. Packard*, and *Shove v. Farwell, supra*; *Seldentopf v. Annabl*, 6 Neb. 524 (1877).

The right to issue an attachment depends entirely upon the fraudulent intent, which must be made to appear, and not upon something inferred from the consequence of the acts stated. *Seldentopf v. Annabl, supra.*

Thus a conveyance of property in violation of the bankrupt law furnishes no ground for an attachment. *Stanley v. Sutherland*, 54 Ind. 339 (1876).

And a conveyance without consideration to his wife by a person whose solvency is doubtful, made without intent to defraud creditors, will not sustain an attachment, though it might justify a bill to set aside the conveyance. *McFarlan v. Mills*, 4 Bull. 1064, as given in 3 *Bates' (Ohio) Dig.* 62.

And a sale to one creditor without actual fraud, to prevent another creditor from gaining any advantage, does not show a fraudulent intent which will support an attachment. *Chamberlain v. Strong*, 3 W. L. G. 231 (1859), as given in *Walker & Bates' (Ohio) Dig.* 101.

So, a transfer of property by an insolvent corporation, by which a preference is given to one creditor over others, is not such a fraud in fact as to afford ground for an attachment at the instance of an unpreferred creditor. *Holbrook v. Peters & M. Co.* 8 Wash. 344 (1894).

And the mere fact that the debtor converted his business house into a corporation, and transferred to the corporation the assets of his business, will not sustain such an attachment without evidence

of fraudulent intent. *Union Rolling Mill Co. v. Packard*, 13 Bull. 591, 1 C. C. 76, as given in *Bates' (Ohio) Dig.* 215.

Nor will a transfer by a limited partnership of the effects of the firm in payment of a valid debt with intent to give preference to a creditor, in violation of Maryland Pub. Gen. Laws, art. 73, § 15, making such transfer void as to creditors, warrant an attachment under the New York Code, on the ground that they have assigned, disposed of, or secreted, their property with intent to defraud their creditors. *Casola v. Vasquez*, 147 N. Y. 259 (1895).

And a surviving partner who in good faith and with the acquiescence of the representative of the deceased partner uses the firm property to continue the business on his own account and in his own name, and raises money upon the credit given him by the possession of such property, and finally disposes of it, is not subject to attachment upon the ground of a disposal with intent to defraud, in the absence of circumstances showing such an actual intention, though a part may have been applied to the payment of his individual obligations. *Fitzpatrick v. Flannagan*, 108 U. S. 648, 27 L. ed. 211 (1882).

So, selling by a mortgagor from the stock of goods mortgaged, in the ordinary course of business, with the knowledge and implied consent of the mortgagee, is a constructive fraud only, where there is no fraudulent intent in fact on the part of the mortgagor, and is not ground for an attachment against him. *Rhode v. Matthal*, 35 Ill. App. 147 (1889).

And a chattel mortgage containing a stipulation for the retention of possession by the mortgagor of the mortgaged property and possession so retained pursuant to the terms thereof, is not *per se* fraudulent or prima facie evidence of a fraudulent intent which will support an attachment, where the mortgage was duly filed and there is nothing to indicate an actual intent to defraud. *Frankhouser v. Ellett*, 22 Kan. 127, 31 Am. Rep. 171 (1879).

And a sale under a chattel mortgage which in fact hinders and delays creditors does not warrant an attachment under the Illinois statute on the ground that such sale is fraudulent in law, in the absence of a corrupt intent in making the mortgage. *Lafin v. Central Pub. House*, 53 Ill. 432 (1869).

So, an assignment for the benefit of creditors, which is fraudulent at law and void on its face as hindering or delaying creditors, will not justify an attachment in the absence of a showing of actual intent to defraud. *Belmont v. Lane*, 22 How. Pr. 325 (1862) (*dictum*).

And an assignment for the benefit of creditors, which is invalid by reason of noncompliance with the statute, does not constitute an assignment or disposition of the debtor's property with intent to defraud creditors, which will support an attachment. *First Nat. Bank v. Rosenfeld*, 66 Wis. 292 (1886).

So, an assignment for the benefit of creditors, ex-

fact that Jane Druley came into court and claimed absolute title under the deed from William is conclusive of her intent to defraud plaintiff, and will disentitle her to any rights under the deed.

Barker v. French, 18 Vt. 460; *Foster v. Grigsby*, 1 Bush, 86; *Thompson v. Pennell*, 67 Me. 159; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Larmon v. Knight*, 140 Ill. 232; *Jones v. Neely*, 72 Ill. 449; *Mackie v. Cairns*, Hopk. Ch. 378.

The instruction to find for the defendant on the attachment issue was error.

It is only when the evidence, with all the inferences that can justifiably be drawn from it,

is so sufficient to support a verdict for plaintiff that it would be the duty of the court to set such a verdict aside, that the court can direct a verdict for defendant.

Purdy v. Hall, 184 Ill. 298; *Pennsylvania Co. v. Conlan*, 101 Ill. 93; *Barlett v. International Bank*, 119 Ill. 259; *Pratt v. Stone*, 10 Ill. App. 633; *Johnson v. Moulton*, 2 Ill. 532; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 388; *Bishop v. Busse*, 69 Ill. 408; *Morgan v. Ryerson*, 20 Ill. 343; *Kincaid v. Turner*, 7 Ill. 618; *Kitzinger v. Sandborn*, 70 Ill. 146; *Lloyd v. McClure*, 2 G. Greene, 139; *Wight Fire Proofing Co. v. Roczekat*, 80 Ill. App. 266; *Lind v. Beck*, 87 Ill. App. 430.

executed in good faith and without any wrongful intent, but which is so defectively executed as to render it void, does not authorize an attachment as a disposal of property with intent to defraud creditors. *Cooper v. Clark*, 44 Kan. 358 (1890); *McPike v. Atwell*, 34 Kan. 142 (1885); *Harris v. Capell*, 28 Kan. 117 (1882).

And an assignment for the benefit of creditors, regular on its face, made in an attempt under the advice of counsel to divide equitably all of the debtor's property among his creditors, cannot be held to be a disposition of property with intent to defraud creditors, though the assignment is void. *Wearne v. France*, 3 Wyo. 278 (1890).

But the act which constitutes the constructive fraud may be such as to justify an inference of a fraudulent intent which will support an attachment.

An actual fraud, as distinguished from a constructive one, is necessary to sustain an attachment, but this arises when the acts done create as a logical sequence results that are not fairly or reasonably consistent with an honest purpose. *Seckendorf v. Ketcham*, 67 How. Pr. 626 (1884).

Acts conceded to be fraudulent should not be declared by the court insufficient to establish a fraudulent intent which will sustain an attachment as a matter of law, if they were acts which the jury should consider and act upon. *Main v. Lynch*, 54 Md. 658 (1890). See also *Kipling v. Corbin*, 66 How. Pr. 12 (1883), *infra*, VI. a. *The intent to defraud*.

Thus, an assignment by a debtor to a creditor for the sale of the property, and a return of the balance after satisfaction of the creditor's claim to the debtor, is fraudulent and void, and contains in itself evidence of a fraudulent intent upon which an attachment may be issued. *Sels v. Evans*, 6 Ill. App. 466 (1890).

And an assignment for the benefit of creditors, containing provisions preferring members of the debtor's firm and giving the assignee power to sell upon credit, though a fraud in law as distinguished from an actual fraud, warrants the inference of the existence of such a fraudulent intent as will support an attachment. *Ryhiner v. Ruegger*, 19 Ill. App. 157 (1890).

So, the constructive fraud evidenced by an assignment by a partner of partnership property for the payment of firm and individual debts without providing that the firm debts shall be first paid, is sufficient to justify an inference of fraudulent intent which will support an attachment. *Friend v. Michaelis*, 15 Abb. N. C. 364 (1885).

In *Friend v. Michaelis*, *supra*, *Milliken v. Dart*, 26 Hun. 24 (1881), *infra*, VI. f. *Assignments for the benefit of creditors*, was limited and distinguished as belonging to a class of cases in which no positive wrongdoing was involved, the invalidity arising wholly from the provision of the law; and the court said that the ruling should be restricted to such cases.

And an assignment by an insolvent firm by 80 L. R. A.

which partnership property is appropriated to the payment of individual debts of a partner, will support an attachment upon the ground of a disposal of property so as to hinder and delay creditors, though the fraud charged is one in law, and not in fact. *Keith v. Fink*, 47 Ill. 272 (1868).

The courts of several of the states, however, among which are Maryland, Florida, and the District of Columbia, have adopted the opposite doctrine,—that mere constructive fraud is sufficient to justify an attachment.

Thus, a conveyance which by its terms operates to hinder, delay, or defraud creditors, will be presumed to have been intended to so operate, and will sustain an attachment. *Whedbee v. Stewart*, 40 Md. 414 (1874); *Farrow v. Hayes*, 51 Md. 498 (1879).

And an assignment in trust to sell the assigned property and pay releasing creditors out of the proceeds, and return the surplus, if any, to the grantor, operates to hinder, delay, or defraud creditors, and is fraudulent, and the intent to defraud, upon which an attachment may be issued, will be imputed to the assignor, and parol evidence is not admissible to show a different intent. *Farrow v. Hayes*, *supra*.

So, in *Cissell v. Johnston*, 23 Wash. L. Rep. 730 (1894), it was held that an attachment upon the ground that the debtor has assigned, disposed of, and secreted his property with intent to delay and defraud his creditors will lie for fraud in law in case of an assignment by insolvent debtors, though there was no fraud in fact or actual fraud.

And the fact that a mortgagor of a stock of goods is permitted to remain in possession and continue to sell and dispose of them in the ordinary course of business amounts to a conveyance to the use of the grantor, and is fraudulent *per se* and a ground for attachment, even when the act is entirely unconnected with any intentional fraud. *Eckman v. Munterlyn*, 33 Fla. 367 (1893).

So, under statutes like those of Missouri and New Mexico, providing for an attachment for a disposition of property so as to defraud creditors, constructive fraud is sufficient to warrant its issuance, no intent to defraud being necessary.

Thus, the element of intention is not embraced in the ground of attachment that the debtor has fraudulently sold or removed or disposed of his property so as to hinder or delay creditors. *Noyes v. Cunningham*, 51 Mo. App. 194 (1892); *Potter v. McDowell*, 81 Mo. 68 (1890); *Douglass v. Cissna*, 17 Mo. App. 44 (1885).

A conveyance which is fraudulent at law and void as to existing creditors warrants an attachment under the Missouri statute, regardless of the motives or intention of the debtor. *Farmers' & M. Bank v. Price*, 41 Mo. App. 291 (1890); *Kritzer v. Smith*, 21 Mo. 296 (1855).

And an act done by a debtor, which is fraudulent in law because it hinders and delays creditors, will support an attachment under the Missouri statute

The deed was fraudulent as to William's creditors.

If the deed, which was absolute on its face, was intended by the parties to be a mere mortgage, it will be conclusively presumed to have been made with intent to defraud, binder, and delay the grantor's creditors.

Harris v. Sumner, 2 Pick. 129; *Metropolitan Bank v. Godfrey*, 28 Ill. 579; *Bullock v. Battenhausen*, 108 Ill. 28; *Battenhausen v. Bullock*, 11 Ill. App. 665; *Sims v. Gaines*, 64 Ala. 892; *Bryant v. Young*, 21 Ala. 264; *Gregory v. Perkins*, 4 Dev. L. 50; *Halcombe v. Ray*, 1 Ired. L. 840; *Gaither v. Mumford*, 1 N. C. Term. Rep. 167; *Benton v. Saunders*, Busbee's L. 860;

North v. Belden, 13 Conn. 876, 35 Am. Dec. 88; *Hough v. Ives*, 1 Root, 492; *Friedley v. Hamilton*, 17 Serg. & R. 70, 17 Am. Dec. 638; *Jacques v. Weeks* 7 Watts, 261; *Dey v. Dunham*, 2 Johns. Ch. 182; *Odell v. Montross*, 68 N. Y. 499; *Coolidge v. Melvin*, 42 N. H. 510; *Winkley v. Hill*, 9 N. H. 81, 31 Am. Dec. 215; *Tift v. Walker*, 10 N. H. 150; *Smith v. Lowell*, 6 N. H. 67; *Rice v. Cunningham*, 116 Mass. 469; *Shield v. Anderson*, 3 Leigh, 729; *Watkins v. Arms*, 64 N. H. 99; *Bentz v. Rockey*, 69 Pa. 71; *McCulloch v. Hutchinson*, 7 Watts, 434, 33 Am. Dec. 776; *Shaffer v. Watkins*, 7 Watts & S. 219; *Connelly v. Walker*, 45 Pa. 449.

When a conveyance by its terms operates to

though it may not defraud the creditor in fact. *Kellog v. Richardson*, 19 Fed. Rep. 70 (1888).

The term "fraud," as understood in the Missouri statute concerning fraudulent conveyances, has the same meaning in the attachment law, and it is not necessary to show that the act originated in any meditated design to commit a positive fraud to injure others. *Reed v. Pelletier*, 28 Mo. 173 (1860) (*dictum*).

Whatever is denounced as fraud by the judgment of the law must be regarded in the same light with reference to an act or transaction which is made the ground of an attachment, and if the act charged to have been committed is fraudulent, actual or constructive, it will be inferred that the party intended its natural and ordinary results.

Ibid.

Thus, an assignment for the benefit of creditors which is fraudulent in and of itself as matter of law is a fraudulent conveyance within the meaning of the provision of such an act. *Douglas v. Chesna*, 17 Mo. App. 44 (1886); *Leitensdorfer v. Webb*, 1 N. M. 34 (1853).

And an assignment for the benefit of certain preferred creditors, made without presenting a petition to any court or judge and without any schedule of debts or creditors, and without the sanction of any court of sessions or service of any citation of creditors, as required by law in New Mexico, is fraudulent in law, and will support an attachment as a disposal of property so as to defraud creditors. *Leitensdorfer v. Webb*, *supra*.

And a mortgage by a tradesman of his entire stock of goods, of which he is permitted to continue in possession and to sell and dispose of in the usual course of his business, is fraudulent in law and furnishes ground for an attachment under the Missouri statute, though it was made to secure a bona fide debt. *Sauer v. Behr*, 49 Mo. App. 86 (1892); *Reed v. Pelletier*, *supra*.

III. Fraudulent contraction of debts.

The statutes of some of the states provide for an attachment upon the ground that the debt thereby sought to be collected was fraudulently contracted.

Under such statutes false representations made by a debtor as to his solvency, by which he obtains credit, are sufficient to sustain an attachment in an action brought by a creditor by whom the credit is given. *First Nat. Bank v. Rosenfeld*, 66 Wis. 232 (1886).

So the contraction of a debt with the preconceived intention not to pay it is fraudulent within the meaning of the Missouri statute, defining the ground of attachment. *Blackwell v. Fry*, 49 Mo. App. 638 (1892).

And the purchase of property by one who is practically insolvent, who for the purpose of obtaining credit makes exaggerated statements as to his solvency, stating the purpose for which he wanted the property, but disposes of it in payment

of debts made after its receipt, together with other suspicious circumstances, authorizes the assertion that he did not intend to pay for it, and is sufficient to support an attachment. *Cole Mfg. Co. v. Jenkins*, 47 Mo. App. 664 (1890).

But to sustain an attachment on the ground that the debt was fraudulently contracted, it must be shown that the debtor intended to defraud the creditor. *Hughes v. Lake*, 63 Miss. 552 (1886).

And to support an attachment upon the ground that a debt was contracted for property obtained under false pretenses, it must be shown that there was an intent on the part of the debtor to cheat or defraud at the time the debt was contracted or property obtained, and some false pretense must have been designedly used for that purpose and the fraud accomplished by means thereof, or it must have had such an effect that without it the defrauded party would not have parted with his money or property. *Wyman v. Wilwarth*, 1 S. D. 172 (1890).

So, statements made by a debtor through an agent, on which credit was given him, though false, will not support an attachment where they were not communicated to the creditor by the authority or with the knowledge of the debtor, and were not made with the intention of influencing and inducing the creditor to part with his property. *Lodge v. Rose Valley Mills*, 11 Pa. Co. Ct. 667, 1 Pa. Dist. R. 811 (1892).

And an attachment will not lie under Mo. Rev. Stat. § 398, providing therefor, when the debt was fraudulently contracted, for the wrongful conversion of personal property, though possession was obtained with intent to convert it. *Finlay v. Bryson*, 84 Mo. 664 (1884).

Proof that a debt was fraudulently contracted, however, will not support an attachment upon the ground that the debtor had assigned, disposed of, or concealed his property with intent to defraud creditors. *Dellone v. Hull*, 47 Md. 112 (1877); *Johnson v. Buckel*, 65 Hun, 601 (1892); *Wittner v. Von Minden*, 27 Hun, 234 (1892).

In the absence of evidence of a fraudulent appropriation of his property by the debtor with such intent. *Johnson v. Buckel*, *supra*.

Thus, procuring a loan by fraudulent representations is not a ground for an attachment under the Ohio statute providing therefor, where the debtor has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat and defraud creditors, or is about to make such sale with like intent. *Stone v. Bank*, 1 Ohio Dec. 369 (1894).

And an attachment will not be granted upon the ground that the debtor has disposed of his property with intent to defraud his creditors on proof of misrepresentations as to his solvency and ownership of property, where there was a failure of proof of fraudulent appropriation and that the debtor had property as represented. *Kibbe v. Herman*, 51 Hun, 438 (1899).

hinder, delay, or defraud creditors, the law presumes the intent to do so.

Sims v. Gaines, 64 Ala. 392; *McKibbin v. Martin*, 64 Pa. 352, 3 Am. Rep. 588; *Harris v. Sumner*, 2 Pick. 129; *Holmes v. Marshall*, 78 N. C. 262; *Chenery v. Palmer*, 6 Cal. 119, 65 Am. Dec. 493; *Briggs v. Mitchell*, 60 Barb. 288; *Lukins v. Aird*, 78 U. S. 6 Wall. 78, 18 L. ed. 750; *Emerson v. Bemis*, 69 Ill. 537; *Ryhiner v. Ruegger*, 19 Ill. App. 156; *Wait, Fraud. Conv. § 9*; *Bump, Fraud. Conv. 8d ed. 362, 579, 603, 604*; *Metropolitan Bank v. Godfrey*, 23 Ill. 579.

The fraudulent conveyance will be wholly set aside, and will not stand as security even.

Harris v. Sumner, 2 Pick. 129; *Metropolitan*

Nor will an assignment for creditors be deemed to have been made with intent to defraud creditors so as to support an attachment because the debtor had previously fraudulently contracted debts, unless some connection between such debts and the assignment appears. *Strauss v. Rose*, 59 Md. 525 (1882).

And a preferential assignment will not be deemed a disposition of property with intent to defraud which will support an attachment merely because shortly before its execution the debtor purchased goods upon credit which had not expired at the time of the assignment, for which he had no reason to suppose he would be able to pay. *Talcott v. Roenthal*, 22 Hun, 573 (1880).

So, false pretenses by a debtor as to his solvency, by which he obtained goods on credit, followed by a general assignment with preferences made a few days later, do not establish a disposition of his property with intent to defraud which will sustain an attachment in a suit by the vendor of the goods. *Tim v. Smith*, 13 Abb. N. C. 81 (1883); *Achelis v. Kalman*, 60 How. Pr. 491 (1861).

Though they would justify an arrest. *Achelis v. Kalman*, *supra*.

And false representations made by a debtor for the purpose of obtaining a large amount of goods on credit, followed by an assignment made six months afterwards, will not justify an attachment upon the ground of a disposition of property with intent to defraud, where all the property in the debtor's possession was assigned and there was nothing to show that he had previously made a dishonest use of it. *Place v. Miller*, 6 Abb. Pr. N. S. 178 (1869).

So, false statements as to a debtor's financial condition, made for the purpose of obtaining goods on credit, and the confession of judgments within three months thereafter to an amount largely in excess of what he represented to be his indebtedness, will not sustain an attachment upon that ground. *Strasburger v. Bachrach*, 38 N. Y. S. R. 1008 (1891).

And false representations by a debtor that he was perfectly solvent and owed only to the amount of \$2,000, followed by an offer of judgment for \$6,000 to his son, which was accepted and an execution issued under which his whole stock in trade was levied upon, does not warrant an attachment where the indebtedness to the son was not impeached and nothing more was done than the law allows in securing the payment of a just debt. *Stein v. Levy*, 55 Hun, 381 (1890).

But the fraudulent contraction of a debt, when considered in connection with other facts, may constitute one of the elements of a case of fraudulent intent upon which an attachment may be granted.

The manner in which a debtor recently obtained goods from his creditors, as well as the manner in which he disposed of them, is admissible in evi-

Bank v. Godfrey, *supra*; *Smith v. Smith*, 11 N. H. 459; *Sidensparker v. Sidensparker*, 53 Me. 486, 83 Am. Dec. 527; *Mackie v. Cairns*, Hopk. Ch. 873; *Graves v. Blondell*, 70 Me. 190; *Egery v. Johnson*, 70 Me. 253; *Graham v. Rooney*, 42 Iowa, 567; *Moore v. Wood*, 100 Ill. 451.

An absolute conveyance or transfer of property, with a secret understanding between the parties reserving an interest to the grantor, is fraudulent and void as to his creditors.

Whenever the effect of a particular transaction is to hinder, delay, or defraud creditors, the law conclusively presumes the intent.

Lukins v. Aird, 78 U. S. 6 Wall. 78, 18 L. ed. 750; *Sims v. Gaines*, 64 Ala. 392; *Dean v.*

dence to prove his intent in making such disposal to sustain an attachment. *Gray v. St. John*, 35 Ill. 223 (1864).

Thus, proof that a debt was fraudulently contracted, and that the debtor was engaged in putting all of his property out of his hands and proposed to refuse payment of his obligations pursuant to a plan determined upon before the debt was contracted, and his failure to deny such facts when charged therewith, make out a prima facie case of fraudulent design which will sustain an attachment. *Blake v. Bernhard*, 8 Hun, 397 (1875).

And positive testimony that possession of the creditor's goods was obtained by the debtor by false statements, and that their whereabouts were concealed, and of the debtor's refusal to consummate an agreement with the creditor which would have been to his interest to fulfil had he intended to continue his business and pay his debts, will support an attachment upon the ground that he had disposed of or secreted property with intent to defraud his creditors. *Weiller v. Schreiber*, 68 How. Pr. 491, 11 Abb. N. C. 175 (1882).

And proof that a large amount of goods were purchased shortly before the failure of the debtor and not paid for, and that judgments were confessed to preferred creditors and preferences made in favor of the debtor's wife and near relatives, exceeding the value of the assets transferred in the assignment in amount, sufficiently indicates a fraudulent intention in making the assignment to uphold an attachment. *Hamburger v. Moeller*, 4 N. Y. S. R. 447 (1886).

So, purchases to a large amount for which the purchaser gives his check, which is dishonored, and the disposal by him of a large amount of money in a clandestine manner, and the transfer of a large sum to his lawyer and friend, are sufficient to uphold an attachment upon the ground of a disposal of property to defraud creditors, in the absence of any excuse for not making his bank account good. *Greenleaf v. Mumford*, 19 Abb. Pr. 469, 80 How. Pr. 30 (1869).

And an attachment on the ground that the debtor has disposed of property with intent to defraud his creditors is justified on proof of an agreement of a stockholder of a corporation to pay an assessment upon his stock, provided the corporation would give him its check for an equal amount in payment of an indebtedness due him, the proceeds of which he agreed to apply in payment of his own and the delivery of such check to the stockholder, who collected it and used the proceeds for other purposes, and stopped payment of his own check. *Wildman v. Van Gelder*, 60 Hun, 443, 21 N. Y. Civ. Proc. Rep. 143 (1891).

So, the purchase of goods on credit by a debtor, who conveys the false impression that a wealthy brother is a member of the firm, and immediately thereafter giving a chattel mortgage to a bank and confessing judgment to it, and riding a long

Skinner, 42 Iowa, 418; *Macomber v. Peck*, 39 Iowa, 851; *Scott v. Hartman*, 28 N. J. Eq. 89; *Coolidge v. Melvin*, 42 N. H. 510; *Winkley v. Hill*, 9 N. H. 81, 81 Am. Dec. 215; *Shield v. Anderson*, 3 Leigh, 729; *Rice v. Cunningham*, 116 Mass. 466; *Chenery v. Palmer*, 6 Cal. 119, 65 Am. Dec. 493; *Hilliard v. Cagle*, 46 Miss. 809; *Potter v. McDowell*, 81 Mo. 62; *Bigelow v. Stringer*, 40 Mo. 195; *Binford v. Johnston*, 82 Ind. 427, 42 Am. Rep. 508; *Emerson v. Bemis*, 69 Ill. 537; *Moore v. Wood*, *supra*; *Lawson v. Funk*, 108 Ill. 502; *Gordon v. Reynolds*, 114 Ill. 118; *Bump*, *Fraud. Conv.* 8d ed. 22, 28, 362.

If the deed was fraudulent *per se* as to the

creditors of William Druley, the attachment should have been sustained.

If, by reason of the facts and circumstances attendant on the execution of the deed, the law would hold the deed void as to the grantor's creditors and raise a conclusive presumption of intention on the grantor's part to defraud his creditors by its execution, then there was ground for the attachment.

Ryhiner v. Ruegger, 19 Ill. App. 156; *Sels v. Evans*, 6 Ill. App. 466; *Rigor v. Simmons*, 47 Ill. App. 428; *Douglass v. Cissna*, 17 Mo. App. 44; *Reed v. Pelletier*, 28 Mo. 173; *Potter v. McDowell*, 81 Mo. 62; *Adams v. Paige*, 7 Pick. 542; *Bernard v. Barney Myrolem*, *Co.*

distance and confessing judgments to a brother, and causing executions to be issued thereon and immediately levied, in connection with requests for time and statements that all judgments would be paid as they matured, and a subsequent sending away of large quantities of goods,—are sufficient *prima facie* to sustain an attachment. *Jaffray v. Nast*, 33 N. Y. S. R. 250 (1890).

IV. Against absconding debtors.

The New York Code, and the Codes and statutes of some of the other states, provide for an attachment where the debtor has departed from the state with intent to defraud his creditors or to avoid the service of a summons, or keeps himself secreted therein with a like intent.

The general rule is that an intent to defraud creditors is not necessary to sustain an attachment upon the ground that the debtor has concealed himself to avoid service of process. *Young v. Nelson*, 25 Ill. 565 (1861); *Morgan v. Avery*, 7 Barb. 656 (1850).

Proof that a debtor has absconded, however, will not justify an attachment where it does not show that he had left the state and the intent with which he left. *Decker v. Bryant*, 7 Barb. 182 (1849).

And that a debtor is absent so that the ordinary process of law cannot be served on him is held to be insufficient in North Carolina to support an attachment, where there is nothing to show that such absence was with intent to defraud creditors. *Love v. Young*, 60 N. C. 65 (1873).

But proof of intent is necessary when the attachment is sought on the charge that the debtor has absconded with intent to defraud his creditors.

Thus, an attachment will not lie because the debtor is about to dispose of his property and leave the state, in the absence of anything to show that he intended to do so for the purpose of defrauding his creditors. *Heriz v. Stuart*, 3 N. Y. Week. Dig. 332 (1876).

And proof of inquiry at the late residence of the debtor, and that the inquirer was informed that the debtor had left the state and was not in the county, will not support an attachment in the absence of evidence of facts showing an intent to defraud creditors. *Ex parte Robinson*, 21 Wend. 672 (1840).

Whether a debtor has withdrawn himself from his creditors with intent to elude process and evade their demands, is a question of fact to be submitted to the jury. *Fitch v. Waite*, 5 Conn. 117 (1823).

And the proof which will warrant an attachment should be such as would warrant no other conclusion than that of a dishonest purpose.

Thus, one who departs from his usual residence, or remains absent therefrom, or conceals himself so that he cannot be served with process, with intent to delay or defraud his creditors, is an absconding debtor within the attachment law; but if he departs from the state or from his usual abode with intention of returning, and without a fraud-

ulent design, an attachment will not lie. *Fitch v. Waite*, *supra*.

And a departure by a debtor openly to another place within the state, where he works openly at his trade, is not a withdrawing himself from his creditors with intent to evade their demands which will support an attachment. *Ibid*.

And an attachment will not issue upon the ground that the debtor had departed from the state with intent to defraud his creditors or to avoid arrest, where his departure and its object were notoriously known. *Re Chipman*, 1 Wend. 66 (1823).

So, proof that a debtor had left with the intent not to return, and secretly and without the knowledge of his family, is not alone sufficient to warrant an attachment upon the ground that he had left with intent to defraud his creditors. *Kelly v. Archer*, 45 Barb. 63 (1866).

And a departure from the state with intent to defraud, which will sustain an attachment, is not established by proof that the debtor had transferred his farm to his wife and gone west, and that he intended to leave the place at which he resided and settle in Dakota. *Taylor v. Hull*, 56 Hun, 90 (1890).

And refusal by a debtor to recognize a creditor's demand as a binding obligation, and a proposal that if he could sell his real estate for a specified price he would remove from the state and go into the cattle business, does not show an intent to defraud which will support an attachment. *Hunter v. Soward*, 15 Neb. 215 (1888).

So, proof that a debtor residing in the city of New York is absent therefrom or concealed therein, and is an absconding or concealed debtor and cannot be found, will not sustain an attachment under the provision of the New York Code which authorizes it where the debtor has departed from the state with intent to defraud his creditors or avoid the service of civil process. *Castellanos v. Jones*, 5 N. Y. 164 (1851).

It is not necessary, however, that a debtor should actually leave the state to entitle a creditor to an attachment under the Maryland statute, where he absconds or flees from justice or removes from his usual place of residence with intent to avoid the payment of his debts or to defraud his creditors. *Stouffer v. Niple*, 40 Md. 477 (1874).

And very strong circumstantial evidence, with some positive testimony, as to a debtor's fraudulent intent, is sufficient to sustain an attachment on motion to dissolve, as against evidence that the debtor had declared the object of his departure to be to collect debts, and had left his family at home, and that his return was expected. *Gibson v. McLaughlin*, 1 Browne (Pa.) 332 (1871).

So, in *Fulton v. Heaton*, 1 Barb. 652 (1847), an attachment upon the ground that the debtor was about to depart from the county with intent to defraud his creditors was upheld on proof that he refused to pay the attaching creditor and told a third party that he was going to Canada, and thus

147 Mass. 356; *Wasburn v. Hammond*, 151 Mass. 182; *Whedbee v. Stewart*, 40 Md. 414; *Bentz v. Rockey*, 69 Pa. 71; *Shaffer v. Watkins*, 7 Watts & S. 219; *Eckman v. Munnerlyn*, 82 Fla. 367; *Rice v. Morner*, 64 Wis. 599; *Leitendorfer v. Webb*, 1 N. M. 34; *Sauer v. Behr*, 49 Mo. App. 88; *First Nat. Bank v. Gerson*, 50 Kan. 589; *Bickham v. Lake*, 51 Fed. Rep. 492; *Gallagher v. Godfrank*, 75 Tex. 562; *Blass v. Lee*, 55 Ark. 329; *Putnam v. Osgood*, 52 N. H. 148; *City Bank v. Westbury*, 16 Hun, 458; *Anderson v. Patterson*, 64 Wis. 557; *Place v. Langworthy*, 18 Wis. 629, 80 Am. Dec. 758; *Orton v. Orton*, 7 Or. 478, 83 Am. Rep. 717;

Kellogg v. Richardson, 19 Fed. Rep. 70; *Burgert v. Rorchert*, 59 Mo. 80; *Bigelow v. Stringer*, 40 Mo. 195.

The giving of a mortgage purporting to be given for a greater sum than was really due is fraudulent as to creditors, and will sustain an attachment.

Rice v. Morner, 64 Wis. 599; *Butts v. Peacock*, 28 Wis. 359; *Sims v. Gaines*, 64 Ala. 392; *Coolidge v. Melvin*, 42 N. H. 510; *Ryhiner v. Ruegger*, 19 Ill. App. 156; *Metropolitan Bank v. Godfrey*, 23 Ill. 579; *Whedbee v. Stewart*, 40 Md. 424.

From the use of the word "intent" it does

he was about to take all of his property with him.

And that a debtor had left his home and place of business to go to an adjacent county for a legitimate purpose which would have required but two or three days, and had been absent about six weeks, and that after diligent search it was learned that he had gone west, but where or for what purpose could not be ascertained, and that he was considerably indebted, are sufficient to confer jurisdiction to issue an attachment upon that ground. *Van Alstyne v. Erwine*, 11 N. Y. 381 (1854).

And that a debtor had failed to pay the rent and water tax due under a lease executed by him, and failed to pay a promissory note, and disposed of his interest in the lease and fixtures of the demised premises, and met requests for payments with evasive answers, and stated that within three days he was to leave the state and take his property to another state, refusing to settle or state when he would pay,—justify an inference that he intended to depart from the state with intent to hinder, delay, and defraud his creditors, for which an attachment will be allowed. *Stevens v. Middleton*, 26 Hun, 470 (1882).

So, proof that the debtor had left the city and his business without leaving any one to take charge of it, and that his bookkeeper stated upon inquiry as to his whereabouts that he had left the state taking what amount of money he could raise, and did not intend to return, warrant an attachment upon the ground that he had left the state with intent to defraud creditors. *Deimel v. Scheveland*, 16 Daly, 38 (1890).

And proof that a debtor had left the county suddenly and clandestinely, and had subsequently sent back and employed help to assist him in the removal of his household goods to a railroad station in order to have them shipped to Boston, warrant the issue of an attachment upon that ground, in the absence of counter affidavits. *Patterson v. Delaney*, 37 N. Y. S. R. 585 (1891).

And an attachment on the ground that the debtor had gone away with intent to avoid the service of a summons is justified by proof that he had gone away and was in an embarrassed position, and attempted to borrow money immediately before his departure, and confessed his inability to meet his payments, and had taken pains not to disclose his intention to go away to any of his creditors, and that his confidential clerk called a meeting of his creditors within twenty-four hours after his departure. *Morgan v. Avery*, 7 Barb. 666 (1850).

So, evidence that a debtor, who was the proprietor of a line of stages, had sold his stages and horses and broke up his business and departed from or kept concealed in the city, and that his goods were sold for nonpayment of rent, and that it was generally understood and believed that he was keeping out of the way to avoid creditors,—is sufficient to confer jurisdiction to issue an attachment upon the ground that he had departed from the state or kept concealed in it with intent to defraud creditors. *Re Fulkner*, 4 Hill, 508 (1843).

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And evidence that an insolvent debtor had sold his stock of goods to his clerk wholly on credit, and that he settled nearly all of his accounts and received payment therefor, and had gone away stating that he was going to Kansas, and had not been seen since, and that the clerk stated that he did not know where he had gone or when he would return, if at all,—is sufficient to support an attachment upon the ground of a departure from the state with intent to defraud creditors. *Furman v. Walter*, 13 How. Pr. 348 (1856).

And proof that one largely indebted absconded, and that he was in possession of personal property worth \$8,000 or \$10,000 immediately before, and that he had transferred property, and that his wife had since been trying to sell the same property,—establishes prima facie the fraudulent intent necessary to sustain an attachment. *Sickles v. Sullivan*, 5 Hun, 569 (1875).

And proof of the purchase of goods to be paid for a few weeks later upon the fraudulent representation that the purchaser was in the habit of purchasing for cash and that his stock was fully paid for, when at the time he was indebted for more than the value of his property, and that, a short time after, he left the county on pretense of a few days' absence and had not returned, and that a clerk in the meantime was disposing of his stock in trade and refusing to apply anything upon his indebtedness,—authorizes the issue of an attachment upon the ground that he had departed from the county and state with intent to defraud his creditors. *Schoonmaker v. Spencer*, 54 N. Y. 366 (1872).

So, an attachment upon the ground that the debtor had left the state with intent to avoid the service of process, or to defraud his creditors, is sustained by proof that he had gone away without the knowledge of his neighbors, and that he had been called upon to account as executor but had absconded and been removed from his trust, and that his wife, after receiving a letter from him, refused to tell his whereabouts to creditors, but told her sister that he was in Canada. *Buell v. VanCamp*, 28 N. Y. S. R. 907 (1889), affirmed on the question of the sufficiency of the affidavit, in 119 N. Y. 160 (1890).

Where one of two partners has left the state with intent to defraud his creditors or avoid the service of a summons, an attachment can issue on that ground against him only, and not against the other partner, where he remains in the state and continues to carry on his business. *Bogart v. Dart*, 25 Hun, 326 (1881).

But a departure of one or more of several defendants from the state with intent to defraud creditors will sustain an attachment, under Ky. Civ. Code, § 221, against the property of all of them. *Mills v. Brown*, 2 Met. (Ky.) 405 (1859).

V. For removal of property.

There are two classes of statutes providing for attachment upon the ground of the removal of property, the one class gives the right for a mere

not necessarily follow that this can only be ascertained by extrinsic evidence.

State v. Benoist, 87 Mo. 500; *Bigelow v. Stringer*, 40 Mo. 195; *Potter v. McDowell*, 81 Mo. 62; *Leitendorfer v. Webb*, 1 N. M. 84.

Every man must be taken to contemplate the probable consequences of the act he does.

Townsend v. Wathen, 9 East, 278; *Holmes, B. & H. v. Holmes B. & A. Mfg. Co.* 87 Conn. 278, 9 Am. Rep. 324; *Binford v. Johnston*, 88 Ind. 427, 43 Am. Rep. 508; *Walt, Fraud. Conv.* § 9; *Edgell v. Hart*, 9 N. Y. 218, 59 Am. Dec. 532; *Schuman v. Peddicord*, 50 Md. 560; *Elders v. Swayne*, 8 Dana, 108; *Coleman v. Burr*, 98 N. Y. 17, 45 Am. Rep.

160; *Smith v. Cherrill*, L. R. 4 Eq. 890; *Worceley v. Demattos*, 1 Burr. 474; *Gregory v. Perkins*, 4 Dev. L. 50; *Seward v. Jackson*, 8 Cow. 406; *Cunningham v. Freeborn*, 11 Wend. 241; *Hunters v. Waite*, 8 Gratt. 26; *Oliver Lee & Co.'s Bank v. Talcott*, 19 N. Y. 146; *McBroom v. Rives*, 1 Stew. (Ala.) 72.

There is no difference between fraud in fact and fraud in law; between fraud proved by direct evidence and fraud inferred by law.

Sims v. Gaines, 64 Ala. 396; *Wilt v. Franklin*, 1 Binn. 502, 2 Am. Dec. 474; *Farrow v. Hayes*, 51 Md. 493; *Babcock v. Eckler*, 24 N. Y. 632; *Hunters v. Waite*, 8 Gratt. 26; *Gregory v. Perkins*, 4 Dev. L. 50; *Re Moroney*, L.

removal of property from the state or a removal from the state without leaving sufficient to pay debts, while the other gives it when the debtor has removed or is about to remove his property from the state with intent to defraud creditors.

The rule supported by a preponderance of authority is that it is not necessary that fraud or a purpose to defraud or injure the creditor should enter into a removal of or purpose to remove property upon which an attachment is sought under a statute providing therefor, where the debtor has removed or is about to remove his property out of the state. *Friedlander v. Pollock*, 5 Coldw. 490 (1868).

And that no intent to cheat, hinder, or defraud creditors is necessary to sustain an attachment on the ground that the debtor is removing or proposes to remove his property beyond the state without leaving sufficient to pay his debts. *Durr v. Hervey*, 44 Ark. 301, 51 Am. Rep. 594 (1884); *Goodbar v. Bailey*, 57 Ark. 611 (1896); *Sherrill v. Fay*, 14 Iowa, 202 (1862); *Branch of State Bank of Iowa v. White*, 12 Iowa, 141 (1861); *Stephenson v. Sloan*, 65 Miss. 407 (1888); *Mack v. McDaniel*, 2 McCrary, 128 (1880).

In *Durr v. Hervey*, *supra*, *Rice v. Pertuis*, 40 Ark. 157 (1882), *infra*, this section, was distinguished upon the ground that in that case the attachment was for a debt not yet due, which was issued under Gantt's (Ark.) Dig. § 437, requiring in terms the averment of fraud.

Thus an attachment will lie against one who is removing or about to remove his property out of the state, not leaving sufficient remaining to satisfy all of his debts, under Mansf. (Ark.) Dig. § 309, subd. 6, authorizing an attachment therefor, though such removal is made with the intent to sell the property and apply the proceeds to the payment of a bona fide debt. *Goodbar v. Bailey*, *supra*.

But an attachment will not lie under the Mississippi statute on the ground that a debtor has taken property from the state with intent to defraud or to remove it from the reach of creditors, where he has in his possession property of a permanent character subject to execution, of sufficient value to pay all his liabilities, which he does not intend to remove. *Montague v. Gaddis*, 37 Miss. 458 (1855).

But some of the cases have insisted upon the necessity of an intent to defraud, though the statute does not expressly require it.

Thus, the removal of property by a debtor from the state, where there is no bad intent and the amount of property removed is small as compared with what is left, and the debtor is solvent, and the collection of the debt is not endangered, though within the letter of the Florida statute authorizing an attachment whenever the debtor is actually removing his property out of the state, is not within its spirit, and will not sustain an attachment. *Haber v. Nassitta*, 12 Fla. 569 (1868).

And an attachment issued upon the ground that the debtor is about to remove his property out of the jurisdiction without paying his debts cannot

be sustained if the evidence fails to show that he was not acting in good faith but with the intention of defrauding his creditors. *Hoes v. Williams*, 24 La. Ann. 568 (1872).

So, in *Vandevort v. Fanning*, 10 Iowa, 589 (1869), it was held that the fact that a debtor is about to dispose of his property or carry the same out of the state without leaving sufficient remaining for the payment of his debts will not warrant an attachment, where there is nothing to show that such removal or disposal will be made with intent to defraud his creditors.

But see subsequent Iowa cases cited *supra*.

Under the other class of statutes the intent to defraud is essential. This was held of the Nebraska statute in *Steele v. Dodd*, 14 Neb. 496 (1883).

And in *Montgomery v. Tilley*, 1 B. Mon. 155 (1840), it was held that a removal of property from the state which will support an attachment under Ky. act 1838, § 3, must have been with fraudulent intent, or its effect must be to cheat, hinder, delay, or defraud creditors in the collection of their debts.

A fraudulent intention on the part of a debtor to remove his property out of the commonwealth alone gives jurisdiction to the court of equity under the Kentucky statute empowering it to attach property and to arrest its removal on the establishment of the intent to remove it, where the demand is purely legal. *Farmer v. Bascom*, 9 B. Mon. 23 (1845).

So, the shipping of cotton by a debtor out of the state to a creditor in another state in payment of a bona fide debt will not sustain an attachment under the provision of the Arkansas statute, authorizing an attachment where the debtor is about to remove his property from the state with intent to defraud his creditors, where no fraudulent intent is shown. *Rice v. Pertuis*, 40 Ark. 157 (1882).

And the temporary removal by a debtor of part of his property from the state will not support an attachment upon the ground of the removal of property with intent to defraud creditors, where no actual intent to defraud existed, though such removal had the actual effect of hindering or delaying them. *Montgomery v. Tilley*, *supra*.

So, the evidence of intention necessary to sustain an attachment on this ground, like that in case of an absconding debtor, must be of such a character as to justify no other conclusion than that of a dishonest purpose.

Thus, the removal by a debtor of a part of his stock of goods to another town in the same county to be sold or traded there does not of itself show a fraudulent intent which will support an attachment. *Mack v. Jones*, 31 Fed. Rep. 139 (1837).

And that a debtor is about to remove his stock of goods from the state will not support an attachment upon the ground that he is about to remove his property with intent to defraud his creditors, where he has \$10,000 worth of unencumbered real estate within the state. *Wrompelmier v. Moses*, 3 Bart. 467 (1874).

R. 21 Ir. Rep. 27; *Harman v. Hoskins*, 56 Miss. 142; *Lukins v. Aird*, 78 U. S. 6 Wall. 78, 18 L. ed. 750; *Rencher v. Wynne*, 86 N. C. 268; *Cheatham v. Hawkins*, 80 N. C. 161; *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. 154; *Blum v. McBride*, 69 Tex. 60; *Sanger v. Guenther*, 78 Wis. 354; *Freeman v. Pope*, L. R. 5 Ch. 588; *Cunningham v. Freeborn*, 11 Wend. 240; *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 532; *Dunkham v. Waterman*, 17 N. Y. 9, 72 Am. Dec. 406; *Bernard v. Barney Myroslum Co.* 147 Mass. 356; *Cook v. Johnson*, 12 N. J. Eq. 51, 72 Am. Dec. 381; *Burr v. Clement*, 9 Colo. 1; *Leadman v. Harris*, 3 Dev. L. 144; *Hardy v. Simpson*, 13 Ired. L. 132.

And the payment to a debtor of moneys held by a third person for him after the dissolution of an attachment against him and before the issue of a second attachment, is wholly insufficient as evidence of an intention of the debtor to remove his property for fraudulent purposes to support the second attachment. *Stow v. Stacy*, 30 N. Y. S. R. 308 (1890).

So, that a debtor was on his way down the Wisconsin river to a southern market with a raft of lumber which he was removing out of the territory and which was all the property that he owned, does not authorize an attachment upon the ground that he is about fraudulently to remove his property to hinder and delay his creditors, where that use of his property was the only one by which it could be of any value, and was in strict conformity to usages and customs of the business. *Hurd v. Jarvis*, 1 Pinney, 475 (1844).

And proof that a debtor closed up his place of business and commenced packing up his goods and continued to do so until midnight, and that his store was closed on the next morning, and that on the preceding day he removed his family without informing any one, will not support an attachment upon the ground that he was about to remove his property with intent to defraud creditors. *Mott v. Lawrence*, 9 Abb. Pr. 156, 17 How. Pr. 559 (1859).

And proof of a statement by a member of a firm that he intended to leave the state and would dispose of the property of the partnership if he could find any one to take it, and any creditor who did not know enough to take care of himself must get what he could, will not support an attachment upon that ground, where neither the time, the place, nor the individual who made the statement, is shown. *Skiff v. Stewart*, 39 How. Pr. 385 (1866).

But an admission by a partner that his copartner in the debtor firm had absconded to another state and taken most of the means of the firm with him is sufficient to warrant an attachment against the firm upon the ground of its removal of its goods beyond the state to defraud creditors, where no effort was made by the one partner to prevent the other from taking the partnership assets. *Bryant v. Simoneau*, 51 Ill. 324 (1890).

So, the failure of a debtor to pay debts, and the giving of conveyances, putting off of payments indefinitely, and the sale of his property with the statement that he is about to leave the state and take his property with him, justify an inference of fraudulent intent which will support an attachment. *Stevens v. Middleton*, 14 N. Y. Week. Dig. 126 (1882).

And the taking of his stock of goods from the rear of his store by a debtor at night, and sending them from a point where there was a station on the railroad beyond another station nearer by to be shipped, are sufficient to support an attachment upon the ground of the fraudulent concealment of property for the purpose of delaying and defrauding creditors. *Bryant v. Simoneau*, *supra*.

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Petition for rehearing.

As a matter of evidence every man is to be presumed, *prima facie* at least, to intend the probable consequences of his acts.

Re Binsinger, 7 Blatchf. 262; *Knapp v. White*, 28 Conn. 529; *Quinebaug Bank v. Brewster*, 30 Conn. 559; *Jones v. Ricketts*, 7 Md. 108; *Reynolds v. United States*, 98 U. S. 167, 25 L. ed. 250; *First Nat. Bank v. Jones*, 88 U. S. 21 Wall. 325, 23 L. ed. 542; *Sackett v. Mansfield*, 26 Ill. 21; *Seacord v. People*, 23 Ill. App. 279; 8 Am. & Eng. Enc. Law, p. 778.

Acts often speak louder than words.

Griffin v. Marquardt, 21 N. Y. 121; *Thurs-*

And stoppage of business, and insolvency, though not necessarily evidence of an intent to defraud, will justify an attachment when taken in connection with the removal of the property, consisting of machinery, from the factory, in which it could only be used to advantage and be of much value. *McTaggart v. Putnam Corset Co.* 29 N. Y. S. R. 552 (1890).

The term "about," as used in the Mississippi statute providing for attachment where the debtor is about to remove himself or property from the state or to dispose of property with intent to defraud, means that such act will soon occur, but does not mean that it must be done within any definite space of time, as an hour, a day, a week, a month, etc. *Myers v. Farrell*, 47 Miss. 281 (1872).

VI. For assignment, disposal, or secretion of property.

a. The intent to defraud.

The provision on this subject found in the Codes and statutes of most of the states authorizes an attachment when the debtor has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property with intent to defraud his creditors.

Under such statutes the existence of the intent to defraud would appear to be essential. See *supra*, II., *Actual as distinguished from constructive fraud*.

Neither indebtedness nor insolvency, alone, will justify the issue of an attachment. *Marx Bros. v. Leinkauff*, 93 Ala. 458 (1890); *Clarke v. Seaton*, 18 B. Mon. 230 (1857).

And while a belief upon the part of the creditor in the existence of a fraudulent intent, based upon proper grounds, would authorize the issuance of an attachment, it is not usually regarded as sufficient to sustain it unless such intent actually existed.

Thus, in *Farwell v. Brown*, 1 Fed. Rep. 128 (1880), it was said that the creditor's reason for believing in the existence of an intent to defraud is a material fact for the purpose of issuing a writ of attachment, but counts for nothing where the facts constituting the ground for sustaining the attachment are denied. Here the parties come to closer quarters and use facts instead of reasons for belief, for their weapons.

The intent to defraud must exist to justify an attachment; it does not suffice that appearances indicate it, and the advertisement by a debtor of the sale of his property will not sustain an attachment though calculated to induce suspicion, where the evidence shows that it was not well founded. *Ferguson v. Chastant*, 35 La. Ann. 389 (1883).

It must be a fair and logical sequence from facts proved, and it is immaterial what the applicant believes or disbelieves. *Ellison v. Bernstein*, 60 How. Pr. 145 (1880).

And letters and threats giving a creditor reasonable ground to believe that his debtor intended to defraud him do not furnish a sufficient ground

ton v. Cornell, 38 N. Y. 281; 8 Am. & Eng. Enc. Law, p. 753.

Fraud that will uphold attachment may be inferred from circumstances.

Waples, *Attachm.* 2d ed. § 58; *Bryant v. Simoneau*, 51 Ill. 324; *Carter v. Gunnels*, 67 Ill. 270; *Strauss v. Kranert*, 56 Ill. 254; *Conoling v. Estes*, 15 Ill. App. 255; *Hanchett v. Goets*, 25 Ill. App. 445.

A person would not be likely to accomplish an act, and afterward say that it was prompted by corrupt motives.

Wait, *Fraud. Conv.* 2d ed. § 8.

Defendant's motive in making the representation does not, in the eye of the law, make the representation less a fraud.

for an attachment, without reference to the actual intention, the question being, not what was believed, but what was the fact. *Rheinhardt v. Grant*, 24 Mo. App. 154 (1887).

Where, however, an attaching creditor had good reason to believe that his debtor is about to dispose of his property with intent to defraud his creditors, and attaches on that ground, the fact that the debtor afterwards changes his mind and absconds does not invalidate the attachment or give priority to another creditor, subsequently attaching on the ground that the debtor had left the state. *Boyd v. Labranche*, 35 La. Ann. 285 (1883).

And where the acts of a debtor are such as to justify the belief on the part of the creditor of an intent to defraud, it is sufficient to justify an attachment, though the creditor may have been mistaken in his belief, as the intent can only be shown by the acts of the debtor. *Steinhardt v. Leman*, 41 La. Ann. 835 (1889).

An intent to defraud or give an unfair preference must exist to sustain an attachment under the Louisiana statute, but as such intent lies in the bosom of the debtor, it can only be shown by his acts and declarations. *Chaffe v. Mackenzie*, 43 La. Ann. 1032 (1891).

So, the burden of proof to show that an assignment which is valid upon its face is fraudulent in fact, and will support an attachment as having been made with intent to defraud, rests with the attaching creditor. *Strauss v. Rose*, 60 Md. 525 (1885).

And evidence necessary to establish a fraudulent intent, which will sustain an attachment, must tend to establish a probability of guilt, and be inconsistent with innocence. *West Side Bank v. Meehan*, 49 N. Y. S. R. 606 (1892).

It should be of such character as to fairly justify no other conclusion than that of a dishonest purpose. Mere conjectures are not sufficient. *Goldschmidt v. Herschorn*, 13 N. Y. S. R. 560 (1888); *Herman v. Doughty*, 15 N. Y. Week. Dig. 94 (1883).

Fraud is not to be presumed when the evidence the transaction may be fairly reconciled with honesty of purpose. *Dempey v. Bowen*, 25 Ill. App. 192 (1887); *Pierce v. Johnson*, 93 Mich. 125, 18 L. R. A. 436 (1892); *Ripon Knitting Works v. Johnson*, 93 Mich. 129 (1892).

Though a fraudulent intent which will support an attachment may be reasonably inferred from the acts and conduct of the party. *Scott v. Simmons*, 34 How. Pr. 66 (1897).

And whatever facts tend to show the good or bad faith of a party against whom an attachment is issued upon the ground of fraud are properly admissible in evidence. *Marx Bros. v. Leinkauf*, 93 Ala. 453 (1890).

But the facts required to be proved to sustain an attachment upon the ground that the debtor is about to dispose of his property for the purpose of defrauding his creditors should be such as will 30 L. R. A.

8 Am. & Eng. Enc. Law, p. 753; *Case v. Ayers*, 65 Ill. 142; *Keith v. Goldston*, 22 Ill. App. 457; *McBean v. Fox*, 1 Ill. App. 177; *Gough v. St. John*, 16 Wend. 646; *Drabek v. Grand Lodge of B. S. Benes. Soc.* 24 Ill. App. 83; *Ryhiner v. Ruegger*, 19 Ill. App. 156; *Moore v. Wood*, 100 Ill. 451; *Flower v. Brumbach*, 30 Ill. App. 294.

It is a fraud which will avoid an obligation of a bond, for the obligee to induce the sureties to become such on representations known to be false, although the motive from which the representation proceeded was not bad.

Drabek v. Grand Lodge of B. S. Benes. Soc. supra; 8 Am. & Eng. Enc. Law, p. 753.

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leave no reasonable doubt on the mind of the officer that the debtor is about to commit such acts, and such as would induce him, where uncontradicted or unexplained, to convict the debtor of the charge if he were on trial on a criminal charge. *Morrison v. Ream*, 1 Pinney, 244 (1842).

And proof of fraudulent intent, consisting chiefly of conflicting evidence and conclusions based upon an examination of the books of the debtor, which might be dissipated by cross-examination of the witnesses, will not support an attachment. *Von Moppes v. Leimbach*, 22 N. Y. Week. Dig. 337 (1885).

And evidence that a debtor, while residing in another state and over ten years before, was embarrassed and had put his property out of his hands, is irrelevant and inadmissible to prove that he is about to dispose of or remove his property with intent to defraud his creditors, to sustain an attachment. *Lewis v. Kennedy*, 3 G. Greene, 67 (1851).

The question of the existence of a fraudulent intent which will support an attachment is generally one of fact to be arrived at from the existence of other facts which tend to show it, and whether such other facts exist in any particular case is a question for the jury, and whether such facts, when they exist, are sufficient to indicate conclusively an intent to hinder and delay creditors, is a question of law. *Butts v. Peacock*, 23 Wis. 350 (1868) (*dictum*).

The intent which will sustain an attachment must appear as a fact in the case, and is the material inquiry in the case. *Ryhiner v. Ruegger*, 19 Ill. App. 157 (1886) (*dictum*); *First Nat. Bank v. Steele*, 81 Mich. 93 (1890).

It is not enough to show that one has conveyed his property. *First Nat. Bank v. Steele. supra*.

A disposition of property with intent to defraud creditors will support an attachment, however, though they were not actually defrauded. *Main v. Lynch*, 54 Md. 653 (1880).

It is not necessary that a transfer of property shall have actually taken place. It is sufficient if there be a fully formed purpose to make it. *Ditchburn v. Jermyn & G. Co-Op. Asso.* 3 Pa. Dist. R. 635 (1894).

And circumstances sufficient to establish in law an intent to defraud creditors justify an attachment, though there is no positive proof of the removal or concealment of property with such intent. *Kipling v. Corbin*, 66 How. Pr. 12 (1893).

But an intent to make a fraudulent conveyance on the part of a debtor, which is retracted before any one sustains an injury, will not sustain an attachment. *McCrosky v. Leach*, 63 Ill. 61 (1872).

And evidence that the debtor was about to dispose of her property and failed to do so will not support an attachment upon the ground that she had disposed of her property with intent to hinder and delay or defraud creditors. *Pierce v. White*, 22 Week. L. Bull. 96 (1899).

So, the disposition of property with intent to de-

by false representation as to his financial ability is guilty of fraud which will avoid the sale, without regard to the motive with which the representation was made; it is wholly immaterial what the vendee's intention was as to paying for the goods.

Reed v. Pinney, 35 Ill. Rep. 610; 8 Am. & Eng. Enc. Law, p. 753.

The intent or intention is regarded as shown by acts and declarations, and, as acts speak louder than words, if a party is guilty of an act which defrauds another, his declaration that he did not by the act intend to defraud is weighed down by the evidence of his own act.

Wait, Fraud. Conv. 2d ed. §§ 8, 9; 8 Am. &

Eng. Enc. Law, p. 753; *Moore v. Wood*, 100 Ill. 451; *Rybhiner v. Ruegger*, 19 Ill. App. 156; *Whedbee v. Stewart*, 40 Md. 424.

The giving of a deed, absolute on its face, as a security, is strong evidence of an intention on the part of the grantor to hinder, delay, and defraud his creditors.

See *Fuller v. Griffith* (Iowa) 60 N. W. Rep. 247; *McClure v. Smith*, 14 Colo. 297; *Stevens v. Hinckley*, 43 Me. 440; *Moore v. Roe*, 35 N. J. Eq. 90; *Earnshaw v. Stewart*, 64 Md. 513; *Whedbee v. Stewart*, *supra*; *Kemper v. Campbell*, 44 Ohio St. 210; *Haselaine v. Espey*, 13 Or. 301; *Samuel v. Kittenger*, 6 Wash. St. 261; *Muchmore v. Budd*, 53 N. J. L. 369; *Gaffney*

fraud creditors is a sufficient ground for attachment though such disposition took place in another state. *Kibbe v. Wetmore*, 31 Hun, 424 (1884).

And the intent of a debtor in making a conveyance need not be to forever defeat the creditor, but will be complete if it is coextensive with the effect of the conveyance as hindering or delaying his creditors. *Shove v. Farwell*, 9 Ill. App. 256 (1881).

And a debtor who has formed a fraudulent intent to dispose of his property is about to dispose of his property so as to hinder or delay his creditor within the meaning of the Illinois statute authorizing an attachment therefor, whether the design is to be executed at once or after a little delay. *Dueber Watch Case Mfg. Co. v. Young*, 155 Ill. 236 (1886), 54 Ill. App. 383 (1891).

So, an intent to dispose of property for the purpose of delaying or defrauding a particular creditor is good ground for an attachment in his behalf. *Correy v. Lake*, 1 Deady, 460 (1863).

And a conveyance by a debtor with intent to delay or defraud any one creditor will justify an attachment of his property by any other. *Sherrill v. Bench*, 37 Ark. 560 (1881).

And a general intention on the part of the debtor to prevent the collection of certain debts, whenever it should be attempted, will sustain an attachment. *Correy v. Lake*, *supra*.

And an intent to hinder or prevent the creditor from taking his property on execution is sufficient. *Ibid*.

So, it is not necessary to establish that a debtor has disposed of all his property with intent to defraud his creditors to uphold an attachment; it will lie where he has disposed of a part thereof with that intent. *Hyman v. Kapp*, 22 N. Y. Week. Dig. 310 (1886); *Wildman v. Van Gelder*, 60 Hun, 443, 21 N. Y. Civ. Proc. Rep. 143 (1891) (*dictum*).

And proof that a debtor disposed of his property with intent to defraud creditors is sufficient to warrant an attachment, without proof that he did not retain sufficient property to pay his debts. *Flannagan v. Donaldson*, 85 Ind. 517 (1882); *Pickard v. Samuels*, 64 Miss. 322 (1887).

And where the creditor gives evidence sufficient to establish the fraud, it devolves upon the debtor to repel the inference. *Pickard v. Samuels*, *supra*.

In *Pickard v. Samuels*, *supra*, *Montague v. Gaddis*, 37 Miss. 453, and *Myers v. Farrell*, 47 Miss. 281, *supra*, V., *For removal of property*, were distinguished upon the ground that they were cases in which an attachment was asked upon the ground of the removal by the debtor of his property from the state.

But affirmative evidence that the defendant is about to dispose of all his unencumbered property with the intent to defraud his creditors is essential to an attachment under the Louisiana statute providing for its issuance on that ground. *Hoy v. Weiss*, 24 La. Ann. 209 (1872).

So, a conveyance made by a debtor with intent to hinder and delay his creditors is a conveyance for 30 L. R. A.

the purpose of avoiding the payment of his debts, which is made a ground for attachment by Ga. Code, § 3297. *Gray v. Neill*, 86 Ga. 188 (1890).

And a conveyance made by a debtor for the purpose of hindering and delaying creditors and to gain time, with the intent eventually to pay them if he could do so, will sustain an attachment. *Ibid*.

And a transfer of property, effected by means of a sheriff's sale under a fraudulent and collusive judgment, is a transfer with intent to defraud within Pa. attachment act 1899. *Simon v. Johnson*, 7 Kulp, 166 (1898).

And even under the Missouri statute providing for an attachment where the debtor has disposed of property so as to defraud his creditors, an intent to hinder, defraud, and delay creditors by the fraudulent concealment, removal, or disposal of property is the real substance of the issue, and it is not necessary to prove that all of the debtor's property was included. *Taylor v. Myers*, 34 Mo. 81.

But in that state fraud in attachment cases is a question of law and the court should specifically direct the jury as to what purposes are honest in a legal sense. *Estes v. Fry*, 22 Mo. App. 53 (1896).

An attachment may be issued under the Iowa Code upon the ground that the debtor has property which he refuses to give in payment or security, without any showing of an intent to defraud creditors. *Bates v. Robinson*, 3 Iowa, 318 (1860).

And the removal of property by a tenant from the premises, which would endanger the landlord in the collection of his rent, justifies the issuing of an attachment under the Missouri attachment act, without reference to the intention with which the removal was made. *Morris v. Hammerle*, 40 Mo. 459 (1867).

And no design on the part of the debtor to do anything that will render the collection of his debt less certain is necessary to an attachment under the Kentucky statute, on the grounds that the debtor has not property enough to satisfy the plaintiff's demands, and the collection thereof will be endangered by the delay in obtaining judgment. *Burdett v. Phillips*, 78 Ky. 246 (1890).

b. Participation in fraudulent intent by transferee.

As a general rule an intent to defraud, in a conveyance of property which will support an attachment, need not be participated in by the vendee. *Miller v. McNair*, 65 Wis. 452 (1886); *Pettingill v. Drake*, 14 Ill. App. 424 (1883); *Spear v. Joyce*, 27 Ill. App. 456 (1889); *Rybhiner v. Ruegger*, 19 Ill. App. 157 (1886).

And an assignment for the benefit of creditors will sustain an attachment as a conveyance with intent to defraud, where the assignor entertained that intent though the trustee was innocent. *Foley v. Bitter*, 34 Md. 646 (1871).

The fraudulent intent which will justify a sale of lands under attachment for a fraudulent conveyance thereof, under 2 Ind. Rev. Stat. 1876, § 523, providing that lands fraudulently conveyed with in-

v. Signaigo, 1 Dill. 158; *Metropolitan Bank v. Godfrey*, 28 Ill. 579; *North v. Belden*, 18 Conn. 376, 35 Am. Dec. 89; *Smith v. Lowell*, 6 N. H. 67; *Bird v. Wilkinson*, 4 Leigh, 266; *Peck v. Whiting*, 21 Conn. 206; *Jess v. Stone*, 51 Conn. 446; *Slearns v. Porter*, 46 Conn. 813; *Gulley v. Macy*, 84 N. C. 434; *Campbell v. Davis*, 85 Ala. 56; *Tryon v. Flournoy*, 80 Ala. 321; *Smith v. Carlisle*, 16 N. H. 484; *Stratton v. Putney*, 63 N. H. 577; *Corpman v. Baccastow*, 84 Pa. 368; *McCulloch v. Hutchinson*, 7 Watts, 484, 32 Am. Dec. 776; *Curtis v. Leavitt*, 15 N. Y. 9; 8 Am. & Eng. Enc. Law, p. 753; *Wait*, *Fraud. Conv.* 2d ed. §§ 8, 9.

Any device to obscure the title to real estate

and thereby hinder or delay creditors is fraudulent.

Lewis v. Lanphere, 79 Ill. 187; *Metropolitan Bank v. Godfrey*, 28 Ill. 579; *Bullock v. Battenhausen*, 108 Ill. 28, affirming *Battenhausen v. Bullock*, 11 Ill. App. 665; *Bostwick v. Blake*, 145 Ill. 85; *Moore v. Wood*, 100 Ill. 451; *Davidson v. Burke*, 143 Ill. 189; *Sims v. Gaines*, 64 Ala. 892; 8 Am. & Eng. Enc. Law, p. 753.

Mr. W. S. Coy, for Jane Druley, appellee: The making of the deed to Jesse Druley, in trust for Jane Druley, was not fraudulent in fact, and will not support an attachment.

Shove v. Farwell, 9 Ill. App. 256; *First Nat. Bank v. Kurts*, 23 Ill. App. 213.

tent to delay or defraud creditors may be attached, however, must be participated in by the grantee. *Johnston v. Field*, 62 Ind. 377 (1873).

So, a transfer of property easily separable of a much larger quantity than is necessary to pay the debt in payment of which it is given will support an attachment of the property transferred when the creditor was privy to the fraudulent design. *McDonald v. Gaunt*, 80 Kan. 698 (1883).

But a general attachment of all a debtor's interest in real estate will not hold lands fraudulently conveyed by him by deed recorded before the attachment and subsequently conveyed by his fraudulent grantee to an innocent purchaser for value. *Ashland Sav. Bank v. Mead*, 63 N. H. 435 (1885).

c. Gifts.

Whether or not a gift will amount to a disposition of property with intent to defraud, would seem to depend upon the amount of the indebtedness of the giver as compared with the amount of his property.

Thus a gift by a husband to his wife, in good faith when he was not owing anything, is not a disposition of property with intent to defraud creditors which will sustain an attachment at the suit of one who subsequently becomes the husband's creditor. *Tootle v. Coldwell*, 80 Kan. 125 (1888).

And a conveyance by a father to his natural daughter of real estate worth \$350, without actual consideration, but for the nominal consideration of \$100, when he possessed no other real estate out of which execution could be satisfied, does not show an intent to defraud which would justify an attachment, where there is nothing to show that he did not have ample personalty with which to pay his debts. *Hinds v. Pagebank*, 9 Minn. 68 (1864).

And an arrangement by which a debtor transfers real estate to his wife in exchange for other real estate, made at a time when he was not indebted to any considerable extent as compared with the amount of his property, which was upwards of \$600,000, is not evidence of an intent to defraud which will sustain an attachment sought two years afterwards. *Iosco County Sav. Bank v. Barnes*, 100 Mich. 1 (1894).

So, the gift of a piano by a debtor to his daughter which was intended for her own use and paid for in part with money which had been given her in small sums at various times does not show a fraudulent intent which will sustain an attachment by a subsequent creditor. *Keith v. McDonald*, 31 Ill. App. 17 (1888).

But when a conveyance is attacked as fraudulent and as a ground for attachment by pre-existing creditors, the burden to show that a valuable and adequate consideration was paid rests with the purchaser, and when the transaction is between near relatives, clearer and more conclusive proof is required. *Marx Bros. v. Leinkauff*, 93 Ala. 458 (1890).

And the execution and placing on record by a debtor of a deed conveying a lot of land to his wife

for a nominal consideration, without explanation, will sustain an attachment by existing creditors. *Washburn v. McGuire*, 19 Neb. 98 (1886).

And evidence that an insolvent debtor, against whom judgments were about to be perfected, transferred his property to his wife through a third person and procured her to execute a mortgage for the benefit of his mother-in-law for which no consideration was paid, and that he continued to use and control the property the same as before the conveyance, justifies an inference of a disposition of property with intent to defraud which will support an attachment. *Allen v. Meyer*, 73 N. Y. 1, 7 Daly, 229 (1873).

d. Sales of property.

The mere fact that a debtor has sold his property, or some part of it, does not establish a fraudulent intent which will sustain an attachment, though creditors are thereby hindered or delayed in the collection of their debts. *Dempsey v. Bowen*, 25 Ill. App. 122 (1887); *Decker v. Bryant*, 7 Barb. 183 (1849); *Frank v. Levie*, 5 Robt. 599 (1866).

That a debtor is selling his property at fair rates for the purpose of paying his creditors, does not show an intent to defraud which will support an attachment. *Knapp v. Joy*, 9 Mo. App. 47 (1880); *Dempsey v. Bowen*, 25 Ill. App. 122 (1887).

And the sale of his entire stock of goods by a debtor, and the application of the money received therefor to the payment of his debts, do not authorize an attachment upon the ground that he had conveyed his property with intent to cheat and defraud his creditors. *Tenney v. Diss*, 32 Neb. 61 (1891).

And such a transfer for the purpose of raising money does not warrant an attachment upon that ground where it is not shown to be fraudulent or for an inadequate consideration. *Ladew v. Hudson River Boat & S. Mfg. Co.*, 61 Hun, 333 (1891).

And proof that a debtor is offering his property for sale in order to realize funds for the payment of his debts, accompanied by a declaration of such purpose, will not justify an attachment upon the ground that he is about to dispose of his property with intent to defraud his creditors or give an unfair preference, or to place it beyond the reach of creditors. *Lehman v. McFarland*, 35 La. Ann. 624 (1889).

So, the daily disposal of his goods in the usual course of business by a solvent merchant, and the use of the money received for his own private purposes and placing it where it cannot be reached by his creditors except at his own pleasure, are not a disposal of his property with intent to defraud creditors for which an attachment will lie, though he may not intend to pay that particular money over to his creditors. *Willis v. Lowry*, 60 Tex. 540 (1886).

And the daily selling of goods by a permanent dealer in the regular course of his business does not indicate a fraudulent intent to place his property beyond the reach of creditors, or to give an

Messrs. J. H. Breckenridge and George S. House for appellees.

Balley, J., delivered the opinion of the court:

On the 8d day of September, 1890, the Weare Commission Company commenced its suit in assumpsit, by attachment, against William M. Druley and Albert A. Druley. The grounds for the attachment, as stated in the affidavit were: (1) That the defendants had, within two years then last past, fraudulently conveyed or assigned their effects, or part thereof, so as to hinder and delay their creditors; (2) that they had,

within two years then last past, fraudulently concealed or disposed of their property so as to hinder and delay their creditors; and (3) that they were about fraudulently to conceal or dispose of their property or effects so as to hinder and delay their creditors. William M. Druley, at the date of the writ, was in his last illness, and on September 5, 1890, which was two days thereafter, he died. It appears from the return to the writ that the sheriff, on September 5, 1890,—the day of William M. Druley's death,—attached a tract of land in Cook county, containing 2 acres, the land then being, or shortly prior to the date of the writ having been, the individual

unfair preference to some of them, which will justify an attachment, though he is financially embarrassed, *Hernsheim v. Levy*, 32 La. Ann. 340 (1880).

So, sales of property by a debtor for the purpose of obtaining money with which to purchase necessities for his family will not support an attachment, as a fraudulent conveyance or assignment of his property or effects. *Estes v. Fry*, 22 Mo. App. 53 (1886); *Dempsey v. Bowen*, 25 Ill. App. 122 (1887).

Whether or not such a disposition of property amounts to a transfer with fraudulent intent depends upon the attending circumstances and conditions.

Thus, an attachment on the ground that the debtor assigned, disposed of, and secreted his property with intent to defraud his creditors will not issue upon proof that he was badly embarrassed and had ineffectually tried to sell out his business, and that he owed largely and was not ready to say what steps would be taken in disposing of his property. *Thompson v. Deter*, 37 Hun, 316 (1890).

And proof that a debtor, whose factory was destroyed by fire, had gone out of business and sold what remained of his machinery and utensils for a small sum and contracted to sell the balance of his stock, and collected the insurance on the property destroyed, and paid or secured other creditors, will not support an attachment by an unsecured creditor upon the ground that he was about to dispose of his property and leave the state with intent to defraud creditors. *Andrews v. Schwartz*, 55 How. Pr. 190 (1878).

And making a conveyance of real estate absolute on its face, which was intended for the purpose of securing the grantee who was a bona fide creditor, is not evidence of a disposition of property with fraudulent intent which will support an attachment. *Rigney v. Tallmadge*, 17 How. Pr. 556 (1859).

So, a debtor who was a professional trader and bought upon credit, and sold and traded nearly everything that he possessed, and sold machinery at or about cost, is not subject to attachment on the ground of a disposal or removal of property with intent of defraud creditors, where that was the usual way in which he conducted his business and the sales at cost were made for the purpose of drawing trade. *Reed v. Bagley*, 24 Neb. 322 (1888).

And the making by a debtor of two assignments of property to the same person and then stating that he had no property and could pay no debts, will not support an attachment. *Miller v. Brinkerhoff*, 4 Denio, 118, 47 Am. Dec. 242 (1847).

And an attachment upon the ground that the debtor is about to convert his property into money for the purpose of defrauding his creditors should not issue on evidence that the attaching creditor had furnished him with supplies for his crop of cotton, and that after ginning five bales of cotton, four were turned over to the creditor and one was sold and taxes upon the debtor's store paid with the proceeds, the debtor remaining upon the place, 30 L. R. A.

and pursuing his usual business. *Bridge v. Ennis*, 28 La. Ann. 309 (1876).

But a sale, by a debtor who had purchased goods on credit, of his store to his wife, the debtor remaining in charge of the business after such sale and there being no actual and continued change of possession, creates a presumption of an intent to defraud creditors which will prima facie sustain an attachment. *Schumann v. Davis*, 33 N. Y. S. R. 191 (1891).

And a deed from a father to his daughter, absolute in form, for an express consideration of \$10,000, but intended as a security for advances not to exceed \$6,000, and to become absolute only in the event of the grantor's death, is calculated to hinder and delay creditors, and will support an attachment. *Evans v. Loughton*, 60 Wis. 128 (1887).

And evidence that a debtor contemplated a sale of all of his estate to his sons upon long credits, and transferring to his creditors his son's notes, is sufficient to establish an intent to defraud which will sustain an attachment. *Clark v. Smith*, 7 R. Mon. 273 (1847).

So, selling a few articles cheaply will not support an attachment upon the ground of an intended disposal of property to defraud creditors, where it was done for the purpose of pushing trade and the stock consisted in part of goods bought at an insolvent sale, and the whole stock was successfully sold. *Mack v. Jones*, 31 Fed. Rep. 129 (1887).

And evidence of an offer by a debtor to sell her stock in trade to another for less than to any other person, with a request to keep the matter secret, is not sufficient to sustain an attachment on that ground, particularly where the stock of goods was worth \$2,000, while her indebtedness did not appear to exceed \$400. *Frank v. Levie*, 5 Robt. 599 (1866).

And the sale of his stock of goods by an insolvent debtor at their fair value, taking land warrants not yet located but to which good titles could be made, the purchaser agreeing that if the lands fell short of a certain price he would make up the deficiency, will not support an attachment as a disposal of property with intent to defraud where the debtor seemed to have been actuated by honest motives. *Heidenheimer v. Ogborn*, 1 Disney (Ohio) 351 (1837).

But that debtors who are largely indebted if not insolvent have sold and are rapidly selling their large stock of goods at less than the original cost, and have disposed of other valuable property recently for cash, will warrant an attachment upon that ground. *Gashline v. Baer*, 64 N. C. 108 (1870).

And an unsuccessful effort by a debtor to borrow money from a creditor, after which the debtor sells the entire contents of his store to him, for much less than they are worth, deducting the creditor's claim, the creditor giving his check for a part of the amount, most of which the debtor sent to his mother, and giving his note payable in nine months for the balance, with an arrangement that the creditor may give his notes to other credit-

property of William M. Druley, and that, after his death, the sheriff also summoned certain insurance companies, who, as it was claimed, were then indebted to William M. Druley individually, as garnishees. No personal service of the attachment writ was had on either of the defendants.

The plaintiff, in its original declaration, declared against the defendants as copartners under the firm name of Druley Bros., upon six promissory notes payable to the order of the plaintiff, two for \$2,500 each, and one for \$1,000, signed by Druley Bros., and two for \$2,000 each, and one for \$200, signed by Druley Bros., and by William M. Druley in-

dividually. On the 17th day of October, 1890, Albert A. Druley entered a special appearance, and suggested on the record the death of William M. Druley, and also filed his affidavit, stating, in substance, that the firm of Druley Bros. was composed of William M. Druley and the affiant, and was formed for the purpose of carrying on a grain trade or business in Will county; that William M. Druley, at the time of his death, was a resident of Cook county, the affiant being a resident of Will county; that neither had been served with process, and that no property, rights, or credits belonging to the affiant, or in which he had any interest, had

ors and indorse the amount thereof on the note given to the debtor, will sustain a finding by a jury of the existence of the fraudulent intent necessary to sustain an attachment. *Pettingill v. Drake*, 14 Ill. App. 424 (1883).

And proof that a debtor was rapidly selling all his stock of goods, which was purchased mainly on credit, at about cost; and that he had no other property; that he had borrowed money and refused to pay it, and was endeavoring to borrow more, and was indebted to numerous persons whom he refused to pay, and neglected and refused to pay his workmen though he had money constantly coming in; together with a statement that if he failed he intended to make something,—is *prima facie* sufficient to support an attachment at the suit of a creditor whose claim he had denied and refused to pay. *Cooney v. Whitfield*, 41 How. Pr. 6 (1871).

And an attempt by an absent debtor, through his attorney in fact, to realize money on his business in haste, by offering to sell it at much less than its real value if payments were made at once, and proof that he had directed his wife to draw all money from the bank and leave none on the premises, and that she had told creditors while carrying a large amount of money that she had none and declared while making a payment on account that it was the last the creditors would ever get,—warrant an attachment on the ground that the debtor was about to dispose of his property with intent to defraud. *Union Distilling Co. v. Ruser*, 30 N. Y. S. R. 128 (1891).

So, a pretended sale by a debtor of no pecuniary responsibility, after which he remains in possession of the goods sold and conducts the business as before, constitutes a disposal of his property with intent to defraud, which will support an attachment. *Scott v. Simmons*, 34 How. Pr. 66 (1867).

And an attachment will lie under Ga. Code, § 3297, for a pretended sale by a debtor for the purpose of avoiding his creditors, and the interposition of a court of equity is not necessary. *Haralson v. Newton*, 68 Ga. 168 (1879).

But a sale by an insolvent debtor of his entire stock of goods in his store, together with the furniture and the outstanding notes and accounts, to his son for notes payable in one, two, and three years, which were placed in a bank to be collected, the proceeds to be applied upon certain indebtedness, will not support an attachment upon the ground of a disposition of his property with intent to defraud his creditors, when the son had expectations as a devisee in his grandmother's will, since making which she had become demented. *Miami Powder Co. v. Hotchkiss*, 20 Fed. Rep. 767 (1887).

So, a warrant of attachment upon the ground that the debtor has disposed of or secreted property with intent to defraud his creditors is properly issued in favor of a creditor to whom he transferred property as security, which he was permitted to hold and sell, provided he applied the pro-

ceeds in payment of the indebtedness, where he secretly and fraudulently sold it, and refused to say what he had done with the proceeds. *German Bank v. Meyer*, 55 Hun, 86 (1889).

But an attachment upon the ground that the debtor was about to convert his property into money with intent to place it beyond the reach of creditors is not sustained by proof that he sold several bales of cotton to pay his landlord who had taken out a provisional seizure, and sent two or three work animals to his brother's plantation after having agreed with the attachment creditor to ship him all the cotton he could get from his lessees and debtors and pay to him what he could realize from the sale of his goods. *Bussey v. Rothschild*, 26 La. Ann. 258 (1874).

And evidence that a debtor, who was a retail merchant, refused to inform his creditors as to his financial standing, and had been making sales of his property for cash and retaining the proceeds and not replenishing his stock, and had disposed of a large part thereof, will not support an attachment, where it appears that it was a season of the year when goods were sold and not bought by retailers, and that he had bought goods during the month and had paid over \$3,000 to his creditors. *Stringfield v. Fields*, 13 Daly, 171, 7 N. Y. Civ. Proc. Rep. 356 (1886).

So, a conveyance by a father, who was surety for his son, of his property to a daughter and her husband to carry out the wishes of his deceased wife and redeem promises made to his children when the property was conveyed to him, and to perform a contract with and pay a debt due the daughter and her husband, does not show such a corrupt motive or fraudulent intent as will justify an attachment, where he did not know at the time he executed the conveyance that his son was financially embarrassed. *First Nat. Bank v. Kurtz*, 23 Ill. App. 213 (1886).

And a sale of attached property after the institution of the attachment suit and during its pendency does not raise an inference that an intention to dispose of the property and defraud creditors existed when the suit was brought so as to sustain an attachment in chancery under the Kentucky statute, it being necessary to show the existence of a fraudulent intent before the issuance of the attachment. *Warner v. Everett*, 7 B. Mon. 262 (1847).

But the disposal by a debtor, for his own benefit, without consent of his creditor, of goods for which warehouse receipts had been issued and delivered as collateral security for money borrowed, is an act done with the fraudulent intent to cheat, hinder, and delay the creditor within the meaning of the Kentucky statute, allowing an attachment for such act. *Bank of Commerce v. Payne*, 35 Ky. 446 (1857).

And the exchange by a debtor of a stock of goods worth about \$2,000 for unproductive real estate of doubtful value, taken subject to a mortgage for \$400, is sufficient to authorize an attach-

been attached under the attachment writ directed to the sheriff of Cook county; that neither the affiant nor the late firm of Druley Bros. had any property in Cook county; and that all the property, rights, and credits seized under the writ were the individual property of William M. Druley. Upon this affidavit, Albert A. Druley moved to dismiss, and quash the writ of attachment. This motion was overruled by the court, and at the same time the plaintiff discontinued its suit as to Albert A. Druley, and by leave of the court amended all the papers and proceedings in the cause by striking out the words, "co-partners as Druley Brothers," wherever they

occurred. It was also ordered that Mary A. Druley, the administratrix of the estate of William M. Druley, deceased, be substituted as defendant in place of her intestate, and also that Jesse Druley and Ralph Druley, the heirs at law of William M. Druley, be made parties to the attachment issue only, and be summoned as such. The plaintiff also, by leave of the court, filed a new affidavit in attachment, setting up the indebtedness sued for as being from William M. Druley, in his lifetime to the plaintiff, and since his death as being due and owing from his administratrix to the plaintiff, and setting up, as against William Druley individually,

ment under the Nebraska statute, providing therefor where the debtor has disposed of his property with intent to defraud his creditor. *Robinson Notion Co. v. Ormsby*, 33 Neb. 685 (1891).

So, that the debtor was making an effort to sell his property or place it out of his hands is sufficient to sustain an attachment on the ground of an alleged conversion of property into money with intent to place it beyond the reach of his creditors, on motion to dissolve. *Wetherow v. Croslin*, 24 La. Ann. 128 (1872).

And that the debtor went to a young lady to whom he was engaged, and urged immediate marriage for the reason that his business affairs were becoming involved, and that he wanted to deed his lands to her and make over to her his personal property so that nobody could get them away, desiring her to go to a neighboring city the next morning and be married and he would make the transfer, will sustain an attachment upon the ground that the debtor is about to dispose of his property with intent to defraud his creditors. *Curtis v. Hoadley*, 29 Kan. 566 (1893).

As to fraudulent contraction of debt as evidence of fraudulent disposition, see *supra*, III.

e. *Mortgaging or pledging property.*

Securing a creditor by mortgaging or pledging property does not establish a fraudulent intent which will sustain an attachment, though other creditors are thereby hindered or delayed in the collection of their debts. *Dempsey v. Bowen*, 25 Ill. App. 192 (1887).

So, the giving of a chattel mortgage on his personal property by a debtor to a trustee for the benefit of designated creditors is not evidence of an intent to defraud which will sustain an attachment, but is evidence of an attempt to secure such creditors. *Rickel v. Strelinger*, 102 Mich. 41 (1894).

And giving a mortgage to a creditor to secure his claims does not constitute a ground for attachment under the Louisiana attachment act, art. 240, No. 4, where there is nothing to show that it was given with intent to defraud creditors or give a fraudulent preference. *Abney v. Whitted*, 28 La. Ann. 818 (1876).

And giving a chattel mortgage upon personal property which is by law exempt from levy under execution or attachment is not a disposal of property with intent to defraud creditors which will support an attachment. *Wyman v. Wilmarth*, 18 D. 172 (1890).

And that a debtor mortgaged a stock of goods and the assignee of the mortgage took possession within a few days after the execution of the mortgage and proceeded to sell the property do not show an intent to defraud which will sustain an attachment, where it is not shown that the mortgage was not given to secure bona fide debts. *Pierce v. Johnson*, 93 Mich. 125, 18 L. R. A. 486 (1902); *Ripon Knitting Works v. Johnson*, 93 Mich. 129 (1902).

So an offer by a debtor to mortgage property to a

creditor, including in the mortgage the claim of another creditor not yet due which it was stipulated should be paid after the debt due the first creditor was discharged, will not support an attachment upon the ground of a disposition of property by the debtor with intent to defraud creditors. *C. D. Smith Drug Co. v. Casper Drug Co. (Wyo.)* 40 Pac. Rep. 879 (1896).

And the mere failure or neglect of a creditor to record a deed given him by his debtor for security without evidence or suspicion that the debtor knew of, or requested or desired such failure, does not show an intent on the part of the debtor to hinder, delay, or defraud creditors which will support an attachment. *Burruss v. Trant*, 88 Va. 980 (1892).

And the withholding of a chattel mortgage upon a stock of goods from record is not a ground for attachment under a statute authorizing it, where the debtor transfers his property with intent to defraud creditors, because while the mortgage was thus withheld it was void as to creditors. *Lord v. Wirt*, 96 Mich. 415 (1896).

And a purchase of mining stock of unknown and uncertain value, by a debtor who placed a mortgage upon his property in part for the purpose of paying for such stock and in part to make a payment upon his indebtedness, though a foolish adventure, is not a disposal of property with intent to defraud creditors which will support an attachment. *Thurber v. Sexauer*, 15 Neb. 541 (1894).

So, an offer by a married woman to pledge her property, pursuant to Alabama Code, § 2349, authorizing it, does not furnish ground for an attachment against her, unless the offer was made with fraudulent intent. *Schloss v. Rovelesky (Ala.)* 18 So. 71 (1896).

But a mortgage by merchants who were indebted in amount nearly equal in value to their assets made to a creditor, containing a stipulation that the mortgagor should dispose of the mortgaged property in a regular course of mercantile sales at customary prices, will support an attachment upon the ground of a disposal of property with intent to defraud creditors, as the effect of the stipulation is to hinder and delay creditors. *Gallagher v. Goldfrank*, 75 Tex. 562 (1890).

And such a mortgage, under which it is understood between the parties that the mortgagor should do as he pleased with the proceeds, constitutes a conveyance or disposal of the debtor's property with intent to defraud his creditors which will support an attachment. *Anderson v. Patterson*, 64 Wis. 557 (1885); *City Bank v. Westbury*, 16 Hun, 468 (1879).

So, a mortgage placed by a debtor upon his stock of merchandise and fixtures is a ground for attachment when it can be inferred that the intention was that the mortgagor was to continue to carry on his usual trade and business. *Eby v. Watkins*, 39 Mo. App. 27 (1890).

And a chattel mortgage under which the mortgagor is permitted to retain possession and to sell

the same grounds for an attachment alleged in the original affidavit. The administratrix afterwards appeared specially, and moved the court to quash the attachment, which motion was overruled. Summons having been served on her, she appeared generally, and filed a plea of none assumpsit, and certain special pleas to the declaration, and also a plea traversing the affidavit for attachment. Issues being formed on these pleas, a trial was had before the court and a jury, at which the court, after the evidence had been heard, instructed the jury to find the issues formed by the plea traversing the attachment affidavit in favor of the defendant. The jury

thereupon returned their verdict finding the issues upon the merits of the action in favor of the plaintiff, and assessing the plaintiff's damages at \$18,500, and finding the issues upon the attachment affidavit in favor of the defendant; and the court, after overruling a motion by the plaintiff for a new trial, gave judgment in favor of the plaintiff for the amount of the damages assessed by the jury and costs, but setting aside and quashing the attachment writ. That judgment has been affirmed by the appellate court, and this appeal is from the judgment of affirmance.

The principal controversy, as presented here, turns upon the propriety of the per-

the mortgaged property in the regular course of trade, without any provision as to what disposal should be made of the proceeds, is sufficient where there is no agreement outside of the mortgage as to what disposal should be made thereof, in connection with a statement by one of the mortgagors that except for the attachment the mortgage might never have been foreclosed, to sustain such attachment upon the ground of a disposal of property with intent to defraud creditors. *Leser v. Glaser*, 32 Kan. 546 (1894).

In *Leser v. Glaser*, *supra*, *Frankhouser v. Ellett*, *infra*, was distinguished upon the ground that in that case the mortgage was executed in good faith and the proceeds of the sales were to be applied in payment of the mortgage debt.

But where a mortgage is given upon a stock of goods and by agreement outside the mortgage the mortgagor is permitted to continue the business and dispose of the goods in the ordinary way, and uses some of the proceeds to support his family, the transaction will not be regarded as showing an intent to defraud creditors which will support an attachment where the arrangement is carried out in good faith. *Frankhouser v. Ellett*, 22 Kan. 127, 81 Am. Rep. 171 (1879).

And sales made by the mortgagor from the stock of goods mortgaged in the ordinary course of business with the knowledge and implied consent of the mortgagee will not sustain an attachment. *Rhode v. Matthal*, 35 Ill. App. 147 (1890).

So the mortgaging by a debtor of his personal property for the purpose of hindering and delaying his creditors justifies an attachment against him, and that he caused the fraudulent mortgage to be released a short time before the attachment is no defense where he immediately remortgaged the property to others under suspicious circumstances. *Buford & G. Implement Co. v. McWhorter*, 41 Kan. 232 (1890).

And the execution by a debtor of a mortgage to another without any consideration, for the purpose of covering up and concealing his interests in real estate, will sustain an attachment upon the ground of a disposition of property with intent to defraud. *Taylor v. Kubuke*, 26 Kan. 132 (1881).

So, a mortgage by an insolvent debtor to a creditor securing the payment of more than the mortgagee's demand, showing upon its face that it was given to cover agreed future advances, will sustain an allegation that the debtor had conveyed a part of his property with intent to defraud creditors, for which an attachment will issue. *Rice v. Morner*, 64 Wis. 569 (1886).

And mortgaging all of his property by a debtor to a creditor as security for his indebtedness is *prima facie* sufficient to justify an attachment upon the ground of the disposition of his property with intent to defraud his creditors, where the value of the property was greatly in excess of adequate security for the debt. *Smith v. Boyer*, 29 Neb. 76 (1890).

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And the giving of a chattel mortgage by a failing debtor to a creditor who knew his circumstances, upon all his property for an amount greater than was owing and in excess of the value of the property, and a claim of the mortgagee to hold the property for the full amount against a creditor, are conclusive evidence of an intent to hinder and delay creditors which will support an attachment. *Butts v. Peacock*, 23 Wis. 359 (1868).

So, the execution, by an insolvent debtor who is being pressed by his creditors, of a chattel mortgage upon his personal property to secure the payment of a sum of money to his attorney, most of which is in consideration of future legal services, is an assignment and disposal of his property with intent to defraud, hinder, and delay his creditors for which an attachment may be had under the Kansas statute. *Shellabarger v. Mottin*, 47 Kan. 451 (1891).

And a mortgage executed by a firm of druggists upon their entire stock, including a large quantity of intoxicating liquors, which is void for that reason, constitutes a hindrance to creditors, and will sustain an attachment upon that ground. *First Nat. Bank v. Gerson*, 60 Kan. 559 (1896).

As to constructive fraud in mortgaging property, see *supra*, II.

1. Assignments for the benefit of creditors.

The mere fact that an assignment for the benefit of creditors will hinder and delay creditors does not make it fraudulent, and is not a sufficient ground for an attachment, unless there was also an intent to hinder and delay them. *Gates v. Labeaume*, 19 Mo. 17 (1853); *Decker v. Bryant*, 7 Barb. 182 (1849).

So, in *Luckemeyer v. Seltz*, 61 Md. 317 (1883), an assignment by a debtor of all his property in trust for the benefit of all his creditors without exacting releases, was held insufficient to support an attachment upon the ground that it was a fraudulent transfer, where the evidence was not legally sufficient to show any fraudulent intent or antecedent fraud on the part of the grantor.

And a deed of assignment, reciting in the preamble that one of the purposes thereof was to prevent an undue sacrifice of the property assigned, does not show an intent to defraud which will sustain an attachment. *McPike v. Atwell*, 34 Kan. 142 (1885).

Nor is an assignment by a debtor for the benefit of creditors, giving preference in excess of one third of the assigned assets, prohibited by the New York statute, a disposition of his property with intent to defraud his creditors which will support an attachment. *Rose v. Renton*, 37 N. Y. S. R. 633 (1891).

And an assignment for the benefit of creditors made in good faith and upon a valid consideration, in which a preferred claim is stated to be a few dollars more or less than it actually is, does not show an intent to defraud creditors which will

empty instruction to the jury to find the issues upon the attachment affidavit for the defendant. If that instruction, and the consequent verdict and judgment, are sustained, it is manifestly immaterial whether the court erred in refusing to quash the attachment on motion of Albert A. Druley, or on the subsequent motion of the administratrix. At the trial, evidence was introduced tending to show the following facts: Some time about the year 1885, Jesse Druley, William M. Druley's father, sold a farm in McLean

county, and of the proceeds loaned to William M. Druley, or put into his business, about \$18,000. William M. Druley afterwards advanced to his father and mother various sums of money, and about March 10, 1887, a settlement was had between them, at which it was found that William M. Druley was indebted to his father in the sum of \$10,000. For this sum William M. Druley, with his father's consent, executed his promissory note, dated March 10, 1887, payable to Jane Druley, his mother, five years

support an attachment. *Strauss v. Rose*, 59 Md. 525 (1882). As to preferences generally, see *infra*, h.

So an assignment for creditors, giving the assignee power to compromise all claims and sell on credit, is not alone sufficient evidence of a disposition of the property with intent to defraud creditors which will warrant an attachment. *Milliken v. Dart*, 36 Hun, 24 (1881).

And an assignment for the benefit of creditors, empowering the assignee, for the proper execution of the trust, to employ and retain competent attorneys to defend and protect it if it be assailed and pay him a just and reasonable compensation, is not invalid, and an assignment of property with intent to defraud creditors which will sustain an attachment. *Bickham v. Lake*, 51 Fed. Rep. 802 (1883).

Nor will an assignment be deemed to have been made with intent to defraud creditors so as to support an attachment, because the assignee removed a part of his goods from the debtor's store on the morning after the conveyance, where the assignee acted discreetly and on his own responsibility without consulting the assignor or preferred creditors. *Strauss v. Rose*, *supra*.

In *Strauss v. Rose*, *supra*, *Main v. Lynch*, 54 Md. 656 (1880) *infra*, in this subdivision, was distinguished upon the ground that in that case the question whether the assignment was fraudulent in fact was submitted to the jury, while in this there was no evidence from which a jury could reasonably find a fraudulent purpose.

So, an agreement between a debtor and a creditor that the debtor will execute an assignment if at any time it becomes necessary for the creditor's protection, does not constitute fraud in fact which will support an attachment under the Mississippi statute. *Anderson v. Leach*, 50 Miss. 111 (1881).

And an agreement by certain creditors that they will accept one half their claims in full satisfaction, the debtors agreeing that if they should find it necessary to make an assignment they would secure the payment of such one half by a preference for confidential debts, followed by an assignment, preferring debts which were not confidential as well as those which were, and the claims of a number of creditors including those who had agreed to the compromise, does not constitute a transfer with intent to defraud which will support an attachment. *Powers v. Graydon*, 10 Bosw. 650 (1863).

And the fraudulent execution of an assignment will not justify the issuing of an attachment three days previous to such execution, unless the fraudulent intent existed at the time the attachment was sued out, though it may afford some evidence that the fraudulent assignment was contemplated at that time. *Donnell v. Jones*, 17 Ala. 689, 52 Am. Dec. 191 (1890).

To sustain an attachment on the ground that an assignment subsequently made is fraudulent, it must appear that at the time the attachment was issued the debtor contemplated making such fraudulent assignment, and the question as to

whether it was thus contemplated is one for the jury. *Bickham v. Lake*, 51 Fed. Rep. 802 (1883).

And proof of fraudulent conduct prior to an assignment for the benefit of creditors will not support an attachment on the ground of a disposition of property with intent to defraud, where the assignment itself is not impeached. *Belmont v. Lane*, 22 How. Pr. 365 (1862).

As to effect on assignment of fraud in the contraction of debts, see *supra*, III.

A fraudulent disposition of property by way of an assignment for the benefit of creditors, however, may be a disposition of property with intent to defraud for which an attachment might be issued. *Skinner v. Oettinger*, 14 Abb. Pr. 109 (1861).

And the execution of an instrument by a debtor purporting to convey all of his property for the benefit of his creditors, showing on its face that it was executed for the purpose of defrauding his creditors, in connection with evidence *alunde* of the same fact, will sustain an attachment under the Kansas statute. *Johnson v. Laughlin*, 7 Kan. 369 (1871).

And a general assignment providing for the payment of fictitious or simulated debts is fraudulent and void for all purposes, and will support an attachment upon the ground of a disposition of property with intent to defraud creditors. *Bickham v. Lake*, 51 Fed. Rep. 802 (1883).

The questions as to whether debts provided for in an assignment for the benefit of creditors are simulated and fictitious, and whether or not the assignor knew or had reasonable cause to know their invalidity, are questions of fact for the jury. *Ibid*.

And the assignor is presumed to know it though such presumption is rebuttable. *Ibid*.

So, an assignment of a stock of goods to a trustee for the benefit of designated creditors will support an attachment as a fraudulent disposition of property where it was the intent of the parties thereto that the grantor should be allowed to remain in possession and dispose of the property in the usual course of business until default. *Stanley v. Bunce*, 27 Mo. 289 (1856).

And an assignment for the benefit of creditors, intended to aid the grantors in dishonestly withholding a large portion of their property from their creditors, and at the same time to enable them to obtain releases from their debts by fraudulently pretending by its terms to convey all their property, is a conveyance with intent to defraud which will support an attachment. *Foley v. Bitter*, 84 Md. 646 (1871); *Main v. Lynch*, 54 Md. 656 (1880).

And the concealment by a debtor of a large portion of his property for the fraudulent purpose of assigning the balance for the benefit of his creditors and inducing them to accept terms of compromise advantageous to himself is a ground for attachment. *Kleine v. Nie*, 88 Ky. 542 (1890).

And an assignment for the benefit of creditors, followed by a statement by the debtor to a preferred creditor that he would not pay some of his creditors who pushed him if he could prevent it,

after date, with interest at the rate of 6 per cent per annum, payable quarterly. This note remaining wholly unpaid, William M. Druley, some weeks prior to his death,—but whether in payment of or as security for the note is left by the evidence somewhat in doubt,—signed and acknowledged a deed conveying the 2-acre tract of land upon which the attachment writ was afterwards levied to Jesse Druley, his father, in trust for Jane

Druley, his mother. This deed was executed as the result of considerable negotiation between William M. Druley and an attorney representing Jesse and Jane Druley, such negotiation resulting in an agreement that the deed should be executed, but that, if William M. Druley recovered from his illness, he should have the land back, or that the deed should be returned to him. The deed, after it was signed and acknowledged,

and that instead of paying such debts he would make him a preferred creditor, is sufficient evidence of an intent to defraud which will authorize the issuance of an attachment. *Wilson v. Eifer*, 7 Coldw. 31 (1869).

So, a general assignment by a partner for the benefit of creditors preferring a dormant partner will support an attachment upon the ground of a disposition with intent to defraud, against the firm property at the suit of a firm creditor. *Claffin v. Hirsch*, 19 N.Y. Week. Dig. 248 (1884).

And proof that a domestic corporation had conveyed all of its property to a large creditor by a conveyance absolute on its face, together with evidence that the latter had declared his intention to satisfy his own claim first, will warrant an attachment on that ground, though it is claimed that the creditor was to act as trustee to pay the creditors ratably. *Bicknell v. Speir*, 45 N. Y. S. R. 661 (1902).

So, under the Missouri provision an assignment for the benefit of creditors will support an attachment as a disposal of property so as to defraud and delay creditors where it was made with fraudulent intent, though it may be valid as to the trustee and creditors secured. *Enders v. Richards*, 88 Mo. 496 (1893).

But an intent upon the part of the debtor to defraud or delay creditors is necessary to render a deed of assignment for the benefit of creditors which is fair on its face fraudulent so as to support an attachment. *Spencer v. Deagle*, 34 Mo. 455 (1884).

So, a reservation in a deed of assignment for the benefit of creditors of any surplus remaining after the satisfaction of the grantor's debts is not a fraudulent reservation to his own use as against creditors upon which an attachment will lie. *Douglass v. Cissna*, 17 Mo. App. 44 (1885).

And an assignment for the benefit of a creditor empowering the assignee to sell the property conveyed in the usual course of business and reserving to the grantor the surplus remaining after payment of the debt secured by the assignment, without providing for other debts, is not *per se* a fraudulent conveyance or a conveyance with intent to defraud creditors which will support an attachment. *Anderson v. Lachs*, 59 Miss. 111 (1881).

But an assignment in trust for the benefit of creditors who shall accept and release the grantor, which makes no disposition of the surplus which may remain after paying the releasing creditors, is fraudulent and void and will support an attachment. *Whedbee v. Stewart*, 40 Md. 414 (1874).

And a bill of sale conveying all of a debtor's property to a creditor with the provision that the creditor is to sell it and after satisfying his own claim return the balance, if any, to the debtor, is an assignment for the benefit of a particular creditor, and is fraudulent and void as to other creditors and will support an attachment. *Rigor v. Simmons*, 47 Ill. App. 428 (1893).

A purpose on the part of a debtor which, if declared in writing and inserted in a general assignment, would render it void as legally fraudulent, ought, when declared by the debtor verbally to be the object of an intended assignment, to be considered as fraudulent and sufficient to support an

attachment. *Gasherie v. Apple*, 14 Abb. Pr. 64 (1861).

As to assignments constructively fraudulent, see *supra*, II.

g. Threats to assign or dispose of property.

The question as to what threats to assign or dispose of property will establish an intent to defraud which will justify an attachment is an unsettled one. But it would seem that the question whether or not the threatened act is a lawful one might be regarded as the test adopted in most cases.

Thus, a threat to make an assignment for the benefit of creditors will not sustain an attachment upon the ground that the debtor is about to dispose of his property with intent to defraud his creditors. *Stamp v. Harpich*, 8 N. Y. S. R. 446 (1887).

And a threat to make an assignment with preferences does not show such an intent. *Kipling v. Corbin*, 66 How. Pr. 12 (1893).

So, a statement by a debtor to his creditor that if suit was brought upon his demand he would make an assignment, and that he owed a large amount of confidential debts, which he would first provide for, does not justify an attachment upon that ground. *Dickinson v. Benham*, 19 How. Pr. 410, 10 Abb. Pr. 890 (1860).

And such a threat will not support an attachment, though the debtor had agreed to furnish collateral security, which he not only failed to do but appropriated the whole of his means to a different object. *Dickerson v. Benham*, 20 How. Pr. 343 (1860).

And a statement by a debtor that he would fix things in such a way as to prevent some of his creditors from getting much will not support an attachment on the ground of an intended fraudulent disposition of his property. *Scott v. Dexter*, 1 N. Y. Week. Dig. 25 (1875).

So, an offer by a debtor to compromise with his creditors, accompanied by a statement that if the creditor did not agree to take it he would make an assignment, and that the creditor would not get anything, and that he would put his property out of his hands, is not sufficient proof of fraudulent intent to justify an attachment in the absence of proof of such intent derived from contemporaneous or subsequent acts. *Wilson v. Britton*, 25 Barb. 562 (1858).

And a statement by a debtor that unless his creditor would accept his offer of compromise he would at once make an assignment of all of his property, preferring another creditor, which would prevent his obtaining the amount of the compromise, will not warrant an attachment upon that ground. *Evans v. Warner*, 21 Hun. 674 (1890).

So when he threatened that they would get nothing. *Farwell v. Furniss*, 67 How. Pr. 183 (1884).

In *Farwell v. Furniss*, *supra*, Anthony v. Stype, 19 Hun. 268 (1879) *infra*, in this subdivision, was distinguished upon the ground that in that case there were other facts besides the threats which tended to show a fraudulent design.

In *Newman v. Kraim*, 34 La. Ann. 910 (1882), however, threats made by a debtor that he would dispose of his property to protect himself if he were sued were held to constitute a sufficient ground for attachment.

remained in the possession of the grantor about two weeks, and he then handed it to his brother, Edwin P. Druley, who was attending and taking care of him in his illness, saying to him that he should take it, and carry it in his pocket, and that if he, the grantor, got well, he should return it to him, but if he did not, he should put it on record. On the 2d day of September, 1890, Edwin P. Druley, having learned that the firm of

Druley Bros. was about to fail, or supposing that it had failed, put the deed on record, and about six weeks afterwards he got it from the recorder's office, and delivered it to his father and mother. This deed, and the circumstances attending its execution, constituted the only evidence given by the plaintiff in support of the grounds for an attachment alleged in its attachment affidavit.

It is urged, and with some show of reason,

So, a statement by one of a firm of debtors that they thought they would have to turn over their business, and that creditors might be left and they would have to protect themselves, does not establish an intent to transfer property to defraud creditors which will sustain an attachment. *Haulenbeck v. Coenen*, 20 N. Y. Civ. Proc. Rep. 6 (1890).

And a request by a debtor to his creditor for an extension of time in consequence of the failure of the cotton crop, accompanied by a statement of his business showing a solvent balance of over \$20,000 together with a declaration that if pressed he would be compelled to make a general assignment, will not support an attachment upon that ground, where there is nothing to impeach his good faith except a gift of land worth \$500 to his mother. *Wingo v. Purdy*, 87 Va. 472 (1891).

And a false statement by debtors that they were solvent, upon which they obtained an extension of credit, and their announcement of their insolvency a month later with the threat that if the creditor brought suit they would make an assignment, preferring another, does not establish a fraudulent intent which will sustain an attachment, whether the representations were innocently or dishonestly made, and though the state prohibits preferences of all the assignor's property. *Atlas Furniture Co. v. Freeman*, 70 Hun, 13 (1893).

But other facts in conjunction with the threat to assign or dispose of property may be sufficient to show the fraudulent intent necessary to sustain an attachment.

Thus, evidence that a debtor is able to pay a debt but that he put the creditor off from time to time and threatened to assign his property for the benefit of his creditors if sued, is sufficient to go to the jury on the question of the existence of a fraudulent intent which will support an attachment under the California attachment act of 1858, §4. *White v. Leszynsky*, 14 Cal. 165 (1859).

And a statement by a debtor to his creditor, made upon demand for payment, that he would not pay the debt and should sell and dispose of his property immediately and remove it out of the creditors reach, sufficiently establishes an intent to defraud which will sustain an attachment. *Pratt v. Pratt*, 2 Pinney, 395, 2 Chund. 48 (1850).

And proof that a firm of debtors had claimed to be entirely solvent, and made a statement of their affairs, showing a large surplus of assets, and soon after claimed to be insolvent and proposed a compromise, giving no explanation of their sudden insolvency, and made threats that unless their offer was accepted they would make an assignment, preferring a designated creditor, in which case the others would get little or nothing, followed by an assignment and the selection of a foreign assignee, is sufficient evidence of fraudulent intent to give jurisdiction to issue an attachment. *National Park Bank v. Whitmore*, 104 N. Y. 237 (1887).

And in *Hanks v. Andrews*, 53 Ark. 327 (1890), it was held that representations by a debtor to a creditor that he was doing a prosperous business upon assets three times greater than his liabilities, in order to get an extension of time, and threats that if he declined to allow it he would make such a disposition of his property as to prevent the creditor

from realizing, justifies an inference of fraud which will support an attachment.

In that case the court said that the case is to be distinguished from a threat merely to make an assignment, which, being a lawful act and standing alone, furnishes no evidence of an intended fraudulent disposition of property. *Ibid*.

So, a threat by a debtor that if sued he would make an assignment with preference leaving out those suits so that they would get nothing, coupled with his keeping his store open after his admitted insolvency, and continuing to dispose of his goods and appropriate the avails to other purposes than the payment of his debts, refusing to pay anything and declaring that he would not pay unless his creditors all agreed to take his goods and discharge him, is sufficient to warrant an attachment on the ground of an attempt to dispose of his property with intent to defraud his creditors. *Anthony v. Stype*, 19 Hun, 265 (1879).

And a conveyance by an insolvent debtor of his entire property in consideration of a sum of money in cash and the assumption by the purchaser of a debt which he pretended to owe to his brother, and giving on the same day a mortgage to such brother, securing such debt, together with a statement to certain creditors that he would give them twenty-five cents on the dollar, and that they might take that or nothing, and that he had got matters fixed so that they could not disturb him, is sufficient to show an intent to defraud which will support an attachment. *Miller v. McNair*, 65 Wis. 452 (1886).

Some of the cases, however, have seemed to look at the purpose of the threat, and to have acted upon the rule that a threat to do an act though lawful in itself will uphold an attachment where its purpose was to impose conditions upon the creditor or to intimidate him from pursuing the remedies provided by law for the collection of his claim.

Thus, a statement by a debtor to a creditor that if he continued to press him he would make an assignment preferring others, which would result in his not getting a cent, is an effort to intimidate the creditor and thus force him to refrain from exercising his legal right and will warrant an attachment on the ground that the debtor is about to dispose of his property with intent to defraud his creditors. *United States Net & T. Co. v. Alexander*, 42 N. Y. S. R. 608 (1891).

In that case it was said that the question is not as to the debtor's right to assign or prefer creditors, but the effort by his threats to impose upon the plaintiff a condition and thus prevent the creditor from using a legal remedy.

So, the using by a debtor of his power of assigning his property preferentially to intimidate creditors into abstaining from pressing the remedies allowed by law to collect debts, is sufficient to charge him with an intent to defraud them which will support an attachment. *Gasherie v. Apple*, 14 Abb. Pr. 64 (1861).

And proof that a debtor, who was able to pay all debts, threatened upon being asked to do so that he would make an assignment, and that the creditor could get nothing, and that he would do business under somebody else's name, will support an attachment upon that ground. *Ibid*.

that the deed was never delivered so as to become effectual as a conveyance. The contention is that Edwin P. Druley took and held the deed merely as agent of the grantor, and that by delivering it to him with instructions to keep it in his pocket, and return it to the grantor in case of his recovery, and to record it only in case of his death, the grantor did not, and did not intend to, absolutely yield dominion over it, but that it remained, down

to the time of his death, subject to his control, and liable to be recalled by him at any time. And it would seem that, if the deed was never delivered, it has no tendency to prove the charge of fraud made by the attachment affidavit. But, without determining the question of delivery, we prefer to place our decision upon another ground.

Even if the deed is to be regarded as having been effectually delivered, it must be

In that case the court distinguished *Wilson v. Britton*, 20 Barb. 562 (1858), and *Dickinson v. Benham*, 10 Abb. Pr. 360 (1860), set forth *supra*, in this subdivision, saying that the fact that the condition accompanied the threat to assign seems to have been overlooked in both cases as affecting the question in case of an action by the party threatened.

So, in *Livermore v. Rhodes*, 27 How. Pr. 506, 8 Robt. 636 (1864), it was held that a threat by a debtor that if he was sued he would turn over all his property and that the creditor wouldn't get a cent, evidences an intention to dispose of property so as to baffle the creditor in the speedy collection of his debt, which of course, could only be done by illegal means, and will therefore sustain an attachment.

See also *infra*, o, *Statements and misrepresentations by debtor*.

b. Making preferences.

Payment of honest debts to one creditor to the exclusion of others cannot be made the basis of a charge of fraud which will sustain an attachment. *First Nat. Bank v. Steele*, 81 Mich. 93 (1890) (*dictum*); *Stamp v. Herpich*, 8 N. Y. S. R. 446 (1887); *Morton v. Sterrett*, 4 W. L. G. 182 (1859); *Scott v. Dexter*, 1 N. Y. Week. Dig. 25 (1875).

The intent of an insolvent debtor to secure and take care of persons to whom he claimed to owe confidential moneys, to the exclusion of other creditors, does not justify an attachment upon the ground that he is about to dispose of property with intent to defraud his creditors. *Ellison v. Bernstein*, 60 How. Pr. 145 (1890).

And a creditor may take adequate security from a debtor without being chargeable with seeking to hinder and delay other creditors so as to justify an attachment against the debtor. *Smith v. Boyer*, 29 Neb. 76 (1890) (*dictum*).

The preference by a debtor in good faith of some creditors over others, either by making payment or transferring his property, or by giving chattel mortgages, is not an assignment or disposal of his property with fraudulent intent to hinder, cheat, and delay his creditors for which an attachment may be had. *Abernathy Furniture Co. v. Armstrong*, 46 Kan. 270 (1901).

Thus, a falling debtor who in good faith pays a debt which he justly owes, and secures an indorser against liability, does not thereby subject himself to attachment upon that ground. *Walker v. Adair*, 1 Bond. C. C. 158 (1857).

And a conveyance or mortgage by a debtor within sixty days prior to making an assignment for the benefit of creditors, with intent to prefer a particular creditor, is not evidence in itself of an intent to defraud creditors which will support an attachment. *Wachter v. Famachon*, 62 Wis. 117 (1885).

And a conveyance in contemplation of insolvency and with a design to prefer will not support an attachment in the absence of anything to show that the preference was fraudulent. *Stamper v. Hibbs*, 94 Ky. 368 (1893).

And that an insolvent debtor is about to sell property consisting of an exempted homestead and other real estate, for a fair price with the purpose

of applying the proceeds less than received for his homestead to the payment of his just debts owing to a portion of his creditors, does not establish that he is about to dispose of his property with intent to defraud or delay his other creditors. *Eaton v. Wells*, 18 Minn. 410 (1872).

So, the execution of mortgages by falling debtors upon their property to creditors to satisfy bona fide debts, thus giving them a preference, will not sustain an attachment at the suit of an unsecured creditor upon the ground that the debtor had or was about to dispose of his property for the purpose of defrauding, hindering, and delaying his creditors. *Gregory Grocery Co. v. Young*, 53 Kan. 339 (1894); *Campbell v. Warner*, 22 Kan. 604 (1879); *Avery v. Estes*, 18 Kan. 506 (1887); *Tootle v. Coldwell*, 30 Kan. 125 (1883); *Miller v. Wichita Overall & B. Mfg. Co.* 53 Kan. 75 (1894).

And the execution by a debtor of a mortgage on a portion of his property, and his refusal to confess judgments or give security to another creditor, declaring an intention to manage his property himself, does not justify an attachment on the ground of an intended fraudulent disposition of his property. *Connell v. Lasecells*, 20 Wend. 77 (1838).

So, an assignment for creditors by a debtor, made in good faith and upon a valid consideration, providing for the payment of one class of creditors in preference to another, does not show an intent to defraud which will support an attachment. *Strauss v. Rose*, 59 Md. 525 (1882).

Nor does a voluntary assignment. *Bryce v. Foot*, 25 S. C. 437 (1896); *Foley v. Bitter*, 84 Md. 646 (1871).

And an assignment for the benefit of creditors in which debts due the debtor's wife and brother are preferred does not establish an intention to defraud creditors which will sustain an attachment, where the indebtedness to the wife and brother is bona fide and clearly proved. *Farwell v. Brown*, 1 Fed. Rep. 128 (1880).

And an assignment for the benefit of creditors by a banker after notice given to two depositors with the banker's knowledge, upon which they drew out their deposits, does not show such an intent to defraud creditors as will support an attachment. *Wearne v. France*, 3 Wyo. 273 (1899).

So, proof that a firm of debtors were insolvent and had turned over to two creditors portions of their goods amounting to less than one half of their respective debts, and had refused to turn over any goods to another creditor, will not sustain an attachment at the suit of the latter upon the ground that they had disposed of or were about to dispose of their property with intent to defraud creditors. *Horton v. Fancher*, 14 Hun. 172 (1877).

But an assignment for the benefit of creditors by a firm preferring a debt due to one of the partners will sustain an attachment as a transfer with intent to defraud. *Citizens' Bank v. Williams*, 35 N. Y. S. R. 542 (1891).

So, a debtor who induces home creditors to attach his property does not thereby render himself liable to attachment by other creditors, where he was actuated by the purpose to secure their debts in preference to others, and it was not done with a view to secure any advantage to himself, though it had the effect to hinder and delay the others. *Heideman-*

conceded that there is no evidence of express fraud, or what is usually termed "fraud in fact." There is no evidence of any actual intention on the part of the grantor to hinder or delay his creditors. But the evidence tends to show that the deed, though absolute on its face, was intended by the parties as a mortgage to secure the \$10,000 note given by the grantor to his mother, and the rule is supported by many authorities that a con-

veyance of lands, absolute on its face, but intended as a mortgage or security for a debt, is fraudulent and void as against existing creditors, although there may have been no actual intent to defraud. Among the authorities so holding, the following may be consulted: *Sims v. Gaines*, 64 Ala. 393; *Watkins v. Arms*, 64 N. H. 99; *Gregory v. Perkins*, 4 Dev. L. 50; *Halcorn v. Ray*, 1 Ired. L. 340; *Coolidge v. Melvin*, 43 N. H. 510;

Benoit Saddlery Co. v. Urner, 24 Mo. App. 534 (1887).

And that insolvent debtors instigated and caused attachment suits to be commenced for the purpose of preferring the attaching creditors at the expense of other creditors, will not defeat the attachment where there is nothing to show that the claims of the attaching creditors were not honest or that there was any secret trust created. *Landauer v. Victor*, 69 Wis. 434 (1887).

And the refusal of a debtor to pay the money she had, being about one third of the creditor's claim, and using the same for other purposes, coupled with a denial in general terms that she had money, is not fraudulent and does not show such an intent to hinder or delay creditors as will furnish grounds for an attachment by those who are not paid, as she has the right to prefer one to another. *Keith v. McDonald*, 81 Ill. App. 17 (1888).

So, an intent to defraud which will sustain an attachment will not be imputed from a preference by a debtor in failing circumstances in the payment of his debts, though such a preference would operate to defeat a voluntary assignment for the benefit of creditors. *McPike v. Atwell*, 34 Kan. 142 (1885).

And a wrongful preference by a corporation of one creditor over others, or the giving of notes and permitting judgment to be taken thereon so as to give such preference, does not furnish ground for an attachment at the suit of the unpaid creditor. *Stone v. Bank*, 1 Ohio Dec. 309 (1894).

And a preference given by an insolvent corporation in a transfer of its property is not such fraud in fact as will support an attachment by an unpaid creditor. *Holbrook v. Peters & M. Co.* 8 Wash. 344 (1894).

But, although a debtor has a right to prefer a particular creditor, if he conveys his property to a trustee, not for that purpose merely, but for the express purpose and with the deliberate intent, to defraud a particular creditor or class of creditors and wholly defeat the recovery of their debts, such intent being the controlling motive in the debtor's mind, it will justify an attachment upon the ground of a disposition of his property with intent to defraud creditors, though the conveyance might be valid as to the trustee. *Wilson v. Elser*, 7 Coldw. 31 (1890).

And an intent to give an unfair preference is a ground for attachment under the Louisiana statute. See *Chaffe v. Mackenzie*, 43 La. Ann. 1063 (1891).

And an unfair preference given by an insolvent debtor to a creditor who was his sister-in-law, together with misrepresentations intentionally made to lull creditors into a sense of security, justifies an attachment of his property. *Stevens v. Helpman*, 29 La. Ann. 635 (1877).

See also, *supra*, c. *Mortgaging or pledging property; infra*, 1. *Transfers in payment of debts*; and *infra*, 1. *Confession of judgment*.

1. Transfers in payment of debts.

A transfer of property by an insolvent debtor to a creditor in payment of a debt, accompanied by delivery of possession, is not a ground for an attachment if there be no intent to hinder, delay, or defraud creditors, though it may have that tendency, where there is no question of bankruptcy. *Bents v. Rockey*, 60 Pa. 71 (1871).

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And is not fraudulent and will not support an attachment though he made false representations as to his condition and intention at or about the time of the sale, unless the vendees were parties to the fraud. *Chouteau v. Sherman*, 11 Mo. 386 (1848).

So, the turning out by a debtor of the property of a firm of which he was a member to pay and secure a particular debt, and thereby to prefer that to other obligations of the firm, does not warrant an attachment upon the ground of a disposition of property with intent to defraud, where the bona fides of the obligation are in no wise impeached. *Dintruff v. Tuthill*, 62 Hun, 591 (1892).

And an assignment by a partner of his interest in the assets of the firm to pay a debt he owed his wife for borrowed money will not support an attachment on that ground where it does not appear that it was not an honest debt. *Edick v. Green*, 38 Hun, 202 (1885).

And proof that a debtor had permitted a note to go to protest, and had been sued on another note, and transferred some of his goods to different parties to liquidate their accounts, and was about to make a general assignment, will not warrant the issue of an attachment upon the ground that he had disposed of or was about to dispose of his property with intent to defraud. *Newwitt v. Mansell*, 33 N. Y. S. R. 595 (1891).

So, a promise by a debtor to allow his creditors to take possession of his property at any time that he might feel insecure does not tend to show that the debtor is about to dispose of his property with the fraudulent intent for which an attachment may be had. *Parsons v. Stockbridge*, 43 Ind. 121 (1873).

But a transfer of all his property by an insolvent debtor to a creditor in payment of a debt, accompanied by an understanding that the debtor should get back a part of the property for working out the stock, is invalid and a good ground for attachment. *Bents v. Rockey*, 60 Pa. 71 (1871).

And an attachment issued on proof that the debtor, who has made a general assignment, made a payment of over \$2,000 to his wife one day previous thereto, will not be vacated upon proof that about ten years before his wife had obtained \$2,500 from her mother which she had delivered to her husband, as that does not establish an indebtedness of the attachment debtor to his wife. *Hyman v. Kapp*, 22 N. Y. Week. Dig. 310 (1885).

So, a transfer by a debtor whose property is easily separable, of a quantity thereof in excess of the amount of the indebtedness, the creditor paying the difference in money, is fraudulent and will sustain an attachment; and where the creditor is privy to the fraudulent design the purchase cannot be supported as against attachment creditors. *McDonald v. Gaunt*, 30 Kan. 608 (1888).

And a debtor who is oppressed with debt and unable to meet his obligations cannot transfer practically all of his unencumbered property to secure, not only an existing debt, but also a new debt then created for an advance of a large amount in cash, without rendering himself subject to attachment upon the ground of a disposal of property with intent to defraud creditors. *Gallagher v. Goldfrank*, 75 Tex. 522 (1890).

And an intent to defraud which will sustain an

Winkley v. Hill, 9 N. H. 81, 31 Am. Dec. 215; *Friedley v. Hamilton*, 17 Serg. & R. 70; *Harris v. Sumner*, 3 Pick. 129. See also *Metropolitan Bank v. Godfrey*, 23 Ill. 579. But we do not wish to be understood as expressing any opinion upon the question whether a deed absolute on its face, but intended as a mortgage, is constructively fraudulent or not.

The question thus arises whether, under

our statute, an attachment will issue where the fraud charged is a legal or constructive fraud only, as contradistinguished from express or intentional fraud, usually denominated "fraud in fact." This question, so far as we are advised, has never been decided by this court, but it has received consideration by the appellate courts in several cases, and in each case it has been decided in the negative. It first arose in the second district, in

attachment is established by proof that a debtor in embarrassed circumstances has transferred to a creditor an amount of property largely in excess of his indebtedness, to the exclusion of other creditors, without any previous negotiations and almost immediately after other creditors had pressed him for payment, and that the vendee did not know the value of the property he bought. *Nelson Distilling Co. v. Voessmeyer*, 25 Mo. App. 673 (1887).

1. Confession of judgment.

It would seem that the right of a debtor to confess judgment for an honest indebtedness without subjecting himself to a charge of entertaining a fraudulent intent must be coextensive with his right to pay or perform such indebtedness.

Thus, a confession of a judgment by a debtor in favor of a bona fide creditor for a just and honest debt is not a disposal of, or evidence of an intent to dispose of, property to defraud creditors which will support an attachment. *Wyman v. Wilmarth*, 1 S. D. 172 (1890).

And a confession of a judgment by a debtor in favor of his wife does not show an intent to defraud which will sustain an attachment in the absence of any showing that it was not for an actual debt, or that the property was sold thereunder for less than it would bring at a public sale. *Thomas v. Dickinson*, 33 N. Y. S. R. 736 (1890).

And a confession of judgment made by a debtor who had received a fund raised by a charitable contribution for the benefit of his brother in trust, which he had used in erecting a house on the rear of his own lot for the use of such brother, made to the brother to the amount of the trust fund, does not show a disposition of property with fraudulent intent which will support an attachment. *Kline v. O'Donnell*, 6 Kulp, 334, 11 Pa. Co. Ct. 38 (1891).

So, in *Lennig v. Senior*, 21 W. N. C. 379 (1886), it was held that a confession of judgment by an insolvent father to his son could not be held to be a fraudulent disposition of property within the Pennsylvania fraudulent attachment act, as he did not dispose of his property, the law disposed of it.

And in *Wright v. Ewen*, 24 W. N. C. 111 (1889), it was held that a confession of judgment by a partner in favor of creditors who claim to be creditors of the firm, and who are admitted to stand in that relation by the confessing partner, does not constitute an assignment and disposal of property with intent to defraud which will sustain an attachment, as a confessed judgment cannot be presumed to be fraudulent.

In *Ditchburn v. Jermyn & G. Co-Op. Assn.* 3 Pa. Dist. R. 635 (1883), however, the court disapproved of and refused to follow *Lennig v. Senior*, and *Wright v. Ewen*, *supra*.

And in that case it was held that a confession of judgment by a failing debtor which virtually swallows up his whole assets made without consideration, is a disposition of property within the meaning of the fraudulent attachment act of 1869, which will support an attachment.

So, the giving of judgment notes by an insolvent debtor in good faith for a genuine indebtedness does not establish such a fraudulent intent as will 80 L. R. A.

justify an attachment at the suit of another creditor. *Standard Oil Co. v. Morrison, A. & A. Co.* 54 Ill. App. 531 (1894).

But a confession of a judgment by a debtor with intent to hinder and delay creditors by having his property held up under execution issued thereon is a fraudulent disposition of property which will support an attachment under the Missouri attachment act. *Field v. Liverman*, 17 Mo. 218 (1862).

And confessions of judgments by a debtor, upon which execution was issued and the debtor's property seized for the purpose of forcing other creditors to agree to a settlement because the property was placed beyond their reach, will support an attachment upon the ground of a disposition of property with intent to defraud, though the confessions were given for debts actually owed. *Galle v. Tode*, 21 N. Y. Civ. Proc. Rep. 147 (1891).

So, judgment voluntarily confessed by a debtor to a creditor, which had no consideration for one half its entire amount, in connection with other circumstances rendering it difficult to regard it as a straightforward, honest transaction, will support an attachment under the Pennsylvania fraudulent attachment act of 1869. *Rubinsky v. Walenk*, 16 Pa. Co. Ct. 401 (1895).

And a confession of judgment by a debtor six days before the execution of an assignment for the benefit of creditors in favor of one of the assignees is a proper circumstance to go to the jury on the question of the existence of an intent to defraud which will support an attachment, where there is proof to connect such assignee with the assignor in the fraudulent disposition of his property. *Main v. Lynch*, 54 Md. 668 (1890).

k. Transfers and withdrawals by partners.

As a general rule any disposition of partnership effects which operates to defeat the right of joint creditors and to give individual creditors priority over them will be regarded as showing an intent to defraud them which will support an attachment.

Thus, a fraudulent transfer by a partner of his interests in the firm to his copartner makes him sole owner of the firm property, and gives his individual creditors a preference over the joint creditors in the marshaling of the assets, and will support an attachment on the ground of a transfer with intent to defraud firm creditors. *Hirsch v. Hutchison*, 64 How. Pr. 368, 3 N. Y. Civ. Proc. Rep. 108 (1883).

And a transfer by one partner to another of his partnership interest at a time when both partners and the firm were insolvent, and an assignment by the purchasing partner for the benefit of his creditors without preference or mention of partnership liabilities, made upon the same day, followed by an offer to settle at 60 cents on the dollar, is fraudulent and void, and a ground for attachment as to partnership creditors, as having been made for the purpose of covering up and concealing the debtor's property, and to defeat the right of partnership creditors to preference in the firm assets. *Collier v. Hanna*, 71 Md. 253 (1899).

So, an assignment for the benefit of creditors by a firm in which a debt due from one of the individual partners was preferred is a transfer with intent to

Shove v. Farwell, 9 Ill. App. 356, and there the court said: "The law does not allow a creditor to ignore the process of the common law in the collection of his debt, and resort to a summary seizure of the debtor's property upon mesne process, from the fact alone that the debtor has, within two years, sold his property, or any part of it, or has secured some other creditor by mortgaging or pledging it, even though the attaching creditor

should thereby be hindered or delayed in the collection of a just debt. Another element must exist in the transaction—the fraud of the debtor. And in our opinion the statute contemplates that this fraud shall be one of fact as contradistinguished from a legal or constructive fraud. If a man has shown himself to be dishonest, by making a conveyance of his property, designing thereby to delay and hinder his creditors, and such effect is

defraud creditors, which will justify an attachment. *Citizens' Bank v. Williams*, 35 N. Y. S. R. 542 (1891); *Keith v. Fink*, 47 Ill. 272 (1868); *Heye v. Bolles*, 2 Daly, 281, 38 How. Pr. 266 (1867).

And an assignment by a partner of partnership property for the payment of firm and individual debts, without providing that the firm debts shall be first paid, warrants an inference of fraudulent intent which will support an attachment. *Friend v. Michaelis*, 15 Abb. N. C. 364.

And such an assignment preferring a dormant partner will sustain an attachment. *Clafin v. Hirsch*, 19 N. Y. Week. Dig. 248 (1884).

So, a conveyance of his property by a partner with intent to defraud his creditors will support an attachment by a firm creditor though it is not shown that all of the partners participated in the fraudulent intent, as the firm creditors are his creditors. *Evans v. Virgin*, 69 Wis. 153 (1887).

And the appropriation by a debtor of money belonging to his firm to the payment of his individual debts is a fraud upon creditors of the firm and will support an attachment. *Keith v. Armstrong*, 66 Wis. 226 (1886).

And the absconding of one partner, and the disposition of the whole partnership effects by the other partner, who remained in possession and was insolvent, are sufficient to establish an intent to delay and hinder creditors of the firm which will sustain an attachment. *Sellew v. Christfield*, 1 Handy (Ohio) 86 (1864).

In *Citizens' Bank v. Williams*, 128 N. Y. 77 (1891), however, it was held that the giving of joint and several promissory notes by copartners for the individual debt of one of them, and the subsequent execution as a firm and as individuals of an assignment in which they declared that the notes should be paid out of the proceeds of the firm property, does not constitute an assignment with intent to defraud creditors which will support an attachment.

So, the turning out by a partner of firm property to pay or secure a particular debt, thereby preferring that to other obligations of the firm, does not of itself show an intent to defraud which will sustain an attachment. *Dintruff v. Tuthill*, 62 Hun, 591 (1892).

And an assignment by a partner of his interest to pay a debt due his wife will not support an attachment where the debt was an honest one. *Edick v. Green*, 38 Hun, 202 (1885).

Nor will a transfer by a limited partnership of its effects in payment of a valid debt, for the purpose of preferring the creditor, sustain an attachment, though such transfer is forbidden by law. *Casola v. Vasquez*, 147 N. Y. 258 (1895).

And a creditor cannot sue out an attachment against a surviving partner because he has been faithless to the trust which the law clothed him with for the benefit of firm creditors, but must bring him within the letter of the attachment statute by showing a disposition with intent to defraud, the same as in case of any other debtor. *Roach v. Brannon*, 57 Miss. 490 (1879).

And the use of the firm property by a surviving partner in good faith and with the acquiescence of the representative of the deceased partner to continue the business on his own account and in his 30 L. R. A.

own name and raising money upon the credit given him by the possession of such property and the disposal thereof, do not show an intent to defraud which will sustain an attachment. *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 211 (1882).

Nor are the failure of a debtor, upon winding up his interests in a store and getting out his share of the partnership, to apply the money to his debts, and the payment only of a debt due to his mother, alone sufficient to show a fraudulent intent upon which an attachment will lie. *Mack v. Jones*, 31 Fed. Rep. 189 (1887).

And an investment by a surviving partner of a part of the firm's assets in a retail liquor license will not sustain an attachment of the firm property on the ground of a disposal of firm property with intent to defraud creditors, where his intent was to sell out the stock at retail to realize a profit for the benefit of firm creditors. *Roach v. Brannon*, 57 Miss. 490 (1879).

And a confession of judgment by a partner in favor of persons claimed to be creditors of the firm does not constitute a disposition of property with intent to defraud which will support an attachment. *Wright v. Ewen*, 24 W. N. C. 111 (1899).

So, simply drawing moneys upon private account by merchant partners within small and reasonable limits, whether for the payment of their individual expenses or the payment of their honest individual obligations, does not show an intent to defraud creditors which will support an attachment, though they knew that they were in some difficulty, so long as they had reasonable expectation of extricating themselves. *McKinney v. Rosenband*, 23 Fed. Rep. 735 (1885).

But the drawing by members of a firm about to make an assignment of much larger amounts from the funds thereof than they had previously been accustomed to do, not for the purpose of paying debts then due, constitutes a withdrawal of firm assets from the reach of firm creditors for the purpose of applying them to their individual use, and will support an attachment though the property thus taken was subsequently returned. *Globe Woolen Co. v. Carhart*, 37 How. Pr. 408 (1884).

And the taking, by insolvent partners who have made an assignment, of a sum in excess of the amount exempted by statute from levy and sale under execution from the assets in the hands of the assignee to be appropriated to their own uses and withheld from creditors unless they should be able to secure a compromise at a certain figure, is a disposition of property with intent to defraud creditors, which will sustain an attachment. *Vietor v. Henlein*, 34 Hun, 522 (1885).

The supporting by the surviving partner of the family of the deceased partner out of the firm assets for a short time after an epidemic of yellow fever is not a disposal of the property of the firm with intent to defraud creditors which will support an attachment. *Roach v. Brannon*, 57 Miss. 490 (1879).

1. Formation of and transfer to corporation or partnership.

The formation of a corporation by a debtor, and the transfer of property to it, cannot be regarded as

produced, then, for the space of two years, the statute permits the creditor to treat him as one who may repeat the fraud, and authorizes its prevention by a seizure of his property, upon mesne process, and hold it to answer any judgment that may be rendered in the action." The same question arose in the same district in *First Nat. Bank v. Kurtz*, 22 Ill. App. 218, where the same conclusion was again announced. So in the first dis-

trict the same conclusion was announced in *Dempsey v. Bowen*, 25 Ill. App. 192, and in *Rhodes v. Matthai*, 35 Ill. App. 147. The decision of the appellate court in the present case is merely an application of what has become a settled rule of law in that court. In *Spencer v. Deagle*, 84 Mo. 455, an attachment writ was issued under a statute apparently identical with ours, and it was held to be error for the court to refuse to instruct

a fraudulent transfer which will support an attachment, unless an actual fraudulent design is shown. *Market Nat. Bank v. Bethel*, 32 Ohio L. J. 135 (1894); *Union Rolling Mill Co. v. Packard*, 18 Bull. 591, 1 C. C. 76, as given in 4 Bares' (Ohio) Dig. 84.

And an insolvent debtor having a large stock of raw material on hand, and with large contracts to sell the articles to be manufactured from it, is not liable to attachment for disposing of his property with intent to defraud his creditors by reason of converting his business into a corporation and taking shares of stock in lieu thereof and conveying all his business and property to it in the reasonable belief and with the intent of being able thereby to provide better for his creditors, although creditors first getting judgment and levying might have collected in full. *Beltman v. McKenzie*, 11 Bull. 272 (1879), as given in 4 Bares' (Ohio) Dig. 84.

So, a transfer by a debtor having a large stock of goods on hand which he bought at an insolvent sale, of a part of the stock to his brother under an arrangement for a partnership whereby the brother was to manage the new store then started and put in an equal amount of money, which was done, does not show a fraudulent intent which will support an attachment. *Mack v. Jones*, 81 Fed. Rep. 189 (1887).

m. Overbuying.

Overbuying by a debtor, who was dazed with the success of his business and thought he could enlarge it, does not show an intent to defraud which will support an attachment and can only be looked to as a circumstance tending to show that some specific transfer was made with intent to defraud creditors. *Mack v. Jones*, 81 Fed. Rep. 189 (1887).

And that a debtor was insolvent when he made purchases, and bought more goods than he needed, and failed to disclose his insolvency, does not, in the absence of false statements, show such an intent. *Ellison v. Bernstein*, 60 How. Pr. 145 (1890).

But extraordinary purchases of goods far greater than the usual course of business requires, by a debtor knowing himself to be insolvent, is sufficient evidence of fraudulent intent to support an attachment. *Clafin v. Einstein*, 6 W. N. C. 298 (1878).

n. Refusal to pay.

It is actual fraud and evil intent to hinder and delay creditors, and not a mere refusal or failure to pay debts, which will support an attachment upon the ground that a debtor is fraudulently withholding his property from the payment of his debts. *Durr v. Jackson*, 59 Ala. 208 (1877).

And a refusal by a debtor to pay a debt at a time when he owed not to exceed \$150 and had over \$1,600 in cash which could have been used to pay it, is not sufficient to sustain an attachment upon the ground that he is about to dispose of his property with intent to defraud his creditors. *Tootle v. Coldwell*, 80 Kan. 125 (1883).

And that a debtor has been requested to pay a debt and failed to do so, and is about to sell his stock and remove to another state, will not support an attachment under the New York Code in the absence of anything to show that such disposal was with intent to defraud creditors. *Seltman v. Jaschenorosky*, 3 Ohio L. J. 9 (1890).

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And evidence that a debtor had made promises to pay which he had broken, and that he was in a precarious situation if pressed, and that he intended to retain control of his property as long as the indulgence of his creditors and the law might permit, are not alone sufficient to warrant an attachment upon the ground of the seclusion or disposition of property with intent to defraud. *O'Reilly v. Freel*, 37 How. Pr. 277 (1877).

But the refusal by a debtor to pay while admitting her ability, and refusal of all information as to stock on hand and as to assets, and proof that persons in her employ were seen taking goods from her store in a suspicious manner and leaving them with her brother-in-law, will sustain an attachment on the ground that she had disposed of or was about to dispose of her property with intent to defraud her creditors, where she denied making sales to such brother-in-law. *Rothschild v. Mooney*, 38 N. Y. S. R. 565 (1891).

And refusal by a debtor to pay, together with a declaration that he would not pay unless his creditors all agreed to take his goods and discharge him, and a threat that if sued he would assign with preferences, leaving out those who sued, and his keeping his store open and disposing of goods and appropriating the avails, in addition to his admitted insolvency, warrant an inference of intent to defraud which will sustain an attachment. *Anthony v. Stype*, 19 Hun. 265 (1879).

And a debtor owing a large debt that is past due, and having a large sum of money that he ought to pay upon it, who refuses to pay anything without giving any reason for such refusal, and attempts to settle upon his intended wife a large sum of money wholly disproportionate to his property, and declares that he does not intend to pay his chief creditor until he gets ready but does intend to bring him to terms, and that he can speedily fix his property so that he can get nothing, and threatens that if he pushes him he will make him lose all he can,—is subject to attachment upon the ground that he is about to remove or dispose of his property with intent to defraud. *Ross v. Wigg*, 6 N. Y. Civ. Proc. Rep. 263 (1884).

o. Statements and misrepresentations by debtor.

The debtor frequently furnishes evidence of his fraudulent intent by his own statements.

Thus, a presumption of a disposition of property with intent to defraud creditors which will sustain an attachment under the Nevada statute is raised by the debtor telling the creditor that he has disposed of all of his property and will pay when he gets ready. *Bowers v. Beck*, 2 Nev. 139 (1866).

So, a statement by a debtor to his creditor that he would not pay his claim unless all his creditors would compromise, and that he had mortgaged all his property upon a claim which he had a year to pay, and was not obliged to pay his creditors, and that he had done so to protect himself from creditors, in connection with the fact that he continued in possession of the stock of mortgaged goods, disposing of them daily, will sustain an attachment upon the ground of a disposal of his property with intent to delay, if not to defraud, his creditors. *Blake v. Sherman*, 12 Minn. 420 (1867).

the jury that, to render the deed of trust there in question fraudulent as to the defendant's creditors, it must appear that it was executed for that purpose,—that it was not enough that the effect of the deed was to delay his creditors, but it must have been executed with that purpose and intent. While some decisions perhaps may be found in other states supporting the contrary view, we are disposed to think that the interpretation put upon our statute by the appellate court is the correct one. It seems to be the policy of our

attachment law to give creditors the right to seize the property of their debtors on original or mesne process, and hold it for the satisfaction of such judgments as may be subsequently recovered, in those cases where the situation or conduct of the debtors is or has been such as to raise a reasonable apprehension that the ordinary common-law processes of the court will be thwarted, and thus rendered unavailing.

The Revised Statutes of 1845 authorized attachments for only the first five of the nine

And statements by a debtor engaged in general mercantile business, disclosing a determination to defeat the claims of a creditor, and arrangements made pursuant to such intention, together with the fact that the stock of goods had during several months been converted into cash as rapidly as possible, and depleted in the aggregate several thousand dollars, and no satisfactory account given of the disposition of the proceeds, will sustain a finding of a disposal or concealment of property with fraudulent intent necessary to sustain an attachment. *Reed Bros. Co. v. First Nat. Bank (Neb.)* 64 N. W. Rep. 701 (1895).

And a statement by debtors to a creditor that they had executed to their sister a bill of sale of all their stock for a specified amount, and a statement by the sister that she had loaned money to the debtors and taken no security for it, and that no bill of sale had been executed by her, sufficiently show a transfer with intent to defraud which will support an attachment. *Boyd v. Miller*, 34 N. Y. Supp. 1023 (1896).

So, a statement by a debtor that he would be glad if a creditor ever got his pay, together with evidence that he had left the county and gone to Canada with intent to remain there, taking a part of his personal property with him, and that he was offering his property in the county for sale, sufficiently shows a design to dispose of property with intent to defraud creditors to sustain an attachment. *Rosenfield v. Howard*, 15 Barb. 546 (1853).

And proof that a wife allowed her husband to take possession of all her money, coupled with a falsehood as to the purpose for which he took it, sufficiently establishes an intention to defraud her creditors to sustain an attachment. *Anderson v. O'Reilly*, 54 Barb. 620 (1890).

Statements made by a debtor to a creditor that he could recover nothing, and that judgment against him would be worth nothing, however, will not support an attachment upon the ground of the disposal or intended disposal of property with intent to defraud creditors, where no such disposal or intended disposal is shown and it is shown that he has just rented another shop and extended his business. *Moulou v. Roengarden*, 22 Ia. Ann. 531 (1870).

And evidence that a debtor had made two assignments of property to the same person, and had then said that he had no property and could pay no debts, will not support an attachment on that ground. *Miller v. Brinkerhoff*, 4 Denio, 118, 47 Am. Dec. 243 (1847).

And a statement by a debtor upon being pressed by a creditor that he expects to realize money from sources not within his reasonable expectation does not tend to prove that he is about to dispose of his property with fraudulent intent, for which an attachment will lie under the Indiana statute. *Parsons v. Stockbridge*, 42 Ind. 121 (1873).

So, misrepresentations by a debtor as to his financial condition will not sustain an attachment upon the ground that he had disposed of or secreted his property with intent to defraud. *Fleimann v. Sickle*, 13 N. Y. S. R. 399 (1888); *Stamp v. Herpich*, 8 30 L. R. A.

N. Y. S. R. 446 (1887); *Goldschmidt v. Herschorn*, 13 N. Y. S. R. 560 (1888).

Want of precision in statements made to creditors, and discrepancies between such statements and the exact showing by the debtor's books, are not to be taken as circumstances showing a fraudulent intent for which an attachment will lie. *Mack v. Jones*, 81 Fed. Rep. 189 (1887).

And false representations by a debtor as to his condition and intention, followed by a conveyance of property to pay a debt justly due, will not support an attachment unless the vendees were parties to the fraud. *Chouteau v. Sherman*, 11 Mo. 385 (1848).

And the exhibit by a failing debtor of his liabilities showing cash on hand and book debts but not the value of his stock is not such a concealment of assets with intent to defraud creditors as will support an attachment, where it appears that the stock consisted of manufactured articles in an unfinished state which were not readily marketable and the value of which was subject to fair conjecture. *Kipling v. Corbin*, 65 How. Pr. 12 (1833).

But the utter insolvency of a debtor and his assignment for the benefit of creditors nine months after a showing made by him of the ownership of net assets of nearly \$20,000, justify the conclusion that the assignment was made with intent to defraud creditors, and warrant an attachment. *Buhl v. Ball*, 41 Hun, 61 (1880).

And a claim by a debtor to be solvent and to have a surplus of from \$10,000 to \$20,000, followed by a bill of sale of his entire stock, fixtures, etc., on the following day to his wife for a consideration of \$1 and a past-due debt of \$7,500, and an announcement of his suspension and insolvency upon the next day, and a general assignment two days thereafter, —sufficiently indicates a fraudulent intent for which an attachment may issue. *Seckendorf v. Ketcham*, 67 How. Pr. 523 (1884).

So, representations by a debtor to his creditor that he was doing a prosperous business upon assets three times greater than his liabilities for the purpose of obtaining an extension of time, in connection with threats to dispose of his property so as to prevent the creditor from realizing anything in case of refusal, will sustain an attachment. *Hanks v. Andrews*, 53 Ark. 327 (1890).

And proof of representations by a firm of debtors that they were doing a good business and had ample means to meet their obligations, and that four weeks later they failed and confessed judgments chiefly to relatives, having hardly sufficient property to pay them, and were largely indebted to the trade, is sufficient prima facie to sustain an attachment upon the ground of a disposition with intent to defraud. *Wickham v. Stern*, 23 N. Y. S. R. 154 (1889).

And proof that debtors stated that they were worth \$40,000, and were doing a cash business at the time of purchasing goods, and that a few weeks later, when the indebtedness became due, they declared they had no money and did not know whether they were solvent or not, and that within a month their stock which had amounted to \$20,000 in value, had become reduced to \$2,000 and

causes for attachment specified in our present attachment act, *viz.*: (1) Where the debtor is not a resident of the state; (2) where he conceals himself, or stands in defiance of an officer, so that process cannot be served upon him; (3) where he has departed from the state with the intention of having his effects removed from the state; (4) where he is about to remove from the state with the intention of having his effects removed from the state; and (5) where he is about to remove his property from the state, to the injury of the creditor suing. Rev. Stat. 1881, p. 128. Here the writ was given only where the debtor was already a nonresident, and so

beyond the reach of the ordinary processes of the law, or where there was an affirmative intention and design on his part to place his person and property, or his property alone, beyond the reach of those processes. The writ was given for the purpose of seizing the property so as to forestall its threatened removal, and to hold it as security for the judgment to be recovered.

It cannot be doubted, we think, that when the statute was so amended as to add the three causes for attachment set up in this case, the legislature was acting in furtherance of the same general intention expressed in the original act. The writ was not given for the

that they were then packing it up and removing it, —will support an attachment upon that ground. *Talcott v. Rosenberg*, 8 Abb. N. S. 297 (1870).

As to disappearance or depreciation of stock, see also *infra*, q. *Miscellaneous cases*.

p. Conversion of property.

A fraudulent conversion of property will not support an attachment, though possession was obtained with intent to convert it. *Finlay v. Bryson*, 84 Mo. 664 (1884).

And that a debtor employed money received from his creditor for purposes other than that for which it was received, furnishes no ground for an attachment upon the ground of an intended fraudulent disposition of property. *Allen v. Herschorn*, 9 Abb. Pr. N. S. 80 (1870).

And proof that one who held property for another with liberty to sell it and pay for it out of the proceeds sold such property and applied the proceeds to his own use, will not sustain an attachment upon the ground of a disposition of property with intent to defraud, as it does not appear that the debtor disposed of any of his own property. *German Bank v. Dash*, 60 How. Pr. 124 (1880).

But a failure by a debtor, who had received goods from a creditor for sale upon an agreement to account, to make return for a large sale for cash made by him will sustain an attachment. *Powell v. Matthews*, 10 Mo. 49 (1846).

q. Miscellaneous cases.

The cases in this subdivision, not properly falling within any of the above subdivisions, are here collected because, from their miscellaneous character, they are not readily susceptible of further or different classification.

Evidence that a debtor's stock had decreased at a more rapid rate than could be accounted for by his legitimate business will uphold an attachment upon the ground that he was disposing of property with intent to defraud his creditors. *White v. Reichert*, 14 N. Y. Week. Dig. 238 (1883).

And evidence that a debtor firm had a stock of goods worth \$40,000 two and one half years before, and during that time it had borrowed \$45,000, and that the business had not been unprosperous but that its stock had greatly diminished in quantity and value, and that they were insolvent and one of the firm had proposed a scheme for the purpose of defrauding certain firm creditors, is *prima facie* sufficient to warrant an attachment upon that ground. *Frankel v. Hays*, 20 N. Y. Week. Dig. 417 (1885).

So, evidence that after nightfall mules belonging to a debtor were clandestinely taken out of the town and run off to a distance of some 10 miles when they were captured, and that the person in charge made contradictory statements as to whom they belonged, will sustain an attachment upon the ground that the debtor was about to dispose

of or secrete his property with intent to defraud creditors. *Brown v. Hawkins*, 65 N. C. 645 (1871).

And in *Blackinton v. Rumpf* (Wash.) 40 Pac. Rep. 1063 (1890), an attachment upon the ground that the debtors were assigning, secreting, or disposing of their property, or were about to do so, with intent to defraud their creditors, was sustained upon a statement of a secret agreement to carry on business in the name of one and to divide the proceeds and to defraud persons from whom they might purchase, and evidence that they purchased goods of the attachment creditor which were not paid for and that the debtor in whose name the business was carried on disposed of his property to the other.

But the secretion of a debtor's books by an employee will not support an attachment upon the ground that he was about to secrete his property with intent to defraud his creditors, where there is nothing to connect him with the act of his employee, or to show that he acted under authority. *Fitzgerald v. Belden*, 49 How. Pr. 225 (1875).

And an attachment on the ground of secreting property with intent to defraud creditors, and concealment to avoid service of a summons, will not be granted because the debtor, who failed to pay at the promised time, had drawn all of his money out of the bank and was absent from his place of business when his creditor called for payment, where the place was open and his business was being conducted in the usual course by the clerk, who made no apparent effort to conceal his employer's whereabouts. *Reynolds v. Horton*, 67 Hun. 122 (1893).

And the removal of property of a debtor from his store by a third person claiming to be his assignee when no assignment had been filed in the clerk's office will not warrant an attachment upon the ground of a disposition of property with intent to defraud creditors. *Denzer v. Mundy*, 5 Robt. 636 (1866).

And mere neglect to defend actions brought against a debtor without any showing of fraud or of collusion between the debtor and creditor, in which judgment is obtained and the property of the debtor is taken, will not support an attachment upon that ground. *Rigney v. Tallmadge*, 17 How. Pr. 556 (1859).

So, the payment by a mutual benefit association of death claims subsequently maturing is not a disposition of or secreting the property of the association with intent to defraud its creditors which will sustain an attachment at the suit of the holder of a claim which had previously matured. *Knorr v. New York State Mut. Ben. Assn.* 79 Hun. 83 (1894).

And that the debtor has become dissipated, careless, and almost a sot, is greatly in debt and daily becoming more so, and is truly insolvent, together with a statement of the creditor's belief that he will dispose of his property in order to defraud his creditors, will not support an attachment. *Jackson v. Burke*, 4 Helsk. 610 (1871).

F. H. B.

purpose of enabling the creditor to attack a transaction which is only constructively fraudulent, but to enable him to seize the property of his debtor in cases where fraud has been committed or contemplated of such character as to raise a reasonable apprehension that by further fraudulent acts the debtor will put his property and effects beyond the reach of legal process. But such apprehension does not arise from the commission of a mere legal or constructive fraud. There evil intention, moral turpitude, and actual dishonesty are wanting. Equity, it is true, will set such transactions aside in a proper proceeding, at the instance of creditors; but no inference arises that the debtor will attempt, by any dishonest disposition of his property, to interfere with his creditors in the assertion of their just rights. We are of the opinion, then, that granting writs of attachment in cases where only legal or constructive fraud is shown is outside of the general scheme and purpose of the attachment law.

It is apparent that any other construction of the statute would often lead to consequences extremely oppressive. Thus, a sale of goods, where possession has not actually been delivered to the purchaser, though valid as between the parties, is constructively fraudulent as to the creditors of the seller, and the goods may be seized by them on execution as his goods, however honest he may have been in the transaction. In contemplation of law he has made, or attempted to make, a disposition of his property which is constructively fraudulent, and, if attachments may issue for constructive frauds, he has thereby subjected himself, however innocent he may have been, to all such attachment writs as his creditors may see fit to sue out against his property for the period of two years. So, if a debtor, in perfect good faith, executes a chattel mortgage to secure an honest debt, but fails to have it executed, acknowledged, and recorded in all respects as required by the statute, the transaction is constructively fraudulent and void as against his creditors. But can it be said that he thereby subjects himself, for a period of two years, to attachments by any of his creditors? Other similar illustrations without number will suggest themselves. In view of these various considerations, it seems to us to be very clear that the legislature, in authorizing writs of attachment in cases where the debtor has fraudulently conveyed or assigned his property so as to hinder or delay his creditors, could have had in mind only such conveyances or assignments as are fraudulent in fact, and that it was not their intention to grant this writ where the debtor acts honestly, and with no fraudulent purpose or design. It follows that the instruction to the jury to find the issues upon the attachment affidavit for the defendant was properly given.

The administratrix, by cross errors, seeks to attack the judgment on the merits. Without pausing to investigate the points thus raised, it is sufficient to say that no practical benefit can result to her, or to the estate which she represents, by a reversal of the judgment. It seems to be admitted on all 30 L. R. A.

hands that the estate is insolvent, and it also appears that the promissory notes for which the judgment was rendered were, some time prior to the trial of this case, presented to the probate court as a claim against the estate, and that they were duly allowed as such, and there is no suggestion that the allowance of the claim is now called in question by any one. It thus appears that the administratrix is conclusively bound to pay the claim in due course of administration, and its being evidenced by a judgment of the circuit court adds nothing to her obligation in that respect.

The judgment of the Appellate Court will be affirmed.

Rehearing denied June 15, 1895.

Frank E. VOGEL, Impleaded, etc., *Appt.*,

John PEKOC.

(157 Ill. 339.)

1. **The acceptance by the master of a written contract of employment signed by the servant is equivalent to its formal execution by him.**
2. **A contract whereby the first party agrees to employ the second party to perform such work as he may assign to him from time to time imposes no obligation on the first party; and a provision therein for the forfeiture of a specified sum by the servant in case he shall leave the employment without a specified notice constitutes no defense to an action by the latter for his wages, as the contract is void for want of mutuality.**
3. **The restriction to a designated class of persons of the right to recover attorneys' fees, granted by Laws 1889, p. 362, in suits for wages, does not render the statute obnoxious to the constitutional prohibition against special legislation, as it applies to all persons in the state similarly engaged.**

(June 15, 1895.)

APPEAL by defendant Vogel from a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover wages alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

Messrs. Dupee, Judah, Willard, & Wolf, for appellant:

The contract in question was not void for want of mutuality and consideration.

Preston v. American Linen Co. 119 Mass. 400; *Pottsville Iron & S. Co. v. Good*, 116 Pa. 385; *Hayes v. O'Brien*, 149 Ill. 403, 23 L. R. A. 555.

A contract signed by one and accepted by the other is binding.

Short v. Kiefer, 143 Ill. 258.

NOTE.—The constitutionality of statutes providing for attorneys' fees in a limited class of cases is considered in a note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* (Ky.) 14 L. R. A. 568. See also, in conflict with the present case, the late case of *Hocking Valley Coal Co. v. Bomser* (Ohio) 20 L. R. A. 338.

The constitutional provisions mean, if they mean anything, that all classes of the community shall have and enjoy equally the benefit of all the laws of the state, whether remedial, beneficial, prohibitory, or otherwise, so far as they may be made generally applicable, and that there shall not be any special or private laws affecting the rights of private individuals or classes of individuals.

Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 858; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Hocking Valley Coal Co. v. Rosser*, 52 Ohio St. —, 29 L. R. A. 886.

On rehearing.

The present decision of the court is, in effect, that a promise to give employment, followed by actual performance of that promise for more than a year and a half, was not a sufficient consideration to support the promise made by appellee when he accepted the employment and without which he could not have gotten it. This is such an astonishing departure from fundamental principles and from the previous decisions of this court that we cannot believe the court will adhere to the decision.

Plumb v. Campbell, 129 Ill. 101.

The court should hold the attorneys' fees act unconstitutional.

Hawthorn v. People, 109 Ill. 802, 50 Am. Rep. 610; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *Hocking Valley Coal Co. v. Rosser*, 52 Ohio St. —, 29 L. R. A. 886.

Messrs. Olson, Frazier, & Bantle, for appellee:

Mutuality is essential; if one party is bound, the other must be bound also.

Weaver v. Weaver, 109 Ill. 225.

The provision of the contract forfeiting the amount of wages withheld is in the nature of a penalty, and only actual damages can be recovered thereunder.

Bryton v. Marston, 83 Ill. App. 211; *Scofield v. Tompkins*, 95 Ill. 190; *Evans v. Chicago & R. I. R. Co.* 26 Ill. 189; *Sedgw. Damages*, § 492.

The contract should have been signed by appellant in order to have been admissible in evidence and binding upon appellee.

Waggeman v. Bracken, 52 Ill. 468; *Bardill v. Trustees of School*, 4 Ill. App. 94; *Hedstrom v. Baker*, 13 Ill. App. 104; *Mendel v. Fink*, 8 Ill. App. 878.

The act providing for attorneys' fees in no way infringes upon section 2 of article 2 of the Constitution.

State v. Hitchcock, 1 Kan. 178, 81 Am. Dec. 503; *Gentile v. State*, 29 Ind. 409; *Hawthorn v. People*, 109 Ill. 802, 50 Am. Rep. 610; *Streeter v. People*, 69 Ill. 595; *Potwin v. Johnson*, 108 Ill. 70; *Chicago L. Ins. Co. v. Auditor of Public Accounts*, 101 Ill. 82; *Johnson v. Chicago & P. Elevator Co.* 105 Ill. 462.

Craig, Ch. J., delivered the opinion of the court:

This was an action originally brought before a justice of the peace by John Pekoc, against Nelson Morris, Frank E. Vogel, and Edward Morris, a firm doing business as Nelson Morris & Co., to recover the sum of 80-L. R. A.

\$25 for wages claimed to be due as a cooper. On a trial before the justice the plaintiff recovered the amount claimed, and the defendants appealed to the superior court of Cook county, where a jury was waived and a trial had before the court, resulting in a judgment for the amount sued for, and also attorneys' fees. To reverse this latter judgment the defendants have appealed to this court.

The defendants requested the court to hold the following propositions of law, but the court refused so to hold, and this ruling is relied upon as error:

1. "That the evidence in the case is not sufficient, in law, to sustain a finding for the plaintiff.

2. "That the act providing for attorneys' fees in suits for wages, approved June 1 and in force July 1, 1889, is unconstitutional and void.

3. "That the evidence in the case does not show a suit for wages, within the meaning of said act, and that no attorneys' fees can be allowed thereunder."

The evidence shows that plaintiff worked as a cooper for Nelson Morris & Co., and that there was a balance in their hands, for wages unpaid, of \$25. The defendants, however, claim that the amount said to be due was forfeited, for the reason that plaintiff quit the services of defendants without giving two weeks' notice, as they claim he was required to do under a contract in writing which they put in evidence, as follows:

"This agreement, made and signed this 12th day of September, 1892, between Fairbank Canning Company and Nelson Morris & Co., the parties of the first part, and John Pekoc, the party of the second part:

"Witnesseth, the said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part. And in consideration of such employment, and the peculiar nature of the business of the said first parties, and of the wages to be paid by the parties of the first part, the said second party agrees that he will not quit said service and employment without giving two weeks' notice, in writing, to said first parties of his intention so to do, and as a guaranty for the faithful performance of this agreement on his part the said party of the second part agrees to deposit with said first parties the sum of \$25, and in case of the violation of this agreement by said second party the said first parties shall retain said amount as liquidated damages, and in satisfaction and payment of all damages by them sustained. It is further agreed that the said first parties shall retain \$2.50 per week of the wages earned by said second party until said sum of \$25 shall be in their hands, to be held by them according to the terms of this agreement.

"John Pekoc.

"----- [Seal.]

"----- [Seal.]

"----- [Seal.]

On the other hand, the plaintiff insists that the contract is void for the want of mutuality.

It will be observed that the written con-

tract was not signed by the parties named therein as parties of the first part, and it is insisted by the plaintiff that as they failed to sign the contract it never became binding on him or any other person. The acceptance of the contract by the parties of the first part, and holding it and acting upon it as a valid instrument, may be regarded as equivalent to its formal execution on their part, as held in *Johnson v. Dodge*, 17 Ill. 442, and *Short v. Kieffer*, 142 Ill. 266. Regarding the contract in the same way, it would be treated as if it had been signed by the persons named as parties of the first part.

The next question to be determined is whether the contract is mutual. It is a general rule, well understood, that a contract between parties must be mutual. *Weaver v. Weaver*, 109 Ill. 283; *Chitty, Contr. 15*; *Bishop, Contr. § 78, p. 82*; *Tucker v. Woods*, 12 Johns. 190, 7 Am. Dec. 805. In the case last cited it is said: "In contracts, where the promise of the one party is the consideration for the promise of the other, promises must be concurrent and obligatory upon both at the same time." 1 *Chitty, Contr. 297*; *Livingston v. Rogers*, 1 Cal. 584. In *Chitty on Contracts, supra*, the author says: "The agreement, as before observed, must, in general, be obligatory upon both parties. There are several cases satisfactorily establishing that if the one party never was bound, on his part, to do the act which forms the consideration for the promise of the other, the agreement is void, for want of mutuality." In *Wharton on Contracts, § 2*, the author says: "The parties to a contract, therefore, must be both bound. Supposing that if one promises in consideration of the promise of the other, the one is not bound unless the other is bound. A promise to do a thing on an executed consideration is not a contract; nor is a promise to do a thing in consideration of an illegal or impossible engagement on the other side. Without this reciprocal obligation, no contract can be constituted, 'It is a general principle,' says Mr. Fry, 'that when from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its execution in the latter way might in itself be free from difficulty attending its execution in the former.'"

Upon looking into the contract read in evidence, it will be found that the parties of the first part practically agree to do nothing, and there is substantially no obligation imposed upon them by the contract. The only portion of the contract claimed to impose any obligation on the parties of the first part is the following: "The said parties of the first part agree to employ the said party of the second part to perform such work as they may assign to him from time to time, such service to continue only so long as satisfactory to the said parties of the first part." What obligation does this impose? When are they to employ the party of the second part? What sum are they to pay? How long is the employment to continue? Suppose they refuse to employ the party of the second part; can

an action for damages be maintained for a breach of the contract? The answer to these inquiries is obvious. We think it is plain that the parties of the first part were not bound, under the terms of the contract, to employ the party of the second part for a single day or hour, and if they had absolutely refused to employ him he was without remedy in any court of the country. It may be true that the plaintiff might have entered into a contract which would require him to give two weeks' notice before he could quit the services of his employer without being liable to respond in damages, as might reasonable be provided in the contract; but no such case is presented by this record. Here the contract imposes no obligation on one of the parties, and hence it is void for the want of mutuality.

The contract being void, it will not be necessary to inquire whether the amount which it was provided might be retained was a penalty or liquidated damages.

It is next claimed that the court erred in allowing attorneys' fees. This involves a construction of an act of June 1, 1889 (Laws 1889, p. 362), which in substance provides that whenever a mechanic, artisan, miner, laborer, servant, or employee shall have cause to bring suit for wages, and shall establish, by the decision of the court or jury, that the amount is justly due and owing, and that demand has been made in writing, etc., then it shall be the duty of the court to allow the plaintiff, when the foregoing facts appear, a reasonable attorneys' fee in addition to the wages. It is claimed that the statute is private or special legislation, and hence is in conflict with that provision of the Constitution prohibiting special legislation. It is true, this statute does not provide that all persons who may recover judgments may, at the same time, recover attorneys' fees, but the recovery is restricted to a designated class of persons, and legislation of this character has never been regarded obnoxious to the Constitution. Indeed, in *Hawthorn v. People*, 109 Ill. 803, 50 Am. Rep. 610, it was expressly held that a statute is not obnoxious to the constitutional objection that it is not a general law because it applies to a class of persons. It is a general law if it applies to all persons in the state similarly engaged. See also *Poturn v. Johnson*, 108 Ill. 70, where the same doctrine is announced. The statute in question confers the right to recover attorneys' fees upon a certain class of persons who bring actions to recover for wages. All persons who bring such actions fall within its provisions, and hence it is in no sense special legislation.

We think the judgment of the Superior Court, upon the facts as they appear in the record, correct, and it will be affirmed.

Rehearing denied October 28, 1895, when the following opinions were handed down:

Per Curiam:

The petition for rehearing filed in this cause greatly emphasizes the previous contention that the act of 1889, providing that a reasonable attorneys' fee shall be allowed

to successful plaintiffs in suits for wages, to be taxed as costs, is a partial and special statute, working deprivation of property without due process of law, and therefore unconstitutional. Reliance is placed in *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 493; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853; and *Braceville Coal Co. v. People*, 147 Ill. 66, 23 L. R. A. 340,—as sustaining the position taken. Those cases do not, however, control the present case, or decide the question here involved. Without discussing separately the facts of the cases relied upon, it may be said generally, that in each of those cases a principal and controlling question was the right of miners of coal (no less than their employers) to make contracts regulating the time and manner of the payment of wages and the method of computing such wages, and in each case cited a law restricting in some manner this important right of contract was held invalid. It was with great propriety said that the privilege of contracting is both a liberty and a property right, of which a portion of the people cannot be deprived by an arbitrary statute, and without due process of law. It was further said (*Braceville Coal Co. v. People*, *supra*): "The right to contract necessarily includes the right to fix the price at which labor will be performed, and the mode and time of payment. Each is an essential element of the right to contract, and whosoever is restricted in either as the same is enjoyed by the community at large is deprived of liberty and property." It might, perhaps, have been said with equal propriety that no legislative act, however general and universal its application, could invade the fundamental right of the citizen to make contracts not against public policy, or injurious to society.

The statute here in question interferes with no one's right to contract. It embraces a well-defined class of cases and persons, not singled out, as is contended, wholly without reason and arbitrarily; but upon grounds which may, we think, properly serve as a basis for valid legislative action. Those to whom the wages of labor are due, and who, after demand in writing of a sum no greater than that subsequently recovered, are compelled to establish, and do establish, their rights as demanded by judgment of court, are within the provisions of the act; and we cannot say this classification is so arbitrary and unreasonable, and the law so partial and unequal, as to be beyond legislative discretion and power. If this law were to be held unconstitutional for the reasons assigned, then many other acts long in force in this state, hitherto deemed to be salutary, and against which no constitutional objection has been heard, would certainly fall with it. Why, for instance, should the seller of materials for a building have by law a lien for their price, not only upon the specific things sold, but upon the whole structure, with the land it stands on, while the seller of a horse, a piano, or a corn sheller is denied any lien even on the specific thing sold? Why should he whose labor constructs a house be secured by a lien on his product, while he who raises

a crop must look only to the personal responsibility of his hirer? Surely, it could be said the lien law makes classes of beneficiaries quite as arbitrary in character as that marked out to receive benefit by the act under discussion. Again, why should the wages of a defendant, who is head of a family, to an amount not exceeding \$50, be exempt from garnishment (Laws 1879, p. 176), while sums due other defendants are protected by no such exemption? And why, again, it might be asked, should heads of families, earning wages, be made the subject of advantageous provisions not applied to all other wage earners, if not to all other persons? The general exemption law also makes heads of families a distinct class, who may claim as exempt \$300 worth more of personal property than other judgment defendants are allowed, while a further section (Rev. Stat. 1874, p. 499) declares that where a judgment is for the wages of a laborer or servant, and noted by the court as such, no personal property whatever shall be free from levy, whatever the estate or condition of the debtor. An analogous case for this purpose is found in the provision of the general assignment law that "all claims for the wages of any laborer or servant which have been earned within three months next preceding the making of the assignment, etc., shall, after the payment of costs, etc., be preferred and first paid to the exclusion of all other demands." Hurd Stat. 1893, p. 166, § 6. It is difficult to see how any of these statutes, and many similar ones which might be named, could be sustained if the strict rule of constitutional validity, so strenuously urged in this case, were applied to them.

The petition for rehearing will be denied.

Magruder, J., dissenting:

I am unable to agree with so much of the opinion in this case as holds the act of June 1, 1889, to be a constitutional law. The act belongs to that species of class legislation which has been recently condemned by this court in the following cases: *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 493; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853; *Braceville Coal Co. v. People*, 147 Ill. 66, 23 L. R. A. 340; and *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79. In the case of *Hocking Valley Coal Co. v. Rosser*, 52 Ohio St.—, 29 L. R. A. 886, the supreme court of Ohio has had occasion to consider and condemn a similar statute. The opinion in that case expresses what seems to me to be the correct view of the subject, and a quotation therefrom is hereinafter set forth as sufficiently indicating the reasons for this dissent. The Ohio statute (89 Ohio Laws, p. 59, § 6563a) provides: "If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of \$5 for his attorney. But no such attorney fee shall be taxed unless said wages have been demanded in writing and not paid within three days after such demand. If the defendant appeal from any such judgment and the plaintiff on

appeal recover a like sum exclusive of the interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of \$15 for his attorney as the court may allow." In the course of the opinion in the *Rosser Case* the Ohio court says: "Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest but unsuccessful defense should be interposed? A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law. It is true that no provision of the Constitution of 1851 declares in direct and express terms that this may not be done, but, nevertheless, it violates the fundamental principles upon which our government rests as they are enunciated and declared by that instrument in the bill of rights. The first section of the Constitution declares that the right to acquire, possess, and protect property, is inalienable, and the next section declares, among other things, that 'government is instituted for the equal protection and benefit' of every person, while section 16 of article 1 provides that 'all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and justice shall be administered without denial or delay.' The right to protect property is declared, as well as that justice shall not be denied, and every one entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it, when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An adverse result in either case deprives the defeated party of property. If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, and grocers, or any other class of citizens might make out their

accounts, and demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorney fee in addition to his claim if he recovered the amount demanded. We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitration of the courts in the adjustment of their respective rights. The legislative power to compel an unsuccessful party to an action—generally the defendant—to pay an attorney fee to his opponent has received the attention of a number of courts of last resort, as well as laws which impose as a penalty double damages or some similar penalty for some wrongful or negligent act injurious to another. Where the penalty has been imposed for some tortious or negligent act the statute has generally, though not always, been sustained, but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Millet v. People*, 117 Ill. 294, 57 Am. Rep. 869; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359; *Durkee v. Janesville*, 23 Wis. 464, 9 Am. Rep. 500; *South & North Ala. R. Co. v. Morris*, 65 Ala. 193; *Wilder v. Chicago & W. M. R. Co.* 70 Mich. 382; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Vanzant v. Waddel*, 2 Yerg. 260; *Atchison & N. R. Co. v. Baty*, 6 Neb. 87, 29 Am. Rep. 856; *State v. Loomis*, 115 Mo. 807, 21 L. R. A. 789; *San Antonio & A. P. R. Co. v. Wilson* (Tex.) 19 S. W. Rep. 910; *Peoria, D. & E. R. Co. v. Duggan*, 109 Ill. 537, 50 Am. Rep. 619. Various phases of this subject have received attention in the foregoing cases as well as in some others, to which we do not deem it necessary to refer. The general tendency of these authorities is towards the result which we have reached; but whether they do or do not support our conclusions, we are satisfied that the fundamental principles of government declared by our bill of rights clearly and unequivocally prohibit legislation of the character of that involved in this case. Judgment allowing an attorney fee reversed."

TENNESSEE SUPREME COURT.

G. H. JARNAGIN, Assignee of the State Savings Bank, *Appl.*,

v.

F. A. STRATTON.

(.....Tenn.....)

A statute making all joint obligations joint and several applies to the indorsement of a promissory note, so that notice of nonpay-

NOTE.—The above case is believed to be one of first impression so far as it touches the effect of a statute making joint obligations joint and several upon the rights of joint indorsers to notice of nonpayment.

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ment given to any one of several joint indorsers is sufficient to bind him.

(November 15, 1895.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Washington County in favor of defendant in an action brought to enforce defendant's alleged liability as indorser of a promissory note. *Reversed*.

The facts are stated in the opinion.

Messrs. Isaac Harr and Crumley & Crumley for appellant.

Messrs. Kirkpatrick, Williams, & Bowman, for defendant.

The note being made payable to Singiser and

Stratton, who are not shown to be partners, it can be transferred only by their joint indorsement.

1 Dan. Neg. Inst. §§ 684, 701a; *Sneel v. Mitchell*, 1 Hayw. (N. C.) 289; *Ryhiner v. Feickert*, 92 Ill. 805, 84 Am. Rep. 130.

Notwithstanding the order in which their names are indorsed, they are not to be regarded as successive, but as joint, indorsers.

1 Dan. Neg. Inst. § 704; *Lane v. Stacy*, 8 Allen, 41.

Being joint indorsers, notice of protest must be given to both in order to render either liable.

Story, Prom. Notes, § 255; 2 Dan. Neg. Inst. § 999a; Tiedeman, Com. Paper, § 584; *Willis v. Green*, 5 Hill, 232, 40 Am. Dec. 351; *People's Bank v. Keech*, 28 Md. 524, 90 Am. Dec. 118; *Sayre v. Frick*, 7 Watts & S. 383, 52 Am. Dec. 249; *Hubbard v. Matthews*, 54 N. Y. 50, 18 Am. Rep. 562; *Miser v. Trovinger*, 7 Ohio St. 286.

Tenn. Code (Milliken & Vertrees), §§ 3484-3486, do not change the rule.

Caruthers, History of a Lawsuit, 49.

There may be an obligation joint in nature.

Hint v. Tillman, 2 Helsk. 202; *Henry v. Walker*, 11 Helsk. 194.

If it be true that a change in the character of the contract is wrought by the Code provisions, those cases holding that an unqualified release of one joint obligor releases the other are ill based.

Richardson v. McLemore, 5 Baxt. 590; *Simpson v. Moore*, 6 Baxt. 372; *Williams v. Hitchings*, 10 Lea, 328; *Greenlaw v. Pettit*, 87 Tenn. 468.

Similar provisions have been incorporated in the Codes of nearly all the states.

Tiedeman, Com. Paper, § 18; Caruthers, History of a Lawsuit, 49; Pom. Rem. & Rem. Rights, § 118.

Yet no decision has been found holding that such a provision changes the liability of joint indorsers.

Willis v. Green, 5 Hill, 232, 40 Am. Dec. 351, anterior to New York Code, reaffirmed in *Hubbard v. Matthews*, 54 N. Y. 50, 18 Am. Rep. 562; *Gates v. Beecher*, 60 N. Y. 523, 19 Am. Rep. 207.

That portion of the Tennessee statute that provides that right of suit shall survive only had the effect to give the remedy in common law that had all the while been given in courts of equity.

Saunders v. Wilder, 2 Head, 578.

No motives of policy could prompt a legislature to deny to citizens the right to make a joint contract; and it may be doubted whether it would be in its constitutional power to do so.

Com. v. Perry, 155 Mass. 117, 14 L. R. A. 325; *Godcharles v. Wigeman*, 118 Pa. 481; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264; *State v. Fire Creek Coal & Coke Co.* 38 W. Va. 188, 6 L. R. A. 359.

Snodgrass, Ch. J., delivered the opinion of the court:

The plaintiff in error, who was plaintiff below, sued the defendant as indorser of the following note:

"Duluth, Minn., Feb. 28, 1893.

"\$2,500.

"July the 15, 1893, after date, we prom- 30 L. R. A.

ise to pay to the order of F. A. Stratton and T. F. Singiser twenty-five hundred dollars. Payable at the Iron Exchange Bank, Duluth, Minn.; value recd.; with interest at the rate of 6 per cent per annum.

"A. R. Merritt.

"E. T. Merritt."

Indorsed:

"T. F. Singiser.

"F. A. Stratton."

This note had been presented by Stratton to the City Savings Bank of Chattanooga, indorsed as above shown, for discount, and he received the money thereon. The note was sent to the bank at Duluth for collection, was not paid, and duly protested, notice thereof being given to Stratton alone. The City Savings Bank assigned, and its assignee brought this suit against Stratton. He resisted payment on the ground that both he and Singiser were discharged by reason of the failure to give Singiser notice. The circuit court held him not liable, and the plaintiff appealed in error.

Here the argument is made for Stratton that he was a joint indorser of the paper with Singiser, and that his obligation as such was a joint obligation, and notice to his co-obligor was essential to bind him. On the contrary, it is insisted by plaintiff that, treating him as a joint indorser, notice to his co-obligor was not essential to bind him, but notice to one joint indorser was sufficient. There is very persuasive and respectable authority for this proposition. *Dodge v. Bank of Kentucky*, 2 A. K. Marsh. 917; *Higgins v. Morrison*, 4 Dana, 100. But the weight of authority is that (except in case of partners) notice to one joint indorser is not sufficient to bind either. Story, Prom. Notes, §§ 239, 255; 8 Kent, Com. § 44, p. 105, and note; Tiedeman, Com. Paper, § 336; 1 Dan. Neg. Inst. §§ 594, 595; 2 Dan. Neg. Inst. § 999a; 1 Parsons, Notes & Bills, chap. 12, p. 502. So, if the question stood only as put on the right of defendant as joint indorser, the judgment would be sustained by the weight of authority; whether by the weight of reason, and treated by us as controlling, we need not now determine, for plaintiff's right of recovery does not depend on the question thus settled, if it is assumed to be settled by the principles of the common law. Our statute provides that "all joint obligations and promises are made joint and several and the debt or obligation shall survive against the heirs and personal representatives of deceased obligors as well as against the survivors, and suits may be brought and prosecuted on the same against all or any part of the representatives of deceased obligors as if such obligations and assumptions were joint and several." Mill. & V. Code, § 3486. In addition to this statutory creation of joint and several liability on joint obligations and promises, with its added right of suit, another section provides for right of suit only, as follows: "Persons jointly or severally or jointly and severally bound on the same instrument or by judgment decree or statute, including the makers and indorsers of negotiable paper, and sureties may all or any part of them be sued in the same action." Mill.

& V. Code, § 8484. This latter section (which is first in order of Code arrangement) relates alone to procedure. The first quoted relates, not only to procedure, but fixes the right. It must be given its full legal effect. And its effect is to make defendant, not only a joint, but several, indorser with Singiser; not only a joint obligor, but a several obligor in the liability of indorser assured by his indorsement. The authorities and cases by them referred to, sustaining the proposition advanced that a joint indorser is not bound unless all are notified, deal with issues where the questions are as to presentment and demand of joint makers of a note, and as to notice to joint indorsers, as to which, on these questions, the rules of law are practically the same; but our statute deposes such an indorsement of its character of joint indorsement, and makes it joint and several,

just as the joint note of the makers is made joint and several. Respecting such a note Mr. Story says: "Where the note is the several as well as the joint note of the makers, . . . the holder is at liberty to elect upon whom he will make the demand and presentment." Story, Prom. Notes, § 256. To the same effect see 1 Dan. Neg. Inst. § 596. The reason of the rule in both cases is the same. It is only necessary to make demand in the one case of all the makers where they are joint makers, and to give notice to all the indorsers where they are joint indorsers, to bind those notified. If they are joint and several indorsers, notice to any one is sufficient to bind him.

It follows that defendant Stratton is bound, and the judgment of the circuit judge to the contrary is reversed, and judgment will be rendered here against him, and for all costs.

RHODE ISLAND SUPREME COURT.

John ALLEN

v.

John P. ALLEN.

(19 R. I. —.)

1. Any inhabitant may take shellfish anywhere in the waters of the state and on the shores below high-water mark as it exists from time to time, in the absence of any express restriction on such right.
2. Disturbing the thatch of a riparian owner by digging clams below high-water mark is not a trespass, as the public right of fishery is paramount to the private right to cut grass or sedge.

(May 24, 1895.)

EXCEPTIONS by defendant to rulings of the Supreme Court in Washington County made during the trial of an action to recover damages for defendant's alleged wrongful destruction of plaintiff's thatch while digging clams, which resulted in a verdict in plaintiff's favor. *New trial granted.*

The case sufficiently appears in the opinion.

Mr. Frederick C. Olney for defendant.

Mr. Samuel W. E. Allen for plaintiff.

Per Curiam:

A riparian proprietor whose land borders upon tide water has, by the common law, certain private rights to the shore between high and low water mark. These do not amount to seisin in fee, but are in the nature of franchises or easements. *East Haven v. Hemingway*, 7 Conn. 186, 202; *Simons v. French*, 25 Conn. 846, 852; *Lockwood v. New York & N. H. R. Co.* 37 Conn. 387. The right to build wharves and to fill out the upland may be exercised, as against any one but

the state, provided navigation is not impeded or a nuisance created thereby. *Engs v. Peckham*, 11 R. I. 210; *Basley v. Burges*, Id. 330. Some of these rights may be alienated, or annexed to other upland estates, as the right to cut sedge or grass (see citation by Potter, J., in *Providence Steam-Engine Co. v. Providence & S. S. S. Co.* 12 R. I. 369, 84 Am. Rep. 652), and the right to take seaweed which is stranded on the beach (*Basley v. Sisson*, 1 R. I. 283; *Kenyon v. Nichols*, Id. 106; *Hall v. Lawrence*, 2 R. I. 218, 57 Am. Dec. 715; *Knowles v. Knowles*, 12 R. I. 400). When it is necessary or convenient, these alienable rights may be defined by boundaries, but this circumstance does not enlarge the character of the right. The state holds the legal fee of all lands below high-water mark, as at common law, as has been uniformly and repeatedly decided by this court. *Basley v. Burges*, 11 R. I. 320; *Engs v. Peckham*, Id. 210, 224; *Brown v. Goddard*, 18 R. I. 81; *Folsom v. Freeborn*, Id. 200, 204. By the common law of Massachusetts and Maine, based upon or declared by a colonial ordinance, the fee in lands, to a certain distance below high-water mark, was given to the upland proprietor, and this rule applies to such portions of our shore as have been ceded from Massachusetts. This right of the state is held, however, by virtue of its sovereignty, and in trust for all the inhabitants,—not as a private proprietor. The public rights secured by this trust are the rights of passage, of navigation, and of fishery, and these rights extend, even in Massachusetts, to all land below high-water mark, unless it has been so used, built upon, or occupied as to prevent the passage of boats, and the natural ebb and flow of the tide. *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Moulton v. Libbey*, 87

NOTE.—Upon the question of the right of the owner of land bounding on tide water to control the shore below high-water mark, see authorities 30 L. R. A.

collected in notes to *Miller v. Mendenhall* (Minn.) 8 L. R. A. 89, and *Eisenbach v. Hatfield* (Wash.) 12 L. R. A. 632.

Me. 472, 59 Am. Dec. 57; *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101. The establishment of a harbor line permits the riparian owner to carry the upland or high-water mark out a certain distance from the natural shore. Actual extension of the upland to the new line extinguishes all public rights within it. The land which was formerly shore becomes upland, and, while the rights to shore and upland are not changed, they are carried further out into the tidal stream or sea. *Engs v. Peckham*, 11 R. I. 224; *Providence Steam-Engine Co. v. Providence & S. S. Co.* 12 R. I. 848, 855, 84 Am. Rep. 652. Until actual filling out, the public rights exist as before. *Gerhard v. Seekonk River Bridge Comrs.* 15 R. I. 384. Shellfisheries are public rights which may be regulated for the public good (*State v. Cozens*, 2 R. I. 561; *State v. Medbury*, 3 R. I. 188; *New England Oyster Co. v. McGarvey*,

12 R. I. 392), as may also the rights of navigation. In the absence of any express restriction, any inhabitant may take shellfish anywhere in the waters of the state, and on the shores below high-water mark as it exists from time to time. In doing so, he may disturb the soil, and dig up the grass or sedge, if necessary. The public right of fishery is paramount to the private right to cut grass or sedge. *Bagott v. Orr*, 2 Bos. & P. 472; *Parker v. Cutler Mill Dam Co.* 20 Me. 353, 37 Am. Dec. 56; *Peck v. Lockwood*, 5 Day, 22; *Lakeman v. Burnham*, 7 Gray, 437; *Proctor v. Wells*, 103 Mass. 216; and other Massachusetts cases cited above.

The instructions of the judge before whom the case was tried were erroneous in affirming that it was a trespass in the defendant to disturb the plaintiff's thatch in digging clams.

A new trial must be granted.

TEXAS SUPREME COURT.

HANOVER FIRE INSURANCE COMPANY, *Plff in Err.*,

SHRADER & ROGERS.

(.....Tex.....)

1. **Sunday cannot be excluded from the computation of the thirty days** after motion for rehearing before filing an application for a writ of error, although it is the thirtieth day and the clerk is not bound to file the application on that day, since he may lawfully do so.
2. **The right to file papers on Sunday** during the progress of a suit is clearly implied by Rev. Stat. art. 1184, prohibiting the commencement of suits on that day or the issue of process, with certain exceptions.
3. **An application for a writ of error is sufficiently filed on Sunday** when the clerk received it on that day, but, being doubtful as to his power to file it, merely noted the fact and date of its receipt, and upon the next day marked it filed.

(December 9, 1895.)

APPPLICATION for a writ of error to the Court of Civil Appeals, Second Supreme Judicial District, to review a judgment affirming a judgment of the District Court for Hardeman County in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Writ refused.*

The case sufficiently appears in the opinions.

An application for a writ of error having been filed in this case and a motion to dismiss the application having been made, **Gaines**, Ch. J., on November 21, 1895, delivered the following opinion:

In this case the motion for a rehearing was

overruled in the court of civil appeals on the 18th day of October, 1895, and on the 17th day of November the application for a writ of error was delivered to the clerk of that court, who noted upon it the fact and date of its delivery, retained it in his custody, and marked it "Filed" on the 18th. The 17th of November was the thirtieth day after the motion for a rehearing was overruled, and was Sunday. The parties adversely interested in the proceeding have met the application *in limine* by presenting a motion to dismiss. If the application was not filed in time, it is the duty of the court to dismiss it without a motion. The precise question presented has not been passed upon in this court, and we therefore invite written arguments or citations of authorities from counsel for the respective parties upon the point or points presented. Was the filing on Monday, the 18th, too late? If so, was the delivery to the clerk on the Sunday, the 17th, of any effect? The clerk will notify counsel, and action upon the application will be suspended until the 8d day of December, next.

Messrs. Morgan & Thompson, A. G. Walker, and D. E. Decker for applicant. Mr. Burton P. Eubank, contra.

Gaines, Ch. J., delivered the opinion of the court:

Counsel for the respective parties in this case, in response to the request of the court made at a former day of this term, have filed written arguments upon the questions to which their attention was then called, and have materially diminished the labors of the court.

Upon the first question, our conclusion is that Sunday, although the thirtieth day from that on which the motion for a rehearing was overruled by the court of civil appeals (32 S. W. Rep. 344), cannot be excluded from the computation. Such is the general

NOTE.—For note on extension of time when last day falls on Sunday, see *Brown v. Valles* (Colo.) 14 L. R. A. 120.
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rule, although there are some conflicting decisions. It was adopted by this court, after a careful consideration, in *Burr v. Lewis*, 6 Tex. 76, and we have found no case in this court which modifies that decision. Where the time allowed for doing an act is very short, it is usual to exclude a Sunday. The principle would seem to be that, when but a few days are allowed in which to do the act, it is not to be presumed that the legislature intended further to abbreviate it, in effect, by including a day ordinarily observed as a day of cessation from all ordinary business. For example, where two days are designated, it is not reasonable to hold that it was the purpose to include a Sunday, when the practical effect of the ruling would be to reduce the time to one day only. But, where weeks are included in the time allowed, the reason does not apply. Sunday at common law is *dies non juridicus*. *Swan v. Broome*, 1 W. Bl. 496, 526. When the point was first raised in the case cited, Lord Mansfield was evidently in great doubt whether a court could not render a valid judgment upon a Sunday, but, after full consideration, the question was resolved in the negative. That a judgment rendered on that day is void may now be regarded as settled law. It was so held by the court of appeals in *Shearman v. State*, 1 Tex. App. 215. But it was also recognized that, while a judgment could not be pronounced, a verdict might be returned on Sunday. See also *Hoghtaling v. Osborn*, 15 Johns. 118. A distinction is made between judicial acts and those of a ministerial character, and it seems to be generally held that, in the absence of a statute, ministerial acts performed on Sunday are valid. The service of process on Sunday was forbidden by the statute of 29 Car. II., and we think that the English cases which hold the ministerial acts of officers of the court void because performed on Sunday are referable to that act. Expressions of opinions may be found in the books to the effect that the statute was merely declaratory of the common law. Early decisions of the courts at Westminster hold to the contrary. *Mackalley's Case*, 9 Coke, 66b; *Bedes v. Alpe*, W. Jones, 156; *Swan v. Broome*, *supra*. See also *Sayles v. Smith*, 12 Wend. 59, 27 Am. Dec. 117. But we have not found it necessary to determine that question. In 1846 our legislature provided that "no civil suit shall be instituted, nor shall any process be had on Sundays, except in cases of attachment or sequestration." Pasch. Dig. art. 1424. The substance of this provision is found in article 1184 of the Revised Statutes, which reads as follows: "No civil suit shall be commenced, nor shall any process be issued or served, on Sunday or any legal holiday, except in cases of injunction, attachment, or sequestration." The prohibition against the filing of a petition (which is the commencement of a suit under our law), and against the issue and service of process, clearly implies that the filing of papers during the progress of the suit

was to be allowed. See *Houston, E. & W. T. R. Co. v. Harding*, 63 Tex. 162; *Crabtree v. Whitesells*, 65 Tex. 111. The statute does not refer to judicial acts, and they are left as at common law. The filing of an application for a writ of error in the court of civil appeals is the continuation of a suit and not its commencement. In *Bedes v. Alpe*, cited above, the information was filed on a Sunday, and it was held that the filing was valid. We conclude from these considerations, that an application for a writ of error may be lawfully filed on a Sunday, but do not hold that the clerk is bound to do an official act of that character on that day. We think he may lawfully refuse to act when a paper is tendered to him to be placed upon the file, but that, if he does act, his act is valid. Sunday being regarded by our people generally as a day of rest, and by many as a day of religious observance, in our opinion, save in exceptional cases, the officers of the court are not required to perform any official functions on such a day; and it is their privilege to refuse their performance should they elect to do so. We may imagine cases in which it may be proper to hold that a ministerial duty performed on a Sunday would be voidable, if not void; such, for example, as a sale by a sheriff of personal property under judicial process. But, should it be so held in regard to such a sale, we think the ruling would rest upon the ground that it would be unjust to the defendant in execution that his property should be sold on a day which is usually devoted to a cessation of business, and on which the conscientious scruples of many persons would forbid their attendance upon and bidding at the sale. But see *Sayles v. Smith*, *supra*.

It follows from what we have said that we think the file mark put upon the paper on Monday was too late; and it remains, therefore, to consider the effect of the clerk's indorsement as to its receipt upon Sunday. The just inference from the indorsement is that the application was delivered to the clerk for the purpose of filing it, and that the clerk received it, but, being doubtful as to his power to place it upon the file upon that day, noted the fact and date of its receipt, and marked it "Filed" upon the next day. Where a paper is deposited with the clerk of a court for the purpose of making it a part of the records in the case, it is filed. The evidence which is looked to by the court in determining whether the paper has been filed or not is the clerk's indorsement of the fact upon the paper itself. The form of that indorsement is usually the word "Filed," with the date. We think, however, if the indorsement shows the fact in other words, it is sufficient.

We conclude that the application was lawfully filed on Sunday, and that the clerk's indorsement is evidence of the fact of its filing, and therefore that we have jurisdiction of the application; but, having examined it, we also conclude that it shows no error, and it is therefore *refused*.

STATE of Texas, *Appl.*,

AUSTIN CLUB.

(.....Tex.....)

An incorporated social club is not engaged in the business of selling intoxicating liquors within the meaning of Sayles's Civ. Stat. (Tex.) art. 8226a, imposing an occupation tax on such business, where the club does not sell liquors for profit, and sells them only to its members.

(December 9, 1896.)

QUESTIONS certified by the Court of Civil Appeals, Third Supreme Judicial District, for the opinion of the Supreme Court, which arose upon an appeal by the State from a judgment of the District Court for Travis County in favor of defendant in an action brought to enforce payment of the license tax alleged to be due from defendant for selling intoxicating liquors. *Affirmance advised.*

The facts are stated in the opinion.

Messrs. M. M. Crane, Attorney General, and *H. P. Brown*, Assistant Attorney General, for appellant:

An incorporated club organized for social and other purposes, that continuously from time to time purchases in bulk spirituous, vinous, and malt liquors, and medicated bitters, and through its authorized agent and employee retails the same to its members only, without regard to profit, in quantities less than one quart, at an agreed price per drink, which each member pays according to the quantity he calls for and consumes, is liable to the payment of the annual tax imposed and levied by virtue of the act of the legislature of this state, passed on the 4th day of April, 1881.

Sayles's (Tex.) Civ. Stat. art. 8226a, §§ 1-8; *United States v. Wittig*, 3 Low. Dec. 406; *People v. Soule*, 74 Mich. 250, 2 L. R. A. 494; *State v. Neis*, 108 N. C. 787, 13 L. R. A. 412; *State v. Lockyear*, 95 N. C. 688, 59 Am. Rep. 287; *State v. Horacek*, 41 Kan. 87, 8 L. R. A. 687; *State v. Tindall*, 40 Mo. App. 271; *State v. Essex Club*, 53 N. J. L. 99; *People v. Andrews*, 115 N. Y. 427, 6 L. R. A. 128; *Martin v. State*, 59 Ala. 84; *Marmont v. State*, 48 Ind. 21; *Chesapeake Club v. State*, 63 Md. 446; *State v. Easton Social, L. & M. Club*, 78 Md. 97, 10 L. R. A. 64; *State v. Mercer*, 82 Iowa, 405; *Rickart v. People*, 79 Ill. 85; *State v. Tindall*, 40 Mo. App. 271; *People v. Luhrs*, 7 Misc. 508; *Com. v. Tierney*, 148 Pa. 552; *Nogales Club v. State*, 69 Miss. 218; *Com. v. Steffner*, 2 Pa. Dist. R. 152; *People v. Sinell*, 84 N. Y. S. R. 898; *People v. Bradley*, 83 N. Y. S. R. 562; *Com. v. Jacobs*, 152 Mass. 276.

Article 8226a, being applicable to all persons or corporations engaged or engaging in the business of selling spirituous, vinous, and malt liquors, etc., in quantities less than one quart, and such liquors having been sold by said Austin Club within the quantity prescribed by statute, and said corporation or its agents hav-

ing made a business of so selling such liquors, the sales constituted the business of selling, and was in violation of law.

Barden v. Montana Club, 10 Mont. 380, 11 L. R. A. 593.

Though the Austin Club may have been incorporated for other purposes, and its main business was the advancement and promotion of other objects, yet if, as an incident to such other business, it also engaged in the sale of spirituous, vinous, and malt liquors, it was guilty of a violation of the statute, and liable to the payment of the taxes sued for in this case.

La Norris v. State, 13 Tex. App. 34, 44 Am. Rep. 699.

Messrs. J. L. Peeler and Fisher & Townes, for appellees:

A club organized and maintained for social purposes only, and not with the view of conducting the business of a vendor of liquors for profit, is not subject to a state license tax; and such a club is not within the law requiring a license to be paid before liquors dispensed for a price paid by members can be distributed to and among them. The purpose of the legislature was to regulate the dealing in liquors as an occupation or business, and to require a license to vendors of liquor only where the selling is engaged in as an occupation or business followed as a means of or with a view to profit.

Sayles's (Tex.) Civ. Stat. art. 8226a; Crim. Code, art. 110; *Koenig v. State* (Tex.) 26 S. W. Rep. 885; *State v. St. Louis Club*, 125 Mo. 808, 26 L. R. A. 578; *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *Seim v. State*, 55 Md. 566, 39 Am. Rep. 419; *Graff v. Evans*, L. R. 8 Q. B. Div. 873; *Com. v. Pomphret*, 137 Mass. 564, 50 Am. Rep. 840; *Friedmont Club v. Com.* 87 Va. 540; *Barden v. Montana Club*, 10 Mont. 380, 11 L. R. A. 593; *State v. McMaster*, 35 S. C. 1; *Standford v. State*, 16 Tex. App. 331; *Williams v. State*, 23 Tex. App. 499.

Brown, J., delivered the opinion of the court:

The court of civil appeals of the third supreme judicial district certified to this court the following statement and question:

"On September 21, 1896, the state of Texas brought this suit to recover \$1,200, alleged to be due from the Austin Club, a corporation, as occupation taxes for continuously engaging in the business of selling spirituous, vinous, and malt liquors, and medicated bitters, in quantities less than one quart, from December 27, 1889, up to the date the petition was filed. The pleadings, evidence, and assignments of error raise the question herein certified. The trial court's findings of facts consist of an agreed statement of the facts upon which the case was there, and is here, submitted. Said statement is as follows:

"It is agreed by and between the parties hereto, the state of Texas acting by and through her district attorney, A. S. Burleson, and the Austin Club, acting by and through its attorneys of record, John L. Peeler, Esq., and Messrs. Fisher & Townes, that this cause shall be submitted to the court for its determination upon the following agreed statement of facts: The Austin Club is a corporation created under the laws of the state

NOTE.—See, in connection with the above case, that of *State v. St. Louis Club* (Mo.) 26 L. R. A. 573, and other cases cited in footnotes thereto.

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of Texas, the charter of which is, in substance, as stated below, except where it is copied. Article 1 provides that James R. Johnson, Lewis Hancock, A. P. Wooldridge, W. H. Tobin, E. Saunders, John Orr, and M. D. Mather, and their associates, are to constitute the body politic known as the 'Austin Club,' with the usual powers of contracting and being contracted with, suing and being sued, and the right to purchase and hold real, personal, and mixed property, to have a seal, and exist for a term of fifty years. Section 2 of the charter is as follows: 'Sec. 2. The purpose and objects of this corporation are the encouragement of social intercourse among its members, the support of literary undertakings and cultivation of literature, the maintenance of a library and reading room, and the promotion of fine arts.' Section 3 provides that the business shall be transacted in the city of Austin, and that it shall be under the control of a board of eleven directors, to be elected at the annual meetings of the members, to be held on the first Tuesday in January of each year. It provides for the filling of vacancies in the board, and names the directors for the first year. Section 4 provides that there shall be no capital stock, the funds of the club to be made up of initiation fees and monthly dues. The charter was duly executed and filed in accordance with law, and the corporation organized thereunder. 'Second. That, since the date of the incorporation of said club, it has from time to time purchased, in bulk, spirituous liquors and medicated bitters, and, through its authorized agent and employee, retailed same to its members in quantities less than one quart, and at an agreed price per drink, and has continuously so done to this day. Third. That each member of said club pays for the quantity of spirituous liquors, etc., he calls for and consumes. Fourth. That only members of said club are permitted to purchase, in any quantity, from said club, spirituous, vinous, and malt liquors, etc. Fifth. That said club is carrying on its business and is domiciled in the second story of a building situated on lot No. 1, in block No. 84, in Austin, Travis county, Tex., and is using, in connection therewith, the following stock, fixtures, and personal property: two billiard tables and one pool table, and billiard racks, cues, and balls therefor; one oak sideboard; seven oak tables; two oak desks; ten upholstered chairs, and two upholstered sofas; thirty-six chairs in billiard room and reading rooms; three carpets, and bar glasses, fixtures, etc. Sixth. That said club has not paid to the collector of taxes of Travis county, for the state of Texas, the annual tax levied on every person engaged in selling spirituous liquors, etc., in quantities less than a quart,—\$300 for the year ending December 27, 1890, nor \$300 for the year ending December 27, 1891, nor \$300 for the year ending December 27, 1892, nor \$300 for the year ending December 27, 1893,—nor any part thereof. Seventh. That said club has continuously, since its incorporation, paid internal revenue license to the United States as liquor dealers. Eighth. That said club does not sell spirituous liquors, etc., for profit, and that the money arising

from sales of spirituous liquors, etc., to members is placed in the treasury of the club, and is only used for the expenses of the club, and replenishing the stock of liquors, etc. Ninth. That said club is now in debt about \$1,000, which is the excess of expense over the revenues derived from the sales of liquors, etc., dues, and initiation fees, received since its organization. Tenth. That said club numbers 100 members. Eleventh. That said club sells only the finest imported whiskies, and the price charged therefor is 25 cents for two drinks; and beer it sells in bottles, for 15 cents per pint and 25 cents per quart. Twelfth. That said club keeps on hand, for use of its members, the latest and most advanced literary periodicals and magazines. Thirteenth. That its by-laws, and rules for its regulation, are as follows.'

The association adopted by-laws, of which we will make extracts, substantially, and by quotation, where necessary, of so much as are material to the question certified for our decision. The first article of the by-laws states the purpose of the corporation to be the same as that stated in the charter. Article 3 of the by-laws provides for the membership of the club,—in substance, that such membership is not to be limited; each member is to be elected by the board of directors by ballot,—then proceeds to prescribe the qualifications of the members, and the method of proposing candidates and acting upon such application. Article 4 of the by-laws fixes the entrance and initiation fee at \$25, and the annual subscription for all members at \$80, payable monthly, in advance, on the 1st of each month. Article 7 makes it the duty of the president of the club, on the first day of each quarter, to appoint three members of the board of directors, called the "house committee," whose duty it is to exercise control and supervision, "in the broadest sense of these terms," over the management and conduct of the clubhouse. Article 8 is in these words: "Nonresidents of Travis county may be admitted as contributing members upon the payment, in advance, of the initiation fee provided for members: provided, that they shall be proposed and elected in accordance with article 3. Such contributing members shall be entitled to all the privileges accorded to regular members, except that of voting and holding office." Article 9 permits any member to introduce, on his own responsibility, a stranger, who does not live in the limits of Travis county, and is not engaged in business therein, for a period of one week, under certain regulations, and contains this provision: "In event of strangers so invited failing to settle their accounts, the member introducing them shall become liable for the amount of their indebtedness."

Under authority conferred by the by-laws, rules were adopted for the government of the club. Rule 2 authorizes and directs the house committee to make all purchases or direct the same, to regulate the prices to be charged for all articles served by the club, report to the secretary the names of members who may be in arrears, etc. Rule 4 permits strangers, not residing or engaged in business in Travis

county, to be introduced as visitors, and makes the members introducing any visitors responsible for their deportment and for any debts contracted by them. No person residing or engaged in business in Travis county, not a member of the club, would be permitted to visit the club. Rule 6 of the club is as follows: "The club shall be open at 8 o'clock A. M., and shall be closed against the admission of members at 2 o'clock A. M. The lights shall be turned off, and the clubhouse closed, at 2 o'clock A. M. every night." Rule 16 is as follows: "No supplies furnished by the club shall be sold on credit. Supplies shall be paid for at the time of receipt, in such manner as the house committee shall from time to time direct."

"The statute under which the state claims that the Austin Club is subject to an occupation tax reads as follows: 'Hereafter there shall be levied upon and collected from any person, firm, or association of persons engaged in the business of selling spirituous, vinous, or malt liquors, or medicated bitters, an annual tax upon every such occupation or separate establishment, as follows: For selling spirituous, vinous, or malt liquors, or medicated bitters, in quantities of less than one quart, \$800.' Sayles's (Tex.) Civ. Stat. art. 8226a.

"The material and controlling question in the case is this: Under the agreed facts as above set out was the Austin Club engaged in the business of selling spirituous, vinous, and malt liquors, and medicated bitters, within the meaning of the statute? That question the court of civil appeals for the third district has decided to certify, and it is hereby certified, to the supreme court for decision."

In addition to the article of the Revised Statutes quoted by the court in its submission of the question certified, we call attention to section 4 of that article, which requires all persons desiring to engage in the sale of spirituous, vinous, or malt liquors to give bond, among the conditions of which are the following: That "he shall keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication." In the same section, "open house" is defined as follows: "An open house within the meaning of this act is one in which no screen or other device is used or placed, either inside or outside of such house or place of business, for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold in quantities less than a quart." The same section defines "quiet house" in this language: "A quiet house or place of business within the meaning of this act is one in which no music, loud and boisterous talking, yelling, or indecent or vulgar language is allowed, used, or practiced, or any other things calculated to disturb or annoy persons residing or doing business in the vicinity of such house or place of business, or those passing along the streets or public highway." The 8th section of the same article provides: "The license required by this act

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shall be posted in some conspicuous place in the house where the business or occupation for which such license is necessary is carried on; and for a failure to so conspicuously post such license at or in such place of business, any person or any member of any firm or association of persons so failing shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not to exceed \$25; and each day of such failure to so conspicuously post such license shall constitute a separate offense." Sections 9 and 10 of the said article apply particularly to persons engaged as retail liquor dealers, under the license required by the law.

The question presented is: Was the Austin Club, in dispensing, to its members and their guests, liquors, in the manner stated, engaged in the "business of selling spirituous, vinous, or malt liquors," within the meaning and intent of article 3226a, as above quoted?

In the cases of *Williams v. State*, 23 Tex. App. 499, and *Standford v. State*, 16 Tex. App. 881, the prosecutions were based upon article 110 of the Penal Code of this state, which is in the following language: "Any person who shall pursue or follow any occupation, calling, or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum." In the cases cited above, the court defined the word "occupation" as follows: "'Occupation,' as used in this statute, and as understood commonly, would signify a vocation, calling, trade,—the business which one principally engages in to procure a living or to obtain wealth. It is not the sale of liquor that constitutes the offense. It is the engaging in the business of selling without paying the occupation tax. It does not require even a single sale to constitute the offense, for a person may engage in the business without succeeding in it, even to the extent of one sale." In the case of *Krenig v. State* (Tex.) 26 S. W. Rep. 835, the appellant had been prosecuted and convicted for playing cards in a clubroom at Cuero, which club was organized and conducted substantially under the same rules as in the case now before us. The indictment charged that the game was played with cards in "a house for retailing spirituous liquors," and the court of criminal appeals, in an able and exhaustive opinion by Presiding Justice Hurt, held that the clubroom was not "a house for retailing spirituous liquors," within the meaning of the statute. In announcing the conclusion arrived at by the court, the learned judge said: "We are of opinion that, upon authority and reason, it must be held, under the facts of the present case, the transaction was not the sale of the liquor in the way of trade; and that neither the association, its members, nor its steward, were engaged in the occupation of selling liquors. If this be true, was the clubroom a place for retailing liquors? . . . It is very clear, both from the decisions we have cited, and our statutes, that the club, its members, or steward, are not engaged in the occupation of

selling liquors in quantitles less than one quart." In the case before us, no question is made as to this being a device to evade the law. It is therefore to be treated as a bona fide club, formed for the purposes expressed in its charter.

The question as to whether or not the transactions of dispensing liquors to the members and guests, as in this instance, constituted sales within the meaning of statutes prohibiting such sales, has been the subject of much judicial investigation, upon which there is a great conflict of authority; but that question is not involved in the case now presented to us, and we refrain from discussing it, and will not undertake to review the many authorities bearing upon that question cited by the counsel for both parties in this case. Clubs like this have been formed and maintained in many of the states, and in some of them the question now before the court has been adjudicated, upon which there is likewise a conflict of authority. But we believe that the decided weight of authority upon this question supports the conclusion arrived at by the court of criminal appeals in the case of *Koenig v. State*, cited above, to the extent that it holds that the club was not engaged in the business of selling spirituous liquors. *Martin v. State*, 59 Ala. 84; *Piedmont Club v. Com.* 87 Va. 540; *Tennessee Club v. Dwyer*, 11 Lea, 452, 47 Am. Rep. 298; *State v. Boston Club*, 45 La. Ann. 585, 20 L. R. A. 185; *Graff v. Evans*, L. R. 8 Q. B. Div. 873. It has been held, on the other hand, by courts of eminent ability, and upon strong reasoning, that persons engaged in like business, either as a voluntary association or as a corporation, were engaged in the business of selling spirituous liquors. *United States v. Wittig*, 2 Low. Dec. 466, Fed. Cas. No. 16,748; *People v. Soule*, 74 Mich. 250, 2 L. R. A. 494; *State v. Bacon Club*, 44 Mo. App. 86.

The conditions of the bond, requiring obligee to keep an open, quiet, and orderly house or place for the sale of spirituous, vinous, or malt liquors, together with the provisions of the statute defining what are open and quiet houses, and the further provision requiring the posting of the license in a public place, indicate that the legislature intended that the business of selling spirituous, vinous, or malt liquors should be conducted in a public place, open to all persons to enter therein, to the observation of those passing by such place, and guarding against all of those things which would be calculated to lure the unsuspecting into such places, or to offend or corrupt those who might visit them. These provisions are inconsistent with the idea that the legislature was attempting to regulate the dispensing of liquors in the private manner shown by the facts of this case, but it shows that the business, as expressed in the article quoted, was intended to be a business conducted in a public manner, and in a place to which the public would have free access as stated above. We think that this tends very strongly to support the position taken by the appellee in this case, that the language of the statute does not embrace the business as transacted

by this club. Under the conditions of the bond required of persons engaging in the business of selling liquors and the provisions of the statute regulating the manner of conducting it, no license could be obtained to sell spirituous liquors in the private manner that it was done by this club and has been done by many other clubs in the state for many years. The conclusion must be drawn that the legislature either did not intend that such business as that conducted by the Austin Club should be embraced in the terms of the statute, or it did intend that all sales of a private character should be absolutely prohibited. We do not think that the latter conclusion can be drawn from this and other provisions of the Penal Code upon the subject of selling spirituous liquors. The Penal Code prohibits the sale of liquors under various other circumstances, as, for instance, all sales to Indians, to minors, and in local option districts, without regard to whether the person selling has a license therefor or not; and if the legislature intended to prohibit this class of business, if it be termed a business, it might easily have done so in plain and unambiguous language, as it has done with reference to the prohibited sales above stated.

Article 110 of the Penal Code was enacted for the purpose of enforcing the license law, and compelling persons pursuing the occupations which were taxed by the state to pay the taxes levied and to procure the license required. In fact, it is the most efficient means provided for the collection of such taxes and the enforcement of the law. The court of criminal appeals is the court of last resort in this state in criminal matters, and to its final judgment must be submitted all questions arising upon criminal prosecutions. The statute now being construed by us is so closely related to and dependent upon the criminal statute (Penal Code, art. 110), that we feel constrained to follow the decision of the court of criminal appeals in this matter, more especially as it is well supported by authority, and, in fact, by the weight of authority; and, considering all the provisions of our statute, as cited above, it is not clear that the decision cited is not a correct statement of the law upon the question. If we should hold that a club such as this, transacting its business in the manner that this did, was engaged in the business of selling spirituous liquors by retail, we would, in effect, hold that the place where such club's business was being transacted was a house for the retail of spirituous liquors, and would be in direct conflict with the highest court in criminal matters in this state. If we were to hold that the appellee is liable for the taxes, then, if indicted, under article 110, Penal Code, for selling without having procured license therefor, it would logically follow that, if the case of *Koenig v. State* is a correct enunciation of the law, the person dispensing the liquors for the club would not be liable to indictment for so doing, and the court of criminal appeals must so hold. Thus, we would have the state of case in which one branch of this department of the state government would enforce the payment

of a tax, and another branch of the same department would hold that such person was not liable for the tax; each court so holding being supreme in the sphere of its jurisdiction. In this matter, this court is situated differently from any of the courts of other states which have dealt with this subject, for the reason that this court is the court of last resort in civil matters, but has no jurisdiction in criminal matters, while in other states the same court had jurisdiction of matters, both civil and criminal, arising out of the matter in dispute. Harmony of decision between these courts is important, and should be preserved where it can be upon proper principles, and in no case of doubt would we

be willing to conflict with the decisions of that court in matters so nearly related and intimately connected with the subjects of its jurisdiction. We therefore, for these reasons and upon the authorities cited, answer that the Austin Club, in the transactions stated by the court of civil appeals, conducted in the manner therein stated, was not engaged in the business of selling spirituous, vinous, and malt liquors and medicated bitters. We call attention to the fact that we have not considered, in this opinion, the difference between article 8226a and the act of the 28d legislature upon the same subject. See Laws 28d Leg. p. 177.

WISCONSIN SUPREME COURT.

Mary E. SMITH, *Rept.*,
v.
MILWAUKEE BUILDERS' & TRADERS'
EXCHANGE *et al.*, *Appts.*

(.....Wis.....)

1. The reservation by an employer, under an independent contract for the construction of a building, of the right of inspection of the work, does not change the character of the contract so as to render the employer liable for the negligence of some of the workmen employed by the contractors.
2. The common council of a city has power to pass an ordinance requiring any owner or contractor building or causing to be built any building abutting on a public sidewalk, to cause a roofed passageway to be built in front on the sidewalk after completion of the first story, under a charter provision giving them power to control and regulate the construction of buildings, to control and regulate streets, and to regulate the manner of using the streets and pavements.
3. An ordinance requiring any owner or contractor constructing any building abutting on a sidewalk to cause a roofed passageway to be built in front of the building after the completion of the first story is a reasonable one, and any owner or contractor who fails to do so is liable for an injury to one passing on the sidewalk not guilty of contributory negligence.
4. One who undertakes to construct the iron work in a building, which is an integral and substantial part thereof consisting of iron girders, beams, and floor joists set in the walls, is a contractor within the meaning of an ordinance requiring any contractor who shall build or cause to be built any building abutting on a public sidewalk to cause a roofed passageway to be built in front on the sidewalk after completion of the first story.
5. One injured by the negligence of another can recover only for such future

pain as the evidence shows she is reasonably certain to endure; not such as there is a reasonable probability that she will endure.

6. An instruction that plaintiff is not chargeable with negligence because she did not use the best means of escaping from receiving the injury is misleading, where she did not know or understand that she was in any danger, and did not adopt any course of action while facing an imminent danger.
7. A deposition taken before certain persons were made parties to a suit cannot be used against them.
8. Negative testimony is not necessarily confined to that of witnesses who, though present at a transaction, say that they did not see or did not hear, as testimony which is positive in form may amount merely to negative testimony.
9. An instruction that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible, is erroneous.

(November 8, 1895.)

APPEAL by defendants from a judgment of the Superior Court for Milwaukee County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. *Reversed.*

Statement by Winslow, J. :

This is an action brought to recover damages for injuries to the person of the plaintiff, caused by the falling of a brick from the top of the fourth story of a partially completed building in the city of Milwaukee, owned by the defendant the Milwaukee Builders' & Traders' Exchange. The accident happened on the morning of the 18th of April, 1892. At the time of the accident the defendant exchange was constructing a five-story brick and iron building, and the

NOTE.—For exceptions to general rule as to liability for acts of independent contractors, see *note to Hawvers v. Whalen* (Ohio) 14 L. R. A. 828.

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As to obstruction of street or sidewalk for building purposes, see also *note to Flynn v. Taylor* (N. Y.) 14 L. R. A. 556.

appellant Neff had contracted with the exchange to build, and was then engaged in building, the masonry of the building, and had completed the walls to the top of the fourth story. The defendants Bayley, who were copartners, had contracted with the exchange to put in place the structural iron for the building. Both Neff and the Bayleys were performing the work undertaken by them under separate and independent contracts with the exchange. Each of said contracts contained a provision that the contractor should well and sufficiently perform and finish his work under the direction and to the satisfaction of Ferry & Clas, architects, acting as agents for the owner." The contracts also contained provisions for the inspection of the work by the architect and his employees. An ordinance of the city of Milwaukee was introduced in evidence, which was in force at the time of the accident, providing in substance that any owner or contractor who should build a building within the fire limits of the city of Milwaukee, abutting upon any public sidewalk, should, after the completion of the first story of the building, cause a passageway to be laid in the front of the building, upon the sidewalk, and cause the same to be roofed at a height not less than 10 feet, and providing for the punishment for failing to comply with the ordinance. The accident to the plaintiff occurred about 8 o'clock on Monday morning. On the Saturday previous Neff had completed the walls of the building to the top of the fourth story, in readiness for the iron girders to be put in place to support the floor of the fifth story. On leaving work Saturday night, Neff's men put canvass upon the walls of the building, with loose bricks thereon to hold it in place. On Monday morning Neff's men were not at work, but the Bayleys were commencing to put the iron girders in place for the fifth story, and hoisting girders and beams to the top of the fourth story by a derrick. The plaintiff resides about a block and a half from the place of the accident, and was thirty years old. She passed along the sidewalk on Fifth street, opposite the building in question, and went to a drug store on Grand avenue, and a few minutes afterwards she returned, and while passing along the sidewalk, within about 6 feet of the building, a brick was in some manner caused to fall from the top of the building, and struck her on the head, fracturing the skull and severely injuring her. The plaintiff claims that all the defendants are liable for her injuries, by reason of negligence. The evidence was conflicting as to whether there were any guards or barriers placed at the north and south ends of the wall, but it was admitted that no roof had been placed over the sidewalk on Fifth street. The jury returned the following special verdict: "(1) At the time the plaintiff first passed along the sidewalk adjacent to the building on Fifth street, on the morning of the accident, had the north end of that sidewalk been guarded by due precaution against accident to pedestrians? A. No. (2) At the time the plaintiff first passed along the sidewalk adjacent to the building on Fifth street, on the morning of the accident,

was there a barrier across the north end of said sidewalk sufficient to warn pedestrians it was dangerous to pass along said sidewalk? A. No. (3) At the time the plaintiff passed along the sidewalk, adjacent to the building on Fifth street, on the morning of the accident, was the south end of said walk guarded by due precaution against accident to pedestrians? A. No. (4) At the time the plaintiff first passed along the sidewalk adjacent to the building on Fifth street, on the morning of the accident, was there a barrier across the south end of said sidewalk sufficient to warn pedestrians that it was dangerous to pass along said walk? A. No. (5) Was there any plank across the north end of the sidewalk, which was moved by the men at work in hoisting the iron upon said building, before the plaintiff was injured, and before she passed along Fifth street the first time on that day? A. No. (6) Was the brick which fell from the building and injured the plaintiff displaced from the pier? A. No. (7) Was the brick which fell and injured the plaintiff a loose brick placed on canvass covering the wall or pier? A. Yes. (8) Was the brick which fell and injured the plaintiff caused to fall by the men who were at work hoisting the iron upon the building? A. No. (9) Were men there employed in the business of hoisting iron upon the building at the time the plaintiff passed along said sidewalk the first time? A. Yes. (10) Was the defendant the Milwaukee Builders' & Traders' Exchange guilty of any negligence or want of care which was the proximate cause of the injury to the plaintiff? A. Yes. (11) Was the defendant Max Neff guilty of any negligence or want of care which was the proximate cause of the injury to the plaintiff? A. Yes. (12) Were the defendants the Bayleys guilty of want of ordinary care which contributed to the injury? A. No. (14) If the court shall be of the opinion that plaintiff is entitled to recover, at what sum do you assess her damages? A. \$5,000." Judgment for the plaintiff against all of the defendants was entered upon the verdict, and they have appealed separately.

Messrs. Van Dyke & Van Dyke, for appellant Neff:

If the barriers had remained in place, and had not been moved by the iron men or others, without Neff's knowledge or consent, plaintiff would have been prevented from passing along the sidewalk, and even if the protection of the tops of the wall with canvass and loose brick was negligence, it would not have caused the injury complained of without the independent act of those who removed the barriers. Such an intervening, independent cause was the proximate cause of the injury.

Marvin v. Chicago, M. & St. P. R. Co. 79 Wis. 141, 11 L. R. A. 506.

The special verdict is inconsistent and cannot support the judgment.

Haley v. Jump River Lumber Co. 81 Wis. 421; *Dahl v. Milwaukee City R. Co.* 65 Wis. 871; *Schwieckhart v. Stueve*, 75 Wis. 157; *Darcey v. Farmers' Lumber Co.* 87 Wis. 245; *Ohlweiler v. Lohmann*, 82 Wis. 203; *Wightman v. Chicago & N. W. R. Co.* 73 Wis. 174, 2 L. R. A. 185.

Where a traveler perceives or knows of repairs or other obstructions in the way, he is obliged to exercise more than usual care and attention in passing.

Bowen v. Rome, 28 N. Y. Week. Dig. 406; *Jacobs v. Bangor*, 16 Me. 187, 83 Am. Dec. 652; *Dickson v. Hollister*, 128 Pa. 421; 2 Shearm. & Redf. Neg. 875; *Nolan v. King*, 97 N. Y. 565, 49 Am. Rep. 561; *Moore v. Richmond*, 85 Va. 588; 2 Thomp. Neg. 1024; *Whitford v. Southbridge*, 119 Mass. 564; *Gosport v. Evans*, 112 Ind. 188; *Richmond v. Courtney*, 32 Gratt. 792; *Peil v. Reinhart*, 127 N. Y. 381, 12 L. R. A. 848; *Wilson v. Trafalgar & B. C. Gravel Road Co.* 93 Ind. 287; Ray, Negligence of Imposed Duties—Personal, 129; Elliott, Roads & Streets, 469.

The fact that one knows of the defect in a way and notwithstanding passes over it is not conclusive that he is negligent, although it may be a weighty circumstance in determining the issue as one of fact.

Kenworthy v. Ironton, 41 Wis. 647; *Kelley v. Fond du Lac*, 31 Wis. 179; Buswell, Personal Injuries, 165; Elliott, Roads & Streets, 470, note, and 641, note.

Where a pedestrian sees or knows of an obstruction on the sidewalk, and can avoid it by passing around it, or over another walk by which the distance is no greater, it is his duty to do so.

Quincy v. Barker, 81 Ill. 300, 25 Am. Rep. 278; *Lovenguth v. Bloomington*, 71 Ill. 288; *Vicksburg v. Hennessy*, 54 Miss. 891, 28 Am. Rep. 354; *Schaeffler v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 538; *Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Parkhill v. Brighton*, 61 Iowa, 108.

The owner of premises fronting on a street may obstruct the sidewalk providing such obstruction is temporary only and reasonably necessary. The questions of reasonable necessity and contributory negligence are ordinarily for the jury.

Jochem v. Robinson, 66 Wis. 688, 57 Am. Rep. 298; *Raymond v. Keesberg*, 84 Wis. 302, 19 L. R. A. 648; Elliott, Roads & Streets, 524-545; *Hundhausen v. Bond*, 36 Wis. 29; *Van O'Linda v. Lathrop*, 21 Pick. 292, 82 Am. Dec. 261; *Palmer v. Silverthorn*, 82 Pa. 65; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Com. v. Passmore*, 1 Serg. & R. 217; *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108; *Loberg v. Amherst*, 87 Wis. 634.

Where an abutting owner uses the highway in accordance with law, he is not, in the absence of negligence, liable for accidents resulting from such use, and in such case the burden of proof is not upon him to show the necessity of such use.

Hay v. Weber, 79 Wis. 587.

Penal statutes can never be extended by mere implication to either persons or things not expressly brought within their terms.

Sutherland, Stat. Constr. §§ 849-851; *Crumbley v. Bardou*, 70 Wis. 385; 1 Wis. Dig. Construct. Statutes; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 160, 50 Am. Rep. 352.

Messrs. George E. Sutherland and Winkler, Flanders, Smith, Bottum, & Vilas for the other appellants.

Messrs. Austin & Fehr, for respondent:

When the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees or is authorized to do, the person who employs the contractor and authorizes him to do the act is equally liable to the injured party.

Robbins v. Chicago, 71 U. S. 4 Wall. 657, 18 L. ed 427; *Hundhausen v. Bond*, 36 Wis. 40; *Whitney v. Clifford*, 46 Wis. 146, 32 Am. Rep. 703.

No one can escape from the burden of an obligation imposed upon him by law by engaging for its performance a contractor.

1 Shearm. & Redf. Neg. § 176; *McCall v. Chamberlain*, 13 Wis. 687; *Brusso v. Buffalo*, 90 N. Y. 679; *Storrs v. Utica*, 17 N. Y. 104, 73 Am. Dec. 437; *St. Paul v. Seitz*, 8 Minn. 297; *Logansport v. Dick*, 70 Ind. 65, 36 Am. Rep. 166; *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78; *Hawver v. Whalen*, 49 Ohio St. 69, 14 L. R. A. 828; *Susquehanna Depot v. Simmons*, 112 Pa. 884, 56 Am. Rep. 317; *Lancaster Ave. Imp. Co. v. Rhoads*, 116 Pa. 377; Smith, Neg. 88.

If the contract is to perform some work which will necessarily or probably injure others, the owner cannot escape liability by having the work done by a contractor.

Lloyd, Building Contracts, p. 124; *Ellis v. Sheffield Gas Consumers' Co.* 3 El. & Bl. 767; *Clark v. Fry*, 8 Ohio St. 358, 73 Am. Dec. 590; *Congrove v. Smith*, 18 N. Y. 79.

The exchange procured this nuisance to be committed, and it does not appear to have objected that the ordinance was not complied with, or to the manner in which the work was being carried on.

Sutherland, Stat. Constr. § 448; *McCall v. Chamberlain*, 13 Wis. 687; 1 Shearm. & Redf. Neg. § 18.

Where the contractor obligates himself to act according to the direction of an architect, the owner is liable.

Faren v. Sellers, 89 La. Ann. 1011; *Schwartz v. Gilmore*, 45 Ill. 455, 23 Am. Dec. 227; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 393; 14 Am. & Eng. Enc. Law, p. 832; *Bower v. Peate*, L. R. 1 Q. B. Div. 321; *Matheny v. Wolfe*, 2 Duv. 187; *Jager v. Adams*, 123 Mass. 27, 25 Am. Rep. 7; *Blyth v. Birmingham Waterworks Co. Props.* 11 Exch. 781; *Vanderpool v. Huson*, 28 Barb. 197; *Harper v. Milwaukee*, 80 Wis. 365; *Hundhausen v. Bond*, 36 Wis. 29.

The same duty devolved upon the defendants Neff and Bayley to erect and maintain barriers upon this sidewalk that did upon the defendant exchange.

The ordinance was valid.

Easton Comrs. v. Cooley, 74 Md. 262; *Sangamon Distilling Co. v. Young*, 77 Ill. 197; *Baumgartner v. Hasty*, 100 Ind. 576, 50 Am. Rep. 880; *Miller v. Valparaiso*, 10 Ind. App. 22.

The ordinance imposed a joint responsibility. The owner or contractor means such contractor as had work to do abutting upon the street, the character of which work might be dangerous to the traveling public. It was a joint and several liability.

Weisenberg v. Winneconne, 56 Wis. 667; 17 Am. & Eng. Enc. Law, p. 604, note 3; *Zeller v. Martin*, 84 Wis. 4.

Winslow, J., delivered the opinion of the court:

The claim made by the defendant the

Builders' Exchange, the owner of the building, that Neff and the Bayleys were independent contractors, seems to us well founded. It is true that in their contracts it is provided that the work is to be performed under the direction and to the satisfaction of the architects, acting as agents of the owner, but it is entirely certain from the whole contract that this is simply a reservation of the right of inspection. It is not a reservation of power to control the manner of the work, to change materials to be used, or prescribe ways and methods in which the work is to be carried out. The contractors have agreed to build the building according to fixed plans and specifications, and of certain materials. They can do the work in their own manner and with their own machinery, providing they comply with their contract. The architect can only require that the building be such as the contract demands. He has no control for any other purpose. We do not regard this reservation of the right of inspection of the work as changing the character of the contract. *Hughbanks v. Boston Invest. Co.* (Iowa) 60 N. W. Rep. 640. It is evident that the falling of the brick was collateral to the contract, and was, if negligence at all, the result of negligent acts on the part of some of the workmen employed by the contractors, and was not the necessary or natural result of any act which the contractors were employed to do. In this situation the owner is not liable, at least in the absence of some other distinct ground of liability. *Hundhausen v. Bond*, 36 Wis. 29; *Hackett v. Western U. Teleg. Co.* 80 Wis. 187.

In the present case, however, the plaintiff claims another distinct ground of liability on the part of the owner of the building, as well as the contractors, arising out of the failure to make a covered passageway along the Fifth street front of the building, thus violating the city ordinance referred to in the statement of facts. This ordinance was passed by the common council before the erection of this building was begun, and provides in substance that "any owner or contractor who shall hereafter build or cause to be built" any building abutting on a public sidewalk shall, after the completion of the first story, cause a roofed passageway to be built in front of the building, upon the sidewalk, under pain of a certain fine or imprisonment. The power to pass this ordinance seems clear. The charter gives the common council power "to control and regulate the construction of buildings," "to prevent and prohibit the erection or maintenance of any insecure or unsafe buildings," "to control and regulate streets," "to prevent the encumbering of streets and alleys in any manner and protect the same from any encroachment or injury," and "to regulate the manner of using the streets and pavements." Laws 1874, chap. 184, subchap. 4, § 8. An ordinance passed by the common council, which is within its power to pass and is reasonable, has the effect of law within the corporate limits. This ordinance, we think, is entirely reasonable, and it was therefore law to all intents and purposes, and it required both the owner and contractor to construct a

covered way over the sidewalk where this accident happened. Had such a way been constructed the plaintiff could not have been injured. The failure to perform this statutory duty must be held negligence. 2 *Thomp. Neg.* p. 1232; *Mueller v. Milwaukee Street R. Co.* 86 Wis. 340, 21 L. R. A. 721, and cases cited; *Karle v. Kansas City, St. J. & C. E. R. Co.* 55 Mo. 476. If by reason of such negligence damage directly results to any one for whose benefit the law was passed, and who is not guilty of contributory negligence, a civil action for damages may be maintained. *Bott v. Pratt*, 38 Minn. 323, 53 Am. Rep. 47; *McCall v. Chamberlain*, 13 Wis. 637. Nor can the nonperformance of such a duty be excused by the plea of an independent contract by which another has agreed to perform the duty. *Thomp. Neg.* p. 904. The plaintiff's contention that the failure to comply with this ordinance constituted negligence on the part of the owner and on the part of Neff, who was the contractor for the walls and brickwork, must certainly be sustained. The situation of the Bayleys is somewhat different, but still we think that they are contractors who are building a building within the meaning of the ordinance. Doubtless the ordinance would not apply to a painter or a plumber, or a mere plasterer or decorator, or any one whose work does not constitute a substantial part of the building. But the iron work in this case is certainly an integral and substantial part of the building. It consists of iron girders, beams, and floor joists, evidently set in the walls, and without which there could be no building, but a mere shell. The mason and the iron contractor evidently must and do work together to make this building. The work of one seems to be fully as important as that of the other, and neither can do his work if the work of the other is not done. We hold, therefore, that the word "contractor," in the ordinance, applies as well to the Bayleys as to Neff, and that all the defendants are within the terms of the ordinance. The ordinance being a reasonable and valid one, and framed to protect the passenger from injury, when a passenger who is exercising ordinary care is injured by reason of the failure to comply with its provisions he may undoubtedly base a claim of negligence on account of such failure against all whose duty it was, under the ordinance, to make the covered way. These considerations demonstrate that there was no error in overruling the motions for nonsuit and the motions to direct verdicts made by the several defendants. A new trial of the case will be necessary, however, because of certain errors, which we will briefly state:

1. The jury were instructed on the subject of damages that the plaintiff would be entitled to compensation for the pain and suffering which she had endured, also for the pain which it may be likely, or that there is a reasonable probability, that she will endure in the future. This was error. The plaintiff is only entitled to recover for such future pain as the evidence shows she is reasonably certain to endure. *Block v. Milwaukee Street R. Co.* 89 Wis. 871, 27 L. R. A. 365.

2. The jury were also instructed as fol-

lows: "I instruct you, gentlemen, that a person is not guilty of contributory negligence in a case where that person receives an injury, being in a place of danger, because that person does not exercise his best judgment in avoiding injury and escaping from danger when warned. So, if the plaintiff, at the time the brick was seen to be falling from the top of that building, was warned and told to escape,—told to get away from the falling brick,—she is not chargeable with negligence because she did not use the best means of escaping from receiving an injury at that time, because, being in a place of danger, she is not chargeable with negligence if she did not use the best means of escaping." This was misleading in the present case, because no facts in evidence warrant it. The plaintiff denies having received any warning, and the evidence of the defendants' witnesses who testify to having shouted at the plaintiff when the brick was falling shows affirmatively that the plaintiff did not understand or know that she was in any danger, and did not adopt any course of action while facing an imminent danger or sudden peril. Under such circumstances the charge in question should not have been given.

3. The defendants Bayley were not parties to the suit as originally brought, and before they were made parties the deposition of one Kneer was taken. Upon the argument of the case the attorney for the defendant Neff was allowed, against objection, to read a part of this deposition to the jury, against the

Bayleys, in reply to the argument of Mr. Sutherland on behalf of the Bayleys. This was error. It could not be used as against the Bayleys, because they were not parties to the action when it was taken.

4. The charge was erroneous, also, when treating of positive and negative testimony. The trial judge practically told the jury that negative testimony was confined to that of a witness who, though present at a transaction, says that he did not see or did not hear. This is too limited a rule. Testimony which is positive in form may amount merely to negative testimony. *Ralph v. Chicago & N. W. R. Co.* 32 Wis. 177, 14 Am. Rep. 725; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 148. It is erroneous, also, to say that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing did not exist, are equally credible. This instruction ignores every well-settled principle which is to be applied in determining the credibility of witnesses, and lays down the rule that one witness will counterbalance another. *Draper v. Baker*, *supra*.

Numerous other questions were presented and argued, but we think the general principles laid down in this opinion so far simplify the questions presented that upon a new trial many of these questions will not again arise, and we do not deem it our duty to consider them in this opinion.

Judgment reversed upon all the appeals, and action remanded for a new trial.

OHIO SUPREME COURT.

CINCINNATI STREET RAILWAY COMPANY, *Plff. in Err.*,

v.

Alta G. MURRAY, Admr., etc., of John L. Murray, Deceased, *et al.*

(53 Ohio St. 87.)

*1. The act of May 4, 1891, 88 Ohio Laws, 552, provides, in substance, that before a street car shall cross over a railroad track at grade, the street car shall stop not less than 10 nor more than 50 feet from the railroad track, and some employee of the street-railroad company shall go ahead of the car, and ascertain if the way is clear and free from danger for the passage of such car, and said car shall not proceed to cross until signaled so to do by such employee, or said way is clear for the passage over said track. In the absence of extraordinary circumstances, it is negligence to cause such street car to cross such railroad track without stopping the car and going ahead as required by this statute.

2. Whether or not such violation of said statute could be justified or excused by any circumstances whatever,—*quære*.

*Headnotes by the Court.

3. In an action for damages, to make such negligence actionable it must appear that injury was directly caused thereby.

4. In a trial of an action for damages in such case it is proper for the court to instruct the jury that such failure to stop the car and go ahead, as required by said statute, constitutes negligence, and if the evidence tends to prove that such negligence was the direct cause of the injury, the case should be submitted to the jury. Whether the evidence does or does not so tend is a question of law for the court.

5. If there is only one employee operating such street car, it is his duty to stop the car and go ahead and ascertain if the way is clear and free from danger, and if he finds the way clear for the passage over the track, he may cross over with his car without signaling to any one; but if there are two or more employees operating such car, such signal is required before crossing.

6. Such stopping, going ahead, and signaling, are required at a crossing having gates and a watchman, the same as at other crossings.

(December 17, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a

NOTE.—The above case is believed to be the first to construe a statute such as that which is here involved, requiring certain precautions to be taken by employees in charge of a street car before crossing a railroad track at grade. As to the right to cross railroads see *note* to *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (Ill.) 29 L. R. A. 486.

crossing a railroad track at grade. As to the right to cross railroads see *note* to *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* (Ill.) 29 L. R. A. 486.

judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of her intestate. *Affirmed.*

Statement by **Burket, J.:**

This action was brought in the superior court of Cincinnati, by Alta G. Murray, administratrix of the estate of John L. Murray, deceased, against the Cincinnati Street-Railway Company, and the Baltimore & Ohio Southwestern Railroad Company, under §§ 6184 and 6185, Revised Statutes, seeking to recover the pecuniary injury resulting from his death by the alleged negligence of said two companies.

The injury occurred on October 4, 1892, at a point where Harrison avenue, in the city of Cincinnati, crosses the double track of the railroad. The avenue is traveled and thronged with persons, vehicles, and street cars, and crosses the railroad at grade. The railroad has a double track, and operates sidings and yard tracks in the immediate vicinity of the crossing, and seventy-five regular trains pass over this crossing every day, besides many switch trains, so that the crossing is regarded as dangerous.

The railroad company had gates at the crossing and a watchman to lower and raise the same, so as to prevent accidents at the crossing. The street car upon which Mr. Murray, who had paid his fare, was a passenger, approached the crossing from the east after dark in the evening. A train of cars was standing on the east side track of the railroad, near the north line of the avenue, and extending some distance north so as to obstruct the view of the main track from persons on the avenue east of the railroad. As the car approached the railroad crossing, the driver of the car checked his horses and brought his car nearly to a stop something less than 50 feet from the railroad, and the conductor of the car was about to step from the car and go forward to see whether it was safe for the street car to cross, when the watchman in charge of the gates called to the employees in charge of the street car to "come ahead" or "come on." The gates this time were in an upright position, indicating that it was safe to cross the railroad tracks. And the watchman who gave the signal to "come ahead" was at the same time sounding the gong signal which was attached to the gates, and was so sounding for the purpose either of indicating to persons about to cross that they should cross promptly and that it was safe to do so, or to warn them that a train was coming and not to attempt to cross, the evidence on this point being conflicting. The driver and conductor of the street car listened and heard no sound of a locomotive bell or whistle or other sounds of an approaching train, and their view of the main track was obstructed by the cars upon the side track. Thereupon the conductor resumed his place on the rear platform of his car, and the driver, in pursuance of the invitation and signal from the watchman to "come ahead," started the street car and attempted to cross the railroad tracks. When the street car was partly across the railroad

tracks, and it was too late to avoid a collision by stopping the street car, a "cut of cattle cars," composed of two or three box cars, loaded with livestock, and being pushed by an engine from behind, came down the west track of the railroad, running at the rate of 20 or 25 miles an hour, and blowing no whistle, ringing no bell, and displaying no signal light, approached the crossing. The driver of the street car then made every effort to get his car across the tracks and avoid a collision, but the railway train struck the rear platform of the street car, after the whole of said car, except the rear platform, had passed over the crossing, and thereby Mr. Murray received the injuries from which he shortly thereafter died.

The case was tried to a jury, and verdict rendered against both defendants. A motion was made for a new trial, which was overruled, and judgment entered on the verdict. On petition in error to the circuit court, which then had jurisdiction, the judgment was affirmed. Thereupon the case was brought here by petition in error on part of the street railway company, and by cross petition on the part of the railroad company.

Meers, Paxton, Warrington, & Boutet and Kittredge, Wilby, & Simmons, for plaintiff in error:

Several acts *in pari materia* and relating to the same subject are to be taken and comprised together in construing them, because they are considered as having one object in view and as acting upon one system.

The courts presume an intention in the legislature to be consistent in the making of laws, and also to have had a purpose in each enactment and all its provisions. Special circumstances often create a necessity for appropriate special provisions, differing from the general rule upon the same subject; and so, where such provisions are found in the statute, different from the general provisions that would apply to the case, the courts must assume that the special provisions were made for adequate reasons, and give them effect by construing them as exceptions to the general rule contained in the general provisions of the statute.

State v. McGregor, 44 Ohio St. 631; *Potter's Dwar. Stat.* 272.

Under the issues as they were made in this case, the failure of the street-railway company to stop its car and send an employee forward, and to do the other things required by the statute, was a fact which, in connection with all the other facts in the case, and disclosed by the evidence, should have been submitted to the jury for their determination of the question whether the street-railway company exercised the degree of care which the law required of it, or whether it was guilty of negligence, which was the proximate cause of the injury.

Baltimore & O. R. Co. v. Whitacre, 85 Ohio St. 629; *Blumires v. Lancashire & Y. R. Co.* L. R. 8 Exch. 283; *Wakefield v. Connecticut & P. R. Co.* 87 Vt. 880, 86 Am. Dec. 711; *Meek v. Pennsylvania Co.* 38 Ohio St. 632; *Knupfle v. Knickerbocker Ice Co.* 84 N. Y. 488; *Horn v. Baltimore & O. R. Co.* 54 Fed. Rep. 301, 6 U. S. App. 881, 4 C. C. A. 346 (1898); *Cleveland,*

C. C. & I. R. Co. v. Elliott, 28 Ohio St. 340; *Bower v. Peate*, L. R. 1 Q. B. Div. 321.

Messrs. Bateman & Harper, for defendant in error Murray:

The court will give effect to all of the terms of the act, and will so construe it, if reasonably possible.

Re Hathaway's Will, 4 Ohio St. 383; *Woodbury v. Berry*, 18 Ohio St. 456.

The statute declares and imposes upon the street-railway company a duty. This duty is in behalf of every passenger it may carry, respecting his safety, while in the care of said company.

Hayes v. Michigan C. R. Co. 111 U. S. 228, 28 L. ed. 410.

There is no duty without negligence resulting from its breach.

Shearm. & Redf. Neg. § 2; Whart. Neg. § 8; Pollock, Torts, 352.

The question as to whether that violation of law occasioned the injury, and the extent of that injury, was a question of fact to be determined upon the evidence by the jury.

Horn v. Baltimore & O. R. Co. 54 Fed. Rep. 301, 6 U. S. App. 381, 4 C. C. A. 346; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 72.

A violation of the statute is negligence *per se*.

Salisbury v. Herchenroder, 106 Mass. 458; *Billings v. Breinig*, 45 Mich. 65; *Correll v. Burlington, C. R. & M. R. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Lloyd v. Perry*, 32 Iowa, 146; *Dodge v. Burlington, C. R. & M. R. R. Co.* 34 Iowa, 276; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 504; *Keim v. Union R. & Transit Co.* 90 Mo. 314; *Nath v. Tower Grove & L. Railway*, 105 Mo. 537, 18 L. R. A. 74; *Siemens v. Eisen*, 54 Cal. 418; *Weber v. Kansas City Cable R. Co.* 100 Mo. 194, 7 L. R. A. 819; *Shearm. & Redf. Neg. § 13a; Central R. & Bkg. Co. v. Smith*, 78 Ga. 694; *Chicago & E. I. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; *Hazard Powder Co. v. Vogler*, 58 Fed. Rep. 152; *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 247; *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 188.

Messrs. Harmon, Colston, Goldsmith, & Headly for Baltimore & Ohio Southwestern Railroad Company.

Burket, J., delivered the opinion of the court:

The errors assigned and relied upon arise upon the charge of the court to the jury as given, and refusal to charge as requested. The general charge as to the liability of the street-railway company in so far as the points made in the argument are concerned, is embraced in the following:

"The Cincinnati Street-Railway Company, at the time and place mentioned, through its agents or servants, was bound to exercise the highest degree of care which prudent men are accustomed to employ under similar circumstances, and to the end that the passenger might be safely carried to the end of his journey, however, without being an insurer of the safety of the passenger, for that the company did not undertake to do. Nor does it under the law stand as an insurer of the safety of the passenger.

30 L. R. A.

"If the jury find from the evidence that the defendant, the Street-Railway Company, is a common carrier of passengers, and that on the 4th day of October, 1892, the plaintiff's intestate was a passenger on the car of the defendant, and having paid his fare, it was the duty of the said defendant to carry him safely to the point of his destination without injury; and when it is shown that the defendant failed to carry the plaintiff's intestate safely to the place of his destination, the failure puts the defendant *prima facie* or affirmatively in the wrong, and the burden of proof devolves upon the defendant to show that the injury was the result of another independent and intervening cause, and that the injury might not have been prevented by the exercise of that high degree of care to which we have alluded, and which prudent men are accustomed to employ under similar circumstances.

"The laws of Ohio make it the duty of a street-railway company to cause their cars to come to a full stop, not nearer than 10 nor further than 50 feet from the tracks of a steam railway at a crossing, before proceeding to cross; to cause some person in its employ to go ahead of the car and ascertain if the way is clear and free from danger for the passage of such street car, and not to proceed to cross until such action has been taken by such persons so employed and the way is clear for their passage over the said tracks. If you find that the death of the plaintiff's intestate resulted from the omission of such duty, or could have been avoided by the observation of said duty, you may consider it as the act of negligence on the part of the railway company, because of the invitation of the steam railway to come across, they should look and see that the way was clear, that does not relieve the street railway company from its duty to its passengers as I have described."

The plaintiff in error excepted to the last of the above propositions of the general charge.

The court also charged the jury that both railroad and street railway might be found guilty of the wrongful acts causing the injury, if both were concurrent in point of time and fact, and the wrongful act of each was the direct and proximate cause of the injury.

At request of plaintiff below, the court gave the following special charges, to which plaintiff in error excepted:

"1. The statute of Ohio made it the duty of the Cincinnati Street-Railway Company to cause its car to come to a full stop not nearer than 10 feet nor further than 50 feet from the crossing, and before proceeding to cross said steam-railway tracks to cause some person in its employ to go ahead of said car and ascertain if the way was clear and free from danger for the passage of said street car, and not to proceed to cross until signaled so to do by such person so employed as aforesaid, or said way was clear for their passage over said tracks; and I charge you that the omission of such duty is negligence on the part of said defendant, which will render it liable in damages, if you find that the death of the decedent resulted from such omission, or could have been avoided by the observance of this duty.

"2. So far as the street-railway company is concerned, the fact, if you shall find it so to be, that the gateman neglected to let down the gates, or invited the street-car driver to come ahead, does not excuse the company from its failure to send a person in its employ forward to examine the track, and to stop until such person shall have notified them to proceed."

The street-railway company then requested the following five special charges, which the court refused to give, and exceptions were duly taken:

"1. If you find that the defendant steam-railway company, in obedience to an ordinance of Cincinnati, had been and at the time of the accident was maintaining gates with a watchman at the crossing in question, then I charge you that the employees of the defendant street-railway company were not required at the same time and crossing first to stop the street car and then go forward to look for the approach of steam trains, but that such employees had the right to rely on the watchman with the gates of the steam-railway company.

"2. If you find that as the car of the street-railway company approached the steam tracks in question, the gateman of the defendant steam-railway company kept his gates open and by the use of this gong and oral invitation indicated to the driver of the street car that it was safe to, and he should drive across the tracks, and that the street-railway employees while in the exercise of their senses of sight and hearing did not know of such an approach of a train as to make it unsafe to cross the tracks, then I charge you that the street-railway employees were excused from stopping their car or going forward in advance of the car to examine for approaching trains, and that they were justified in accepting such invitation of the gateman and attempting to cross the tracks.

"3. If the jury find from the evidence that the gates established at the steam-railroad crossing were open at the time the street car approached the crossing; the open gates were an affirmative and explicit declaration that it was safe to cross, and that no train or locomotive was approaching the crossing near enough to make it unsafe for the employees of the street-railway company to act upon the invitation to cross; and if you find that the employees of the street railway in the use of their senses of sight and hearing did not know of the approach of a train and were not otherwise warned or advised of its near approach so as to make it unsafe to cross, they were not guilty of negligence in acting upon the invitation extended to them by the open gates.

"4. If you find that Harrison avenue and the steam-railroad track at the point where this collision occurred was a crossing much used both by the steam railroad and the street railroad and the traveling public generally, and the number of trains using the steam road and others using public conveyances and traveling along the street made it necessary and highly important for safety in crossing that persons driving wagons and public conveyances should cross over promptly and

quickly, so that the passage of steam railroad trains and of persons desiring to use the street crossing should not be unduly delayed and hindered, and in order to avoid this you should find that it was necessary for the defendant's street car to cross over promptly and speedily—then I charge you that unless the employees of the defendant street-railway company were made aware, or by the exercise of their senses of sight and hearing could have ascertained, that a train was approaching, before they went upon the crossing, so near as to make it unsafe to cross, you may find that they were not negligent in acting upon the invitation presented by the open gates, or such other invitation, if you find any was given, by the employee of the steam railroad in charge of the gate.

"5. If the jury find that the defendant street-railway company's car was slowed up as it approached the tracks of the defendant Baltimore & Ohio Southwestern Railroad Company on Harrison avenue, and that thereupon and before the street car reached the side track of the steam railroad, the gateman of the steam-railroad company personally called to the employees in charge of the street car to "come ahead," or called to them in any other words to that effect, and in response to which the street car went ahead,—then I charge you that there can be no recovery against the street-railway company."

Section 2 of the act of May 4, 1891 (88 Ohio Laws) provides as follows: "Whenever the tracks of any street railroads in this state cross the tracks of any steam railway at grade, the street-railway company operating said line of cars shall cause their street cars to come to a full stop not nearer than 10 feet nor further than 50 feet from the crossing, and before proceeding to cross said steam-railway tracks, shall cause some person in their employ to go ahead of said car or cars, and ascertain if the way is clear and free from danger for the passage of said street cars, and said street-railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks."

The penalty for a violation of this section is \$100, together with liability in damages to the party injured, on the part of both the street-railway company and its employee.

On the part of the street railway, it is contended that the above statute should be read *in pari materia* with that section of the railroad statute requiring gates and a watchman to be maintained at dangerous crossings, and that when the gates are open and such watchman is at his post and signals the street car to come on and cross, that the employees of the street-railway are thereby relieved and excused from stopping the car and going forward to ascertain whether the crossing is clear and free from danger.

We do not agree with this view. The watchman is placed at his post to prevent accidents and injuries at the crossing, and he and the railroad company are chargeable only with ordinary care, while the street-railway company is a carrier of passengers,

and as such is chargeable with a much higher degree of care.

The street-railway statute is for the protection of the lives of its passengers, and in addition is highly penal in its provisions, and by its terms makes no exception of crossings where there are gates and a watchman.

It is therefore clear that the car must stop and the employee go forward, whether there are gates and a watchman or not.

It is also contended, on the part of the street-railway company, that the court erred in its general charge, and in the special charge, in which the court called the attention of the jury to the above statute and the duty thereby imposed of stopping the car and going forward to see that the crossing is clear, and then added: "If you find that the death of the plaintiff's intestate resulted from the omission of such duty, or could have been avoided by the observation of said duty, you may consider it as the act of negligence on the part of the railway company, because of the invitation of the steam railway to come across, they should look and see that the way was clear, that does not relieve the street-railway company from its duty to its passengers as I have described."

The case was argued, both on brief and orally, as if the court had charged that the mere failure to stop the car and failure to go forward to see that the crossing was clear, constituted, *per se*, such actionable negligence as to warrant a recovery; and it is strongly urged that the question as to whether such failure to stop the car and go forward was or was not negligence on part of the street-railway company, should have been submitted to the jury. Four of the five requests to charge are also in line with this theory. But an examination of the above part of the general charge shows that the court only decided that in this case it was negligence to fail to stop the car and go forward, and then as to whether or not the injury was caused by such negligence was submitted to the jury. The language of the court is: "If you find that death resulted from the omission of such duty or could have been avoided by the observation of such duty."

This clearly leaves to the jury the question as to whether or not the injury was caused by the negligence of not stopping the car, and not going forward as required by statute.

True the effect of the charge was that the failure to stop the car and go forward was negligence. The charge in that regard was strictly correct. The statute requires that the car stop and that an employee go forward and ascertain if the way is clear, and a failure to obey the statute in this regard is negligence, but in an action for damages, and not for penalty, it is not actionable negligence, because to make such negligence actionable some injury must have been directly caused thereby. In such case if there is nothing which in law tends to justify or excuse such negligence, it is not only the right, but the duty, of the trial judge to say to the jury that such omission is negligence, and then, if the evidence tends to prove that such negligence was the direct or proximate cause of

the injury, to submit that question to the jury; if the evidence does not so tend, a verdict should be directed for the defendant. Whether or not the evidence so tends is a question of law for the court, and not of fact for the jury.

It may well be doubted whether, under any circumstances, the street-railway company would be justified or excused for violating the statute, but that question is not necessarily involved in this case, as the facts shown at the trial did not even tend toward an excuse or justification.

The trial court in this case said to the jury that if they found that death resulted from the omission of such duty, or could have been avoided by the observation of such duty, the street-railway company would be liable. The true test in such case is, that the injury resulted directly from the negligence complained of, or was directly or proximately caused thereby; but, in the absence of a request to make the charge more specific in that regard, we cannot say that the street-railway company was prejudiced by the charge as given.

It is urged that this failure of duty on the part of the street-railway company was not averred in the petition, and that therefore it cannot be relied upon as a ground of recovery. *Baltimore & O. R. Co. v. Whitacre*, 85 Ohio St. 629. The statute prescribes the care to be taken by the street-railway company at a crossing, and the terms of the statute need not be pleaded, but in this case they were pleaded, and were, on motion, very properly stricken out. The petition avers that "the said street-railway company, without exercising any care on its part, negligently and carelessly caused said car, on which said decedent was riding, to be drawn across said steam-railroad tracks." If it drove on without exercising any care, it certainly did not stop its car nor go forward, because that would have been exercising some care, in fact such care as the statute requires. The averment of no care is broad and sweeping, and perhaps indefinite and uncertain, but all this might have been cured by motion.

It is also urged that it is not always necessary to stop the street car and go forward when a railroad crossing is reached, and that the last sentence of the section shows that if the track is clear the car may proceed without stopping and without any one going forward. The section of the statute in question, after providing for the stopping of the street car and an employee going forward to ascertain that the way is clear and free from danger, provides as follows: "And said street-railroad cars shall not proceed to cross until signaled so to do by such person so employed as aforesaid, or said way is clear for their passage over said tracks."

In many cities there is but one employee on a street car, and while he is bound to stop his car and go forward and ascertain if the way is clear and free from danger, he cannot well signal to himself to proceed, and in such case he shall not proceed to cross with his car, "until said way is clear for their passage over said tracks." This last sentence is clearly applicable only to cases where, afte-

one goes forward, there is no one left in charge of the car to whom a signal can be given. But this does not excuse the employee from stopping his car and going forward and ascertaining whether the way is clear and free from danger.

The railroad company in its brief, asks a reversal of the judgment against it only in case the judgment against the street-railway

company should be reversed, but in oral argument it is urged that the judgment against the railroad company should be reversed, and that against the street-railway company affirmed. We find no error in the record prejudicial to either company, and therefore the judgment against both companies is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

HUDSON FURNITURE COMPANY *et al.*,
Plffs. in Err.,

v.

Edgar HARDING.

(70 Fed. Rep. 462.)

1. The relation to a note of a party whose name is signed on the back of it is a question of general law on which Federal courts are not bound by state decisions.
2. The liability of joint makers of a note is controlled by the law of the place where the contract is payable.
3. A state statute providing that all persons becoming parties to promissory notes payable on time, by signature on the back thereof, shall be entitled to the same notice of nonpayment as indorsers, must control the decisions of a Federal court as to the rights of parties to a note payable in that state.
4. State legislation with respect to the law merchant must be recognized and enforced by Federal courts, although in the absence of such statutes they are not bound by state decisions on the subject.
5. There is no common law of the United States, except possibly as the common law of England has been adopted with reference to the construction of powers granted to the Federal Union.
6. Insolvency of the maker of a note is no excuse for failure to give notice of dishonor.
7. The fact that persons who became joint makers of a corporation note were directors of the company and constituted a majority of the board does not make it unnecessary to give them notice of dishonor of the note, when, by the law of the state, joint makers are entitled to the same notice as indorsers.

(October 7, 1895.)

ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a promissory note. *Reversed*

Before Woods and Jenkins, Circuit Judges, and Baker, District Judge.

Statement by Jenkins, Circuit Judge:

This suit was brought to recover the amount

NOTE.—See also *Gatton v. Chicago, R. L. & P. R. Co.* (Iowa) 28 L. R. A. 556, as to the question of a national common law.

30 L. R. A.

of a promissory note executed by the Hudson Furniture Company (a corporation of the state of Wisconsin), dated Hudson, Wis., March 26, 1892, payable April 14, 1893, to the order of Edgar Harding, the defendant in error, for the sum of \$5,000, payable at the North National Bank, Boston, Mass. Prior to its delivery or acceptance, the plaintiffs in error severally signed their names upon the back thereof for the purpose of giving credit to such note with the payee. It was thereupon sent by mail from Hudson, Wis., to the payee, at his residence in the state of Massachusetts, with the request that he would accept it in lieu of and in extension of a note of the Hudson Furniture Company for a like amount then held by him, and maturing at or about the date of the new note. It was received by the payee in the state of Massachusetts, and there accepted by him for the prior obligation of the company, upon the faith and security of the individual names upon the paper. The note was not paid at maturity. It was not properly protested for nonpayment, nor were the plaintiffs in error seasonably notified of its presentment and nonpayment. At the time of its execution and delivery, the Hudson Furniture Company was insolvent, to the knowledge of the plaintiffs in error, who were directors of the company, constituting the majority of its board of directors at the time of its execution, and so continued down to and after the maturity of the note.

By the statute of Massachusetts (Stat. 1874, chap. 404) it is enacted that "all persons becoming parties to promissory notes payable on time, by signature on the back thereof, shall be entitled to notice of the nonpayment thereof the same as indorsers."

The case was tried in the court below, without the intervention of a jury. The court found the facts as above stated, and, as conclusion of law upon such facts, held that the several individual defendants (plaintiffs in error here) were "joint and several makers of said note, and therefore not entitled to protest of said note," and judgment was rendered against all the defendants for the amount due upon the note.

It is assigned for error that the court erred in the following respects: (1) In the finding and decision of the said circuit court that at the time of the execution and delivery of the note upon which this action was brought to the plaintiff, the defendant, the Hudson Furniture Company, was insolvent;

(2) in that the said court also found and decided that such insolvency was known by the defendants, Phipps, Coon, Jones, and Goss; (3) in the finding and decision of the said court that the said Phipps, Coon, Jones, and Goss signed the said note; (4) in the finding and decision of said court that said Phipps, Coon, Jones, and Goss were not entitled to protest of said note; (5) in the finding and decision that plaintiff recover from the defendants above named the amount due on said note, with interest and costs; (6) in the finding and decision of said court by which judgment is ordered according to the findings.

Messrs. John C. Spooner, A. L. Sanborn, James B. Kerr, and Charles P. Spooner, for plaintiffs in error:

The obligation of the Hudson Furniture Company was a Massachusetts contract, for the note signed by it was payable "at North National Bank, Boston, Mass."

Dan. Neg. Inst. 879; Edwards, Bills & Notes, 178; Rorer, Interstate Law, 85; *Andrus v. Pond*, 88 U. S. 13 Pet. 65, 10 L. ed. 61; *Wooley v. Lyon*, 117 Ill. 244, 57 Am. Rep. 867.

The obligation of Phipps, Coon, Jones, and Goss commencing and to be performed in Massachusetts, the law of that state must govern it.

Tilden v. Blair, 88 U. S. 21 Wall. 247, 22 L. ed. 633; *Lee v. Selleck*, 33 N. Y. 615; *Gray v. Ratney*, 89 Ill. 221, 31 Am. Rep. 76; *Freese v. Brownell*, 35 N. J. L. 235, 10 Am. Rep. 239; Rorer, Interstate Law, 2d ed. pp. 86-90.

Under the law of Massachusetts notice of protest was required.

Mass. Stat. 1874, chap. 404; *National Bank of the Commonwealth v. Law*, 127 Mass. 72.

Where any controversy arises as to the liability of a party to a bill of exchange, promissory note, or other negotiable paper, in one of the Federal courts of the United States, which is not determined by the positive words of a state statute, or by its meaning as construed by the state courts, the Federal courts will apply to its solution the general principles of the law merchant, regardless of any local decision.

1 Dan. Neg. Inst. § 10.

The statute became a part of the contract.

Gregg v. Weston, 7 Biss. 360; *Brabston v. Gibson*, 50 U. S. 9 How. 263, 18 L. ed. 181; *Dundas v. Bowler*, 3 McLean, 397; *Pierce v. Indeth*, 106 U. S. 546, 27 L. ed. 254; 1 Dan. Neg. Inst. 908; Tiedeman, Com. Paper, § 216, and cases cited; *Bull v. First Nat. Bank*, 14 Fed. Rep. 612.

The known insolvency of the maker of a promissory note for six months previous to and at the time of the making of the note does not excuse the holder from a reasonable demand on the maker and due notice to the indorser.

Farnum v. Fowle, 12 Mass. 89, 7 Am. Dec. 35; *Sandford v. Dillaway*, 10 Mass. 52, 6 Am. Dec. 99; *Granite Bank v. Ayers*, 16 Pick. 392; *Lee Bank v. Spencer*, 6 Met. 308, 39 Am. Dec. 734.

The Massachusetts statute is applicable.

Lane v. Vick, 44 U. S. 8 How. 464, 11 L. ed. 681; *Scott v. Sandford*, 60 U. S. 19 How. 898, 15 L. ed. 691; *Oates v. First Nat.* 80 L. R. A.

Bank, 100 U. S. 239, 25 L. ed. 530; *Brooklyn City & N. R. Co. v. National Bank*, 103 U. S. 14, 26 L. ed. 61; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424; *Butcher v. Cheahire R. Co.* 125 U. S. 555, 31 L. ed. 795; *Re Burrus*, 136 U. S. 586, 34 L. ed. 500; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 369, 37 L. ed. 772; *Nathan v. Louisiana*, 49 U. S. 8 How. 73, 12 L. ed. 993; Tiedeman, Com. Paper, § 8.

Defendants are not liable because they are officers of the corporation.

Tiedeman, Com. Paper, § 334; *Musson v. Lake*, 45 U. S. 4 How. 262, 11 L. ed. 967; *Rothschild v. Currie*, 1 Q. B. 43; Story, Eq. Jur. § 870; *Banfield v. Whipple*, 14 Allen, 13.

Messrs. Ray S. Reid, F. H. Boardman, and M. H. Boutelle, for defendant in error: Plaintiffs in error were joint and several makers of the note in suit.

Rey v. Simpson, 63 U. S. 22 How. 341, 16 L. ed. 260; *Good v. Martin*, 85 U. S. 90, 24 L. ed. 841; *First Nat. Bank v. Lock-Stitch Fence Co.* 24 Fed. Rep. 221.

The Massachusetts statute is not applicable.

Swift v. Tyson, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Luke v. Lyde*, 2 Burr. 883; *Watson v. Tarpley*, 59 U. S. 18 How. 517, 15 L. ed. 500; *Brooklyn City & N. R. Co. v. National Bank*, 103 U. S. 14, 26 L. ed. 61; *Hollingsworth v. Tensas*, 17 Fed. Rep. 109.

Plaintiffs in error are liable if the Massachusetts statute is held applicable.

By the common law of the state of Massachusetts, as it existed at the time of the passage of the statute in question, a party signing his name in blank upon the back of a note prior to its delivery to the payee was a co-maker, and as such liable.

Union Bank v. Willis, 8 Met. 504, 41 Am. Dec. 541; *Way v. Butterworth*, 108 Mass. 509.

The statute in question provides that such party shall be entitled to notice the same as an indorser. This act, being in derogation of the common law, is to be strictly construed, and the common law held repealed thereby no further "than is expressly declared, or the clear import of the language used absolutely requires."

23 Am. & Eng. Enc. Law, p. 388.

Numerous conditions exist in the law, dispensing with the necessity of demand and notice:

1. Where the drawer, by virtue of the relations existing between himself and his drawee, has no reason to expect the paper to be cared for.

2. Where the facts are such as to make it the duty of the drawer or indorser to provide for the payment of the paper.

3. Where the relations between drawer and indorsers are such that the indorser must know, or the law will impute notice, of the nonpayment or dishonor.

Tiedeman, Com. Paper, § 355; 2 Dan. Neg. Inst. § 1685; *Hull v. Myers*, 90 Ga. 674.

Jenkins, Circuit Judge, delivered the opinion of the court:

We are not at liberty to review the evidence to ascertain whether the finding of the court below upon the facts was warranted by the testimony. We are restricted to the com-

sideration of the question whether the facts as found support the judgment rendered. *Jenks v. Stapp*, 9 U. S. App. 84, 3 C. C. A. 244, and 52 Fed. Rep. 641. We must therefore consider the case upon the assumption that, at the time of the execution of the note, the Hudson Furniture Company was insolvent, to the knowledge of the individual parties to the note, who were its directors. Whether the term "insolvent," as employed in the findings, was used in the sense of inability to meet obligations as they mature, and in contradistinction to "bankruptcy," meaning an absolute inability to pay a debt, without respect to time,—a want of assets convertible into money sufficient to pay the debt,—it is not necessary for us to consider. It may be observed, however, that it appears from the record that this corporation continued a going concern after the making of the note, and until February 11, 1893, when, at a meeting of the stockholders of the company, it was resolved that owing to the large loss of the company in its business during the previous year, as disclosed by the treasurer's report, the board of directors was authorized to proceed at once to collect all outstanding accounts, sell the property of the company, and apply the proceeds to the payment of its debt, and generally to do every and all things necessary to wind up the affairs of the company at the earliest date practicable.

"Insolvency," in a popular sense, means "bankruptcy." There is, however, a state of insolvency which does not necessarily imply bankruptcy. This is true, doubtless, within the experience of most merchants and corporations engaged in trade. It is the incident of nearly every business that periods of depression are experienced, when there is a total inability to meet obligations as they mature; not from want of sufficient assets, but from inability to turn them presently into money for the payment of debts. That is a state of insolvency which, continuing, may ultimately result in bankruptcy. It, however, often occurs that by prudent management, well-directed energy, and by the indulgence of creditors, the business is kept upon its feet, and, with the advent of more prosperous times, at last re-established upon a sure and solvent basis. We are unable to say in what sense the term "insolvent" was employed in these findings of fact. The history of the company, as we read it in the evidence, and as stated in the letter inclosing and asking acceptance of this note by Mr. Harding, indicates that the company was financially embarrassed, but that its directors hoped, through the indulgence of its creditors, to restore the company to a solvent condition, and to pay its notes after the end of the then current year. We have said this much, not that we deem the fact essential to a correct decision of the case, but simply to call attention to the necessity that, in findings of fact which are to be presented for review in this court, care should be taken that terms should not be employed which are susceptible of double or of doubtful interpretation. This is of importance, since we are without authority to review the evidence to

ascertain the sense in which terms are employed, or to declare the sense in which they should have been used.

It is settled doctrine that the Federal courts, in the exercise of their co-ordinate jurisdiction, are not bound by the decisions of the state courts upon subjects of general law, but are at liberty to follow the convictions of their own judgment. *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Brooklyn City & N. R. Co. v. National Bank*, 103 U. S. 14, 26 L. ed. 61; *Burgess v. Seligman*, 107 U. S. 20, 27 L. ed. 359; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Lake Shore & M. S. R. Co. v. Prentiss*, 147 U. S. 106, 37 L. ed. 101. Therefore, notwithstanding it has been held by the supreme court of the state in which this note was executed that parties standing in like relation to bills and notes with the plaintiffs in error here are to be treated as indorsers (*Blakeslee v. Herrett*, 76 Wis. 841), the Supreme Court of the United States, in *Good v. Martin*, 95 U. S. 90, 24 L. ed. 841, and *Bendey v. Townsend*, 109 U. S. 665, 667, 27 L. ed. 1065, 1066, has determined that they must be treated as joint makers of the note with the party who appears thereon as maker. And such is also the law of Massachusetts. *Union Bank v. Willis*, 8 Met. 504, 41 Am. Dec. 541; *Brown v. Butler*, 99 Mass. 179; *Way v. Butterworth*, 108 Mass. 509; *Allen v. Brown*, 124 Mass. 77. We are therefore constrained to hold that the plaintiffs in error were joint makers with the Hudson Furniture Company of this note, and, if the contract is to be controlled by the law of the state of Wisconsin, were not entitled to notice of protest. Being joint makers of the note, their liability is controlled by the law of the place where the contract is payable, because they are deemed to have reference to the law of such place in the construction of the obligation assumed. *Brabston v. Gibson*, 50 U. S. 9 How. 263, 277, 18 L. ed. 131, 137; *Calhoun County Supers. v. Galbraith*, 99 U. S. 214, 218, 25 L. ed. 410, 411; *Pierce v. Indseth*, 106 U. S. 546, 27 L. ed. 254; 1 Dan. Neg. Inst. 4th ed. § 895. It would be otherwise with respect to the indorser of a note, for he is treated as in fact entering into a new obligation, undertaking that the maker will pay at the time and place stipulated, and that he (the indorser) will respond to his obligation at the place of the execution of his indorsement, if there delivered, in the event of dishonor and notice. If delivered at a place other than at the place of execution, the law of the place where delivered controls. Dan. Neg. Inst. §§ 868, 899; *Slacum v. Pomeroy*, 10 U. S. 6 Cranch, 221, 3 L. ed. 204; *Musson v. Lake*, 45 U. S. 4 How. 262, 11 L. ed. 967. The plaintiffs in error thus being joint makers of a note payable and delivered in the state of Massachusetts, their obligation is to be judged by the law of that state.

We are therefore brought to the inquiry whether the statute of that state to which reference has been made is operative to clothe the joint makers with the rights to notice of protest that an indorser is entitled to. This statute manifestly regards all parties to a note by signature on the back thereof, whether they were to be treated as guarantors or as

joint makers, in the light of sureties for the maker, and recognizes the equitable right of such parties to notice of dishonor of the note by their principal. It sought to place them, with respect to presentment, demand, and notice of dishonor, upon the same footing with an indorser. The statute was thus construed by the supreme judicial court of that commonwealth in *National Bank v. Law*, 127 Mass. 72, prior to the execution of the contract in question. We are, of course, bound by that construction. *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 38 L. ed. 784, 2 Inters. Com. Rep. 801; *Baltimore Traction Co. v. Baltimore Belt R. Co.* 151 U. S. 187, 38 L. ed. 102. So that, assuming the validity of that statute, any one becoming a party to a note payable on time by signature on the back thereof, whether he be treated as guarantor or joint maker, is in fact a mere surety for the maker; his liability is conditional and secondary; and before he can be charged, he must have the same notice of protest that an indorser by the law merchant would be entitled to under like circumstances. He stands in this respect in the shoes of an indorser. The statute entered into and is a term of the contract. The engagement of the plaintiffs in error, therefore, was that if, upon due demand, the note should not be paid according to its tenor, they would compensate the holder or a subsequent indorser who was compelled to pay, provided the requisite proceedings on dishonor were duly taken.

It is urged, however, that we must disregard this statute; and in support of this contention the broad doctrine is asserted that the several states of this Union have no right by statute to change the general commercial law. This contention is rested upon certain observations of justices delivering the opinions of the court in *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 18 L. ed. 885, 871, and *Watson v. Tarpley*, 59 U. S. 18 How. 517, 521, 15 L. ed. 509, 511. In the former case it is said: "In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the 84th section limited its application to state laws, strictly local; that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And

we have not now the slightest difficulty in holding that this section, upon its true intendment and construction is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 882, 887, to be in a great measure, not the law of a single country only, but of the commercial world."

In the latter case the observation which is supposed to warrant the asserted restriction upon the rights of the states is as follows: "The general commercial law being circumscribed within no local limits, nor committed for its administration to any peculiar jurisdiction, and the Constitution and laws of the United States having conferred upon the citizens of the several states, and upon aliens, the power or privilege of litigating and enforcing their rights acquired under and defined by that general commercial law, before the judicial tribunals of the United States, it must follow by regular consequence, that any state law or regulation the effect of which would be to impair the rights thus secured, or to divest the Federal courts of cognizance thereof, in their fullest acceptance under the commercial law, must be nugatory and unavailing. The statute of Mississippi, so far as it may be understood to deny, or in any degree to impair, the right of a nonresident holder of a bill of exchange, immediately after presentment to and refusal to accept by the drawee, and after protest and notice, to resort forthwith to the courts of the United States by suit upon such bill, must be regarded as wholly without authority and inoperative. The same want of authority may be affirmed of a provision in the statute which would seek to render the right of recovery by the holder, after regular presentment and protest, and notice for nonacceptance, dependent upon proof of subsequent presentment, protest, and notice for nonpayment. A requisition like this would be a violation of the general commercial law, which a state would have no power to impose, and which the courts of the United States would be bound to disregard."

It may not be denied that the language employed gives color of authority to the pretension. It is therefore necessary to ascertain the precise questions there involved, in order to discover whether the remarks quoted were pertinent to the subject under discussion, and necessary to be determined, and so authoritative and binding upon us as decisions of the court. In the former case the question was whether a certain defense to a bill of ex-

change, being a contract made within the state of New York, and governed by its law, was available; and this contention was rested upon the ground that the courts of New York had decided affirmatively upon that question. The supreme court held: First, that the question had never been definitely determined in the courts of that state; and, secondly, if it had been so determined, the decision would not be binding upon the Federal courts with respect to principles established in the general commercial law, under the 34th section of the judiciary act of 1789; that decisions of the state courts do not constitute laws within the meaning of the act, but are merely evidence of what the laws are; and that the term "law," as there used, refers to the acts of the legislature or long-established local customs having the force of law. It is to be observed that the judgment in that case was carefully limited to the effect of decisions of local tribunals. Mr. Justice Story, delivering the opinion, remarks with respect to the facts of the case that "it is observable that the courts of New York do not found their decisions upon any local statute or positive, fixed, or ancient local usage, but they adduce the doctrine from the general principles of commercial law." The decision in the case upon the precise question presented is now universally recognized as correct, but whatever was said with respect to local statutes and their effect was upon a question not involved in the case. The language of Cicero, adopted by Lord Mansfield, and quoted by Mr. Justice Story, is undoubtedly correct,—that the law of negotiable instruments is in a great measure, not the law of a single country only, but of the commercial world. That was the statement of an historical fact, as true to-day as in the time of Cicero. The underlying principles of the commercial law are the same in all commercial countries; but, as matter of fact, the customs and laws of the various commercial nations differ widely with respect to negotiable paper. The law merchant, as we have received it from the common law, grew out of the customs of the merchants of London, and in many essential particulars is at variance with the commercial law of continental Europe. The language quoted from Cicero by no means suggests, nor is it true, that it is beyond the power of each sovereignty to change the commercial law to suit its pleasure. In the latter case, of *Watson v. Tarpoley*, a statute of the state of Mississippi provided that "no action or suit shall be sustained or commenced on any bill of exchange until after the maturity thereof." This statute was invoked in defense of an action in the Federal court prior to the maturity of the bill against the drawer of the bill upon protest for nonacceptance. A question in the case was whether the statute of a state could thus restrict the right of a party to pursue his suit in a Federal court. The court held adversely upon that question. It is to be noted that the statute relied upon did not go to the question of liability upon the contract, nor impose any new term upon commercial contracts, but merely affected the remedy thereon, postponing suit until after maturity

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of the bill. The decision was certainly correct, because no state statute can thus control the remedy of a suitor in a Federal court.

The observations referred to in both the cases were certainly *obiter* so far as they seem to imply or can be properly construed as holding that a state is without power with respect to contracts made within its jurisdiction, and controlled by its law. In view of the eminent learning of the distinguished jurists referred to, their observations are to be treated with great deference; but, if susceptible of the meaning contended for, they cannot be held to declare the settled law of the land without determination of the question by the supreme court in a cause wherein the question was involved and necessary to be decided.

There are a number of decisions of the supreme court which distinctly recognize the right of such legislation by the state. Thus, in *Bank of United States v. Donnelly*, 88 U. S. 8 Pet. 361, 8 L. ed. 974, it is asserted that: "The general principle adopted by civilized nations is, that the nature, validity, and interpretation of contracts are to be governed by the law of the country where the contracts are made, or are to be performed [the remedy being governed by the *lex fori*]."

In *Musson v. Lake*, 45 U. S. 4 How. 262, 278, 11 L. ed. 967, 978, the question being whether the contract between the holder and indorser of the bill in controversy was to be governed by the law of Louisiana, where the bill was payable, or by the law of Mississippi, where it was drawn and indorsed, the court says: "This part of the contract was, by the agreement of the parties, to be performed in Mississippi, where the suit was brought and is now depending. The construction of the contract, and the diligence necessary to be used by the plaintiffs to entitle them to a recovery, must therefore be governed by the laws of the latter state."

In *Brooklyn City & N. R. Co. v. National Bank of The Republic*, *supra*, Mr. Justice Harlan speaking for the court, observes (page 25 of 103 U. S. and 66 of 26 L. ed.): "According to the very general concurrence of judicial authority in this country as well as elsewhere, it may be regarded as settled in commercial jurisprudence—there being no statutory regulations to the contrary—that where negotiable paper is received," etc.

And so in *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 87 L. ed. 97, Mr. Justice Gray, delivering the opinion of the court, remarks upon the question then under consideration that "It is a question, not of local law, but of general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the several states."

The contention that this statute of Massachusetts is invalid and inoperative goes to the extent of depriving a state of power to legislate with respect to the law merchant. It presents a bold and far-reaching proposition, striking at the root of power in the respective states to which we are not prepared to yield assent. We are referred to no provision of the Constitution which expressly

or impliedly inhibits the exercise of such power by the state. The contention assumes that there is a commercial law of the United States distinct from and independent of the law of the states. Whence came it, and how was it adopted? Was it the common law of England or the civil law of continental Europe? Was it a law appropriated by the nation upon the adoption of the Constitution? It must, then, be universal in its application throughout the nation, overriding all state laws upon the subject and all right of the states to legislate. We know that most of the states are governed by the common law of England as modified and adapted to the peculiar circumstances and conditions of each, and that one state, at least, is governed by the civil law. And we know, moreover, that the commercial law existing in these various states, while alike with regard to underlying principles, is widely different in many essential respects. There is no common law of the United States, except possibly as the common law of England has been adopted with reference to the construction of powers granted to the Federal Union.

This subject received the consideration of the court in *Smith v. Alabama*, 124 U. S. 465, 478, 31 L. ed. 503, 512, 1 Inters. Com. Rep. 804, and was there determined, Mr. Justice Matthews, speaking for the court, saying: "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. *Wheaton v. Peters*, 38 U. S. 8 Pet. 591, 8 L. ed. 1055. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied was none the less the law of that state. In cases, also, arising under the *lex mercatoria*, or law merchant, by reason of its international character, this court has held itself less bound by the decisions of the state courts than in other cases. *Swift v. Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Carpenter v. Providence Washington Ins. Co.* Id. 495, 10 L. ed. 1044; *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61. There is, however, one clear exception to the statement that there is no

national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The Code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority. *Moors v. United States*, 91 U. S. 270, 23 L. ed. 346."

Mr. Daniel, in his valuable treatise upon the law of Negotiable Instruments (secs. 863, 864), defines the principle which should rule the question in the following explicit language: "Each one of the United States is, in contemplation of its own and of the Federal Constitution, a distinct and independent sovereignty, with its own peculiar code of laws and system of judicature. And while, in the aggregate, they compose one integral confederacy, which is itself an independent nation, paramount in certain respects to the states, in all other respects the states retain their separate autonomies, and are deemed as much foreign to each other as if not in any wise associated together. The regulation of contracts comes peculiarly within the province of the states, and therefore contracts between citizens of the different states, while they may be enforced by process in the Federal courts, nevertheless are to be construed and effectuated, not by a general system of laws which overspread the whole country, but in accordance with the principles of international law which govern transactions between parties of different nations.

"Sec. 864. As long as all the parties to a bill or note are confined within the limits of a single state, the local law alone determines their rights and liabilities. No suit can be brought in a Federal court, and any question which may be litigated begins and ends with the local tribunals. But the vast and constant traffic between the states, and the general use of bills and notes as a medium of exchange, give circulation to those instruments from hand to hand, and from state to state; and questions of nicety are often presented in the inquiry by what law the rights and liabilities of the parties are to be ascertained. In some of the states, as in Maryland, the English statute of 3 & 4 Anne is in force. In others, as in Virginia, where none but notes payable at bank are negotiable, there are peculiar statutory provisions respecting commercial paper. In all of the states, each recognizes the precedents of its own courts, as independently of the rulings of the Supreme Court of the United States as of those of Great Britain, which may, indeed, shed great light on all commercial questions, but are of no binding authority. When suit is brought in one of the Federal courts, it, on the other hand, will be guided by the general law merchant in questions referable to it, and will follow its own views about it, unless the nature of the liability contracted has already been determined, in

the particular state of the contract, at the time it was entered into."

We are of opinion that these principles are not shaken by the *obiter dicta* to which reference has been made. It will thus be seen that, in the exercise of the concurrent jurisdiction of the Federal court with respect to all contracts not within the exclusive control of the Federal government, we administer the law of the state which controls the contract, and that each state has the right to impose such conditions and limitations upon contracts, not inhibited by the terms of its own or the Federal Constitution, as it may see proper. It is, of course, most desirable that there should be uniformity of laws with respect to commercial paper,—a necessity becoming more and more emphasized day by day, and which may possibly result in the grant of exclusive control of the subject to the Federal government. It is not, however, within our province to bring about such a result, however desirable. We are constrained to hold that the act of Massachusetts here in question was a valid exercise of power, and became a term of this contract. The nature of the liability at the time of the making of the contract was declared by the statute law of the state of the contract, and we must construe the contract in the light of such statute law.

We are thus brought to the question whether the known insolvency of the maker at the time of the execution of the note, and the fact that the plaintiffs in error were directors, constituting a majority of the board of directors, of the maker of the note, obviate the necessity of presentment of the note for payment, and the giving of seasonable notice of dishonor. The contract of the parties was conditional. It was, as we have seen, that if, upon due demand, the note should not be paid by the corporation according to its tenor, they would compensate the holder, or a subsequent indorser who is compelled to pay, provided the requisite proceedings for dishonor were duly taken. That there should be demand of payment and notice of dishonor were terms incorporated into this contract. *Rothschild v. Currie*, 1 Q. B. 48. The reason of the condition imposed by the law doubtless was that the indorser might take prompt measures for his security, and the law presumed injury from want of notice of dishonor. This presumption is certainly not refuted by proof of the solvency of the maker evidencing that no injury resulted from want of notice to the indorser. It is said, however, that insolvency known to the indorser dispenses with the necessity of notice, because nothing could be lost by default of demand and notice. We are not prepared to concur in the conclusion of fact. We have said that the solvency of the maker, when no possible loss could result to the indorser from want of notice, will not excuse failure to advise of dishonor. Certainly, in the case of insolvency notice is more essential, that the party to be charged may take prompt measures for his security. The insolvency of the maker might possibly affect the sufficiency of indemnity, but it would not necessarily result in a total failure of

redress. That would be dependent upon the extent of the insolvency. There have been cases, invested with peculiar equities, in which courts have sought to evade this wholesome rule of the common law, and in which they have permitted evidence of no injury to excuse notice. We are not prepared to follow a rule that will tend to confusion in commercial law in order to relieve a supposed hardship. We concur with the supreme court of Massachusetts in *Farnum v. Fowle*, 12 Mass. 89, 92, 7 Am. Dec. 85, that "the hardship, if any, arises from a fluctuation of opinions, and an uncertainty as to rules; and seldom from an inflexible adherence to them; because, when it is once known that exactness in the performance of duty is to be required, parties will adapt themselves to such a state of things, and be always diligent and punctual to avail themselves of their contracts." And we concur with Mr. Daniel (Dan. Neg. Inst. § 1184) that it is "a total misconception of the obligation of an indorser to place his liability at all upon any question involving the pecuniary circumstances of his principal." Hardship is more likely to happen from speculation of courts and juries in the determination of the question of fact whether injury has or has not resulted from want of notice than from strict adherence to the law and to the terms of the contract. The better opinion is, and, as we think, the settled doctrine of this country is, that insolvency is no excuse for failure of notice of dishonor. *French v. Bank of Columbia*, 8 U. S. 4 Cranch, 141, 2 L. ed. 576; *Wilson v. Senior*, 14 Wis. 880; *Sandford v. Dillaway*, 10 Mass. 52, 6 Am. Dec. 99; *Farnum v. Fowle*, 12 Mass. 89, 7 Am. Dec. 85; *Granite Bank v. Ayers*, 16 Pick. 392; *Lee Bank v. Spencer*, 6 Met. 308, 39 Am. Dec. 784.

Nor do we think that the fact that the plaintiffs in error were directors and constituted a majority of the board of directors of the maker of the note is matter of moment or excuses failure of notice. The case of *Hull v. Myers*, 90 Ga. 674, is urged upon our attention in support of this contention. The decision of the court upon this question is bottomed, as we think, upon incorrect reasoning, and is without the support of authority. The court says: "Though the debt is his and not their own, primarily, yet, having all his assets and full power over them, and over all his business, they are bound to know all that he would be bound to know were his business and assets in his own hands and under his own management."

If we grant this, we have already seen that the settled law of the land is that knowledge by the indorser of the solvency or insolvency of the maker will not excuse want of notice. The court further observes: "In this instance the principal being a corporation, and the indorsers the corporate directors, the latter could have no right or reason to expect that funds would be provided for liquidating the debt, unless it was done by their procurement or through their agency."

This is true if it means that the funds to meet the note are in a sense to be procured through and appropriated to the debt by the

agency of the board of directors; but it is not necessarily true if it means that the funds are to be procured through the agency of the indorsers of the note. Their contract is personal and individual, and is not affected by their official relation to the company. The directors, in the management of the property of a corporation, have no duty imposed upon them or upon any member of the board to furnish funds for the uses of the corporation, save such as arise from the fact that the property of the corporation is committed to their care. Unless knowledge by the indorser of the insolvency of the maker of a note can avail to dispense with the necessity of a notice, we are unable to approve this decision. The defect in its reasoning seems apparent from the following clause: "A single director, or even a minority of the directors, indorsing a note for the corporation, might be entitled to notice of dishonor, for one only, or a small number, might have a right to suppose that the note would be attended to at maturity; but when the whole board, or a majority of its members, unite in the indorsement, each and all so indorsing should be charged with the duty and responsibility of protecting the paper, since the power to control the conduct of the corporation in respect to paying or not paying would be in their own hands."

It seems a curious conclusion that, because the note is indorsed by a majority of the board of directors, therefore the individual liability of each is fixed, and want of notice of dishonor excused, upon the ground that they should act together as a majority, and so could appropriate funds of the corporation to the payment of the note. The argument assumes that they must act together as a majority of the board of directors; that there are funds of the corporation which should have been applied to the payment of the note, and were not applied, because of the non-action by the indorsers. The argument concedes that, if the note were indorsed by a minority of the directors, failure to give notice would not be excused. But by what right does the court assume that the majority of the directors indorsing the note will or should act together as a majority in the board upon any question affecting the interests of the company? The argument proceeds upon the theory that they should act in their own interest to protect their liability, and possibly in opposition to the interests of creditors. We think the case is founded upon a mistaken notion of the duties and obligations of directors. They are only to administer the property of the corporation as they find it. They are not obliged to furnish funds for the use of their principal, nor ought they, as directors, to protect their individual interests against the interests of their principal. It is, moreover, to be observed, that, in the case we have now in hand, the body of the stockholders, some two months prior to the maturity of this note, directed the officers of the

company to wind up the affairs of the company at the earliest date practicable, to collect all its assets, sell all its property, and apply the proceeds to the payment of the debts of the company. The corporation then ceased to be a going concern.

We have held in *Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320, 68 Fed. Rep. 496, that "when a private corporation is dissolved, or becomes insolvent, and determines to discontinue the prosecution of business, its property is thereafter affected by an equitable lien or trust for the benefit of creditors. The duty in such cases, of preserving it for creditors, rests upon the directors or officers to whom has been committed the authority to control and manage its affairs. Although such directors and officers are not technical trustees, they hold, in respect of the property under their control, a fiduciary relation to creditors; and necessarily, in the disposition of the property of an insolvent corporation, all creditors are equal in right, unless preference or priority has been legally given by statute or by the act of the corporation to particular creditors."

It would have been a violation of duty for the plaintiffs in error, as directors of the company, after this resolution of the stockholders, to have sought to apply the assets of the corporation to the payment of this particular debt for which they were conditionally liable, and thus to relieve themselves of liability, to the detriment of the general creditors of the company. Their duty was to refrain from applying the assets of the corporation to the payment of this note if the assets of the corporation were insufficient to pay all debts in full. Their power by the resolution became limited, and their duty was to marshal all the assets of the corporation, and apportion them ratably among all the creditors of the corporation according to their equality of right. They could not legally have done that which the supreme court of Georgia, in the case referred to, holds that they should have done, and failure so to do wrought legal excuse for failure of duty on the part of the holder of the note. In this respect this case is distinguishable from the case of *Hull v. Myers*.

The court below held that the plaintiffs in error were joint makers of the note, and therefore not entitled to notice of protest. We have seen that, by the law of Massachusetts which governs this contract, they were entitled to notice, notwithstanding that relation to the paper. We hold that failure of notice is not excused by anything apparent on the record, and that the plaintiffs in error are discharged from liability upon the paper by reason of failure of proper demand and of seasonable notice of dishonor.

The judgment will be reversed, and the cause remanded, with directions to the court below to render judgment for the plaintiffs in error upon the findings.

MINNESOTA SUPREME COURT.

William Pett MORGAN, *Resp't.*,
v.
William KENNEDY *et al.*, *Appts.*

(.....Minn.)

- *1. The common-law rule which holds a husband liable in damages for slanderous words uttered by his wife, although he is not present, and in which he has not participated in any manner, has not been abrogated in this state by the passage of the statutes relating to married women.
2. The words alleged in the complaint as having been spoken of and concerning plaintiff were as follows: "He has been drunk throughout Thanksgiving week. He has not retired any night during that week other than in a state of drunkenness. He has drunken people in his room. He gets people in his room, and makes them drunk. He was drunk during the early

Headnotes by COLLINS, J.

NOTE.—*Liability of husband and wife for the wife's libel and slander.*

- I. The common-law doctrine.
- II. Effect of state legislation.
- III. The question of the husband's presence and coercion.
- IV. Joinder of parties and actions.
- V. Necessity of service upon wife.
- VI. Effect of death pending action.
- VII. Husband and wife as witnesses.
- VIII. Damages and evidence in mitigation.
- IX. Effect of a judgment in such cases.
- X. Action on bail bond in such cases.

This note is confined exclusively to cases of libel and slander by the wife, and does not include other torts, although the same principles would apply as to them.

As to the responsibility of married women for the use and safety of premises owned by them, see note to *Strouse v. Leipf* (Ala.) 23 L. R. A. 622 (1894).

Upon the question of the husband's liability for the wife's torts, see note to *Baker v. Braslin* (R. I.) 6 L. R. A. 718 (1899) and to *Prentiss v. Paisley* (Fla.) 7 L. R. A. 640 (1890).

Introduction.

The principal case adds another to the list of states which hold that the rules and doctrines of the common law regarding the husband's liability for the wife's torts have not been abrogated by state statutes, and therefore the husband remains liable as at common law for a libel or slander committed by the wife.

I. The common-law doctrine.

The common-law liability of the husband for the torts of his wife, such as slander, is placed upon the same ground as his responsibility for other wrongs committed by her.

Thus, in an action to recover damages against the husband alone for slander uttered by the wife, the court stated the rule as follows: For the wife's torts, committed during coverture, the husband is responsible, and such torts may be committed in either of the following circumstances: First, where the husband is absent and has no knowledge of the intended act; second, where the husband is absent, but where the tort is done under his direction and instigation; third, where the husband is present, but the wife acts of her own volition; and fourth, where the tort is committed in the company of the husband, and by his command or encouragement. In the first three cases they are jointly liable, and 30 L. R. A.

hours of the morning after Thanksgiving." These words involved moral turpitude on plaintiff's part, as well as charged him with the commission of an indictable offense. *Held*, that they were slanderous *per se*.

(November 5, 1895.)

APPEAL by defendant from an order of the District court for Ramsey County overruling a demurrer to the complaint in an action brought to recover damages for slander. *Affirmed*.

The facts are stated in the opinion.

Mr. Theodore M. Holland, with Mr. John L. Townley, for appellants:

The unprecedented enlargement of married women's property rights, which took place even before Minnesota passed into statehood, and which was known as section 115 (106) of chapter 61 (71) of the Public Statutes of Minnesota of 1849-1858, had swept out of existence the

the wife must be joined, for the reason that she is in reality the offending party, and if the marriage should be dissolved by divorce or the death of either before judgment is recovered, the liability of the husband ceases, he being joined because she cannot be sued alone; but in the fourth case, the law considers the tort as committed by the husband, and he alone is liable, but in order to exempt her from liability, the concurrence of his presence and his command must be shown; a wrong done by his direction, but not in his company, does not excuse her; nor does his presence if unaccompanied by his direction. The court further stated that the rule as laid down in 2 Kent, Com. 149, to the effect that "if committed in his company, or by his order, he alone is liable," was too broad. *Kosminsky v. Goldberg*, 44 Ark. 401 (1884).

The reasons for the rule of the common law in such actions have been thus stated: At common law the husband has the control, almost absolute, over her person, is entitled, as the result of the marriage, to her services, and consequently to her earnings, to her goods and chatties; he has the right to reduce her chose in action to possession during her life, can collect, and enjoy the rents and profits of her real estate, and thus has dominion over her property and becomes the arbiter of her future. The wife is in a condition of complete dependence, cannot contract in her own name, is bound to obey him, and her legal existence is merged in that of her husband so that they are termed and regarded as one person in law; as a necessary consequence he is liable for her debts *dum sola*, and for her torts and frauds committed during coverture, if they are done in his presence or by his procurement, he alone is liable, otherwise they must be sued jointly. *Martin v. Robson*, 65 Ill. 129 16 Am. Rep. 578 (1872).

So, it has been held that at common law a husband is liable for slanderous words spoken by his wife. *McElfresh v. Kirkendall*, 36 Iowa, 224 (1873).

And the party slandered has an action against them jointly, and the husband's property is liable to be taken in satisfaction of the judgment rendered therein. *Hill v. Duncan*, 110 Mass. 238 (1872).

To the same extent as if she alone were answerable. *Austin v. Wilson*, 4 Cush. 273, 50 Am. Dec. 766 (1849).

For torts such as slander committed by the wife not in the presence of her husband and not by his coercion they are jointly liable, and must be joined in the action. *Smith v. Taylor*, 11 Ga. 20 (1852).

last remnant of the husband's common-law liability for his wife's torts, in this state.

Under similar provisions, the identically same question arose in Illinois which is the question in this case,—whether a husband was any longer liable for his wife's slanderous words. The court held not.

Martin v. Robson, 65 Ill. 129, 16 Am. Rep. 578.

Similar decisions were made in *Norris v. Corkill*, 82 Kan. 409, 49 Am. Rep. 489, and *Boward v. Kettering*, 101 Pa. 181.

Could it, after the passage of those acts, any longer be said that "the husband is the custodian of her fortune," or that he "adopts the wife and her circumstances together," or that "he takes her fortune, if she has one, and assumes all the liabilities therefrom,"—all of which are the reasons and only reasons assigned for his common law liability for her torts?

Schouler, Dom. Rel. pp. 102, 103.

Nothing short of a positive re-enactment of the husband's liability would suffice to overcome the legislation of 1849-58.

Bingham v. Winona County Supers. 8 Minn. 443.

We do not conceive of any reason why the fact that the legislature expressly declared that in this one particular instance of desertion the husband shall not be liable for his wife's torts, committed in the carrying on of her separate business, should prevent the remaining legislation from having its necessary and natural effect, to wit, to absolve him from liability for her personal torts.

The New York courts hold that the husband is exempted from liability for the wife's torts committed by her in the conduct of her separate estate, while they hold him liable for her personal torts.

Quilty v. Battie, 185 N. Y. 201, 17 L. R. A. 521; *Rowe v. Smith*, 45 N. Y. 230; *Fiske v. Bailey*, 51 N. Y. 150; *Baum v. Mullen*, 47 N. Y. 577; *Fitzgerald v. Quann*, 62 How. Pr. 331, reversed, 109 N. Y. 441.

Some very respectable authorities hold that to charge a person orally with an indictable crime, involving moral turpitude or subjecting him to infamous punishment, is actionable *per se*.

Kinney v. Nash, 8 N. Y. 177; *Hewitt v. Ma-*

So it has been held that such doctrine applies so long as the relation of husband and wife continues, no matter whether their separation be permanent or temporary, unless it operates upon the marriage so as to make that civil relation cease. *Head v. Briscoe*, 5 Carr. & P. 484 (1838). In that case the husband was held liable for the wife's libel, although they were permanently living apart.

And it has been held that the old principles and precedents of the common law must stand with respect to actions of this nature until they have been changed by intelligent legislative enactment, and that judicial decisions cannot attempt to think what the legislature ought to have done. *McNicholl v. Kane*, 2 City Ct. Rep. 57 (1884).

II. Effect of state legislation.

The effect of recent state legislation with reference to the rights and liabilities of married women has not been uniform as to the husband's common-law responsibility for the wife's torts, such as libel and slander, only a very few of the states holding that such legislation has entirely abrogated the common-law rule.

In Illinois the decisions of the court are strong in the construction of the statutes of that state as abrogating, to a great extent, the principles of the common law. So the statutes of Kansas, Indiana, Massachusetts, Pennsylvania, and Vermont would seem to follow in the same line to some extent, although in Pennsylvania the statute of 1887 is the only one upon which the courts have placed such a construction. In other states, however, such as Iowa and Texas, the courts have held that the common-law doctrine has not been abrogated by state statute.

The common-law rule was declared abrogated by the Illinois statute of 1899, in the case of *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578 (1872), an action for slander brought against both husband and wife.

By the statute in question in that action, a married woman is "entitled to receive, use, and possess her own earnings, and sue for the same in her own name, free from the interference of her husband." *Ibid*.

The operation of this statute, the court held, was to discharge the husband from his liability for the torts of the wife during coverture, which he neither aided, advised, nor countenanced. *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578 (1872).

And this for the reason that if the wife alone was

entitled to receive and appropriate to her own use damages recovered for slander of herself, she should answer for her slander of others. *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578 (1872).

The decision was also based upon the theory that the statutes in question give the wife during coverture the sole control of her personal estate and property acquired in good faith from any person other than her husband, and her own earnings for labor performed for any person other than her husband or minor children, with the right to use and possess the property and earnings free from the control and interference of her husband. *Martin v. Robson*, 65 Ill. 129, 16 Am. Rep. 578 (1872).

And upon the further ground that since the passing of such statute the husband cannot enjoy the profits of her real estate without her permission. He has no control over her separate personal property, it is not subject to his disposal, control, or interference, all her separate property being under her sole control. To be held, owned, possessed, and enjoyed by her the same as though she was sole and unmarried. He has no right to use or dispose of a horse or cow, without her consent. He can no longer interfere with her choses in action; they are under her sole control. The product of her labor is her exclusive property, which she alone can sue for and enjoy. Any suit or action for earnings must be in her own name, and she may sue and possess them free from the interference of her husband or his creditors. *Ibid*.

With reference to the above-mentioned acts, the court stated that the intention of the legislature was to abrogate the common-law rule, to a great degree, that husband and wife were one person; and that the intent to give to the latter the right to control her own time, to manage her separate property, and contract with reference to it, was plainly indicated by those statutes, which while they did not expressly repeal the common-law rule, that the husband is liable for the torts of the wife, made such modification of his rights and her disabilities as wholly to remove the reason for the liability; that the rights acquired by the husband by virtue of the marriage had almost all been taken away, and the disabilities of the wife had nearly all been removed, and therefore a liability which had for its consideration rights conferred should no longer exist when the consideration had failed; and that if the relation of husband and wife had been so changed as to deprive him of all right to her

son, 24 How. Pr. 367; *Dial v. Holter*, 6 Ohio St. 241; *Alfede v. Wright*, 17 Ohio St. 241, 98 Am. Dec. 615; *Young v. Miller*, 8 Hill, 22; *Curry v. Collins*, 37 Mo. 328.

Others hold that the words must charge an indictable offense, involving moral turpitude and subjecting the person to infamous punishment.

Newell, Defamation, Slander, & Libel, p. 84; Cooley, Torts, p. 195; *Pollard v. Lyon*, 91 U. S. 225, 23 L. ed. 806; *Redway v. Gray*, 31 Vt. 292.

The latter doctrine states the law.

Redway v. Gray, *supra*.

So far as appears from the complaint plaintiff was charged with misdemeanor punishable with a fine, or imprisonment commutable to a fine. This, emphatically, is not an indictable crime punishable with infamous punishment.

Buck v. Hersey, 31 Me. 558; *Warren v. Norman*, 1 Walk. (Miss.) 387; *McKee v. Wilson*, 87 N. C. 300; *O'Hanlon v. Myers*, 10 Rich. L. 128; *Broughton v. McGrew*, 39 Fed. Rep. 673, 5 L. R. A. 406; *Lemons v. Wells*, 78 Ky. 117; *Seery v. Viall*, 16 R. I. 517.

property, and to the control of her person and her time, every principle of right would be violated by holding him still responsible for her conduct; and that if she was emancipated he should no longer be enslaved. *Martin v. Robeson*, 65 Ill. 129, 132, 16 Am. Rep. 578 (1872).

In the same case the court also stated that so diverse were the rights and interests, the duties, obligations, and disabilities of husband and wife now, that it would be most unreasonable to hold him still liable for the torts committed without his presence and without his consent or approbation; and that if he was not bound to pay her debts he should not be responsible for her torts, for the reason that when the ground-work is gone as to the one, it is gone as to the other, and the structure of the parties must fall before the innovations of the present. *Ibid.*

From the opinion of the court in *Martin v. Robeson*, 65 Ill. 129, 16 Am. Rep. 578 (1872), as above expressed, however, Justices Sheldon, Breese, and Scott dissented, holding that the abrogation of the law left the party who might receive injuries at the hands of a married woman practically remediless, making wives as it were licensed wrongdoers.

Kansas Comp. Laws 1879, chap. 62, § 3, provides that a married woman may, while married, sue and be sued in the same manner as if she were unmarried.

The provisions of the Kansas statutes as stated above changed the common-law rule and discharged the husband from liability for the torts of the wife committed when he was not present, and with which he had no connection, and in that state the wife stands upon an equality in all respects with the husband, and she alone is responsible for her contracts, and should be alone responsible for her words and her acts. *Norris v. Corkill*, 32 Kan. 409, 49 Am. Rep. 489 (1884).

So that under the provisions of the Kansas statutes, the reasons assigned for the liability of the husband for the torts of his wife, such as slander, no longer hold good, and the liability no longer exists, it being a part of the common law that where the reason of the rule fails the rule itself falls with it. *Ibid.*

In the same case it was said that since the passing of the statute placing a married woman upon equal footing with her husband, "her brain, and hands, and tongue are her own, and she should alone be responsible for slanders uttered by herself. 30 L. R. A.

The mere charge of drunkenness, made against any ordinary person, would not be actionable in itself, but becomes so through the attending circumstances that it was made against the parties, so as to touch them in their special character or relation, office or trust.

Townshend, Slander & Libel, pp. 283 et seq. *Mr. Frank M. Hopkins*, for respondent:

At common law the husband is liable for all the torts of his wife committed during coverture.

Brasil v. Moran, 8 Minn. 236, 83 Am. Dec. 772; *Jackson v. Kirby*, 37 Vt. 443; *Fowler v. Chichester*, 26 Ohio St. 9; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149.

This is the law of this state to-day unless it has been changed by legislative enactment.

In *Brasil v. Moran*, *supra*, the husband's liability for the torts of his wife was held to exist.

The statutory provisions which appellant cites were enacted to enable courts of law to deal with the separate estates of married women to the same extent as courts of equity had previously been doing.

Carpenter v. Leonard, 5 Minn. 155.

Ibid.: *Martin v. Robeson*, 65 Ill. 129, 16 Am. Rep. 578 (1872).

In the case of *Norris v. Corkill*, *supra*, the slanderous words were spoken by the wife when the husband was not present, and was in no manner a participator, so that he was not liable.

By the Indiana statute of March 25, 1879, § 6 (Acts of 1879, p. 100), a married woman may bring and maintain an action in her own name against any person or body corporate for damages for any injury to her person or character the same as if she were sole, and the money recovered shall be her separate property, and her husband in such case shall not be liable for costs."

In *Logan v. Logan*, 77 Ind. 558, 561 (1881), the court held that such act was retrospective in its effect, affecting only the remedy, and that therefore the action could be maintained with respect to slanderous words uttered prior to the passing of the act.

By § 5120 of the Revised Statutes of Indiana of 1881, which came into operation in September, 1881, "married women without reference to their ages shall be liable for torts committed by them, and an action may be prosecuted against them for torts committed as if unmarried. Husbands shall not be liable for the contracts or torts of their wives." *McCabe v. Berge*, 89 Ind. 225, 229 (1883). In that case, however, a judgment rendered against the husband prior to the passing of the act was enforced against the husband by reason of his common-law liability.

In considering the effect of the Iowa statutes in the case of *McElfresh v. Kirkendall*, 36 Iowa, 224 (1873), the court stated that the enlargement of the liabilities of the wife did not of necessity restrict those of the husband; that the wife might be made liable for her torts the same as though she were unmarried, and yet that fact alone did not exempt the husband from liability also for her torts; and that therefore the statute must be looked to, to see whether, independently of a mere enlargement of the rights and liabilities of the wife, it contained anything which in terms, or by necessary or reasonable implication, discharge the husband from liability for a claim for damages for slander uttered by the wife, the court pointing out that the words "debts" and "liabilities," were used in connection with the responsibility of the husband for the legal obligations of the wife incurred before marriage, but that the word, "debt," was used alone when reference was made to her obligations

It certainly was not intended by that act to abrogate the husband's liability for the torts of his wife.

The husband's liability for his wife's torts was not limited to those committed in his presence.

Carleton v. Haywood, 49 N. H. 818; *Nolan v. Traber*, 49 Md. 460, 38 Am. Rep. 277; *Cassin v. Delany*, 88 N. Y. 178; *Brazil v. Moran*, 8 Minn. 236, 83 Am. Dec. 772.

Acts similar to our married woman's act have been enacted in most of the states of the Union, and the courts of last resort in the various states having such statutes have held that these married woman's acts do not abrogate the common-law rule of the husband's liability for his wife's torts.

Stewart, Husb. & W. §§ 14, 15, and cases; *Wheeler & Wilson Mfg. Co. v. Heil*, 115 Pa. 487; *Fitzgerald v. Quann*, 83 Hun. 652, affirmed, 109 N. Y. 441; *Choen v. Porter*, 66 Ind. 195; *Ferguson v. Brooks*, 67 Me. 251; *Kouing v. Manley*, 57 Barb. 479; *Powler v. Chichester*, 26 Ohio St. 9; *McQueen v. Fulgham*, 27 Tex.

463; *McElfresh v. Kirkendall*, 36 Iowa, 224; *Zeliff v. Jennings*, 61 Tex. 458; *Luse v. Oaks*, 36 Iowa, 562; *Seroka v. Kattenberg*, 55 L. J. Q. B. 375; *Ferguson v. Brooks*, 67 Me. 251; *Dean v. Metropolitan Elev. R. Co.* 119 N. Y. 547.

The spirit of modern legislation on this subject does not require that the husband should be relieved of his liabilities for his wife's torts.

McQueen v. Fulgham, *Zeliff v. Jennings*, and *McElfresh v. Kirkendall*, *supra*.

Drunkenness is a crime in this state.

Laws 1889, chap. 13.

It is punishable by indictment.

Gen. Stat. 1878, chap. 107, § 28.

Words charging a person with having committed an act for which, if the charge were true, he would be punished criminally by indictment, are actionable *per se*.

St. Martin v. Desnoyer, 1 Minn. 156, 61 Am. Dec. 494; *West v. Hanrahan*, 28 Minn. 385; *Young v. Miller*, 3 Hill, 21; *Wright v. Paige*, 86 Barb. 438; *Hong v. Hatch*, 23 Conn. 585; *Todd v. Rough*, 10 Serg. & R. 18; *Torbitt v. Clare*, 9 Ir. L. Rep. 86; *Perdue v. Burnett*,

generally without reference to the time when they were incurred; and that the words "debt" and "liability" were not synonymous and were not commonly so understood, the term "liability" as applied to the pecuniary relations of the parties being a term of broader significance than debt.

In holding that the Iowa Revised Statutes did not relieve the husband of his common-law responsibility for the slander uttered by his wife, the court based its opinion upon the ground that usually the husband possesses and controls all the accumulations of their joint efforts, and that the slander uttered by the wife became hurtful in the proportion that his wealth and standing gave her social position, and that therefore, unless the injured party could hold the husband responsible he was without remedy, and that to exonerate the husband from responsibility under such circumstances would be to permit almost one half the adult members of society to slander the remainder with impunity, and further, that the exemption of the husband from liability for the torts of the wife would be a startling innovation of the common law which would be a radical change; but whether it would not be a change without reform might be a question. *McElfresh v. Kirkendall*, 36 Iowa, 224, 223 (1873).

The above case of *McElfresh v. Kirkendall*, 36 Iowa, 224 (1873), was followed by the court in the case of *Luse v. Oaks*, 36 Iowa, 562 (1873), the court holding the husband liable for the wife's slander.

The Massachusetts statute of 1871, chap. 312, provides that "any married woman may sue and be sued in actions of tort in the same manner as if she were sole, and her husband shall not be liable to pay the judgment against her for damages or costs in any such suit, but the same may be collected out of her property, real or personal, and all sums recovered by her in any such suit shall be her sole and separate property."

In *Hill v. Duncan*, 110 Mass. 238 (1872), it was held that the above statute did not exempt the husband from liability in an action for a slander committed by the wife where the proceedings were commenced prior to the passing of the statute, the words of the statute being satisfied and full effect being given to its provisions by construing it to apply only to suits thereafter commenced.

Under the Massachusetts act of 1871 the wife alone is liable to action, judgment, and execution for torts committed by her in the future. *McCarty v. De Best*, 120 Mass. 89 (1876), where dam-

ages were sought for slander uttered by the wife.

Where in such an action the husband answered that he was improperly joined, and the court refused a ruling to the effect that he was not liable, the verdict being returned for the plaintiff, the court held that, the tort having been committed since the passage of the act, the exceptions to the verdict as presented by the defendant husband must be sustained. *McCarty v. De Best*, *supra*.

In *Warren v. Norman*, Walk. (Miss.) 397 (1881), it was held that the words "got drunk on Christmas day" uttered by the defendant wife, regarding the plaintiff wife, were not actionable *per se*, and that a declaration which did not set forth all the circumstances and allegations would not support an action under the statute, and that therefore such declaration was defective under a statute making drunkenness a crime.

Under the New York statutes the separate property of a married woman is solely liable to execution when the judgment is against her alone, and also to execution when the judgment is against her and another person, whether such other person be her husband or a stranger; and the statutes do not prohibit a joint execution against the property of all the parties against whom the judgment is recovered when she is one of such persons, but authorize the seizure of her separate property for the satisfaction of such a judgment. *Horton v. Payne*, 27 How. Pr. 374 (1864).

The law is as it always has been, that the husband is jointly liable with the wife for her torts whether committed before or after marriage, but the rule has been changed respecting a satisfaction of judgments recovered upon such torts so that executions on such judgments may issue against the property of the wife as well as of the husband. *Ibid*.

In *Hoffman v. Loehman*, 1 N. Y. Civ. Proc. Rep. 278, note (1873), the husband was joined on the ground of his liability for his wife's torts, and an order in arrest was issued, and a motion made to vacate such order, based upon the ground of the nonliability of the husband for the personal torts of the wife, under the Code of Civil Procedure. The court held that the new Code had not changed the common-law liability of the husband for torts committed by the wife.

The legal existence of the wife was at common law suspended during the marriage, or at least con-

Minor (Ala.) 138; *Cheadle v. Ruell*, 6 Ohio, 67; *Buckley v. O'Neil*, 118 Mass. 193, 18 Am. Rep. 466; *Halley v. Gregg*, 74 Iowa, 568; *Geary v. Bennett*, 53 Wis. 444.

In *Brown v. Nickerson*, 5 Gray, 1, it was held that the charge of drunkenness falsely made was actionable *per se*.

Collins, J., delivered the opinion of the court:

The paramount question presented by this appeal is whether a husband is liable for slanderous words uttered by his wife when he is not present, and in which he has not participated in any manner,—in other words, Has the common-law rule which makes the husband answerable in damages for the torts of his wife during coverture been abrogated by statute? Counsel for appellant does not claim that this rule has been wiped out by direct enactment, but earnestly insists that this is the inevitable result of legislation respecting married women and their property, their and its legal status. To determine

solidated in that of the husband, under whose wing, protection, and cover she was theoretically supposed to perform everything; and this rule continues excepting as to rights of property and the like, in respect to which the husband and wife are by force of express statute considered as two distinct persons. But the statute goes no further, and it is only in respect of those statutory rights and the liabilities growing out of them that the wife is by fiction of law regarded as a single woman for the purpose of suing and being sued alone, and therefore in an action against a husband and wife for a slander uttered by the wife, the husband was held liable although the wrong was committed in his absence, the New York Code making no difference in this respect, § 450 thereof not purporting to change the liabilities, but simply to allow married women, when solely interested or liable by force of existing laws, to sue and be sued as if they were unmarried. *McNichols v. Kane*, 2 City Ct. Rep. 57 (1884).

In the above case the court stated that if the legislature of New York had intended by § 450 of the Code to relieve the husband from his common-law liability for the tortious acts of his wife committed in respect to persons and things, in which, by the enabling statute, she acquired no right of property, language indicative of such intent would have been implied.

In *Fitzgerald v. Quann*, 100 N. Y. 441 (1888), affirming 38 Hun, 552 (1884), which reversed the same case in 62 How. Pr. 331, it was claimed that there was an express enactment in the New York statute of 1862 amending the prior act, passed March 20, 1860 (Laws 1862, chap. 172), abrogating the common law in regard to the liability of a husband for the torts of his wife, reference being made to § 7 of the statute of 1862, which provides: "A married woman may be sued in any of the courts of this state, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate in the same manner as if she were sole;" but the court held that the section did not reach the result contended for, and that the rule of the common law was not thereby abrogated, the section only having reference to actions respecting her separate estate; and the court further held that §§ 450 and 1208 of the Code of Civil Procedure did not abrogate the common-law rule respecting such actions and the judgments recovered therein, the various statutes relating to the rights and liabilities of 30 L. R. A.

this question, we are required to examine statutory enactments from the days of territorial legislation, keeping in mind the well-settled rules of construction that the common law will be held no further abrogated than the clear import of the language used in the statutes requires, and that an intention to change the common law will not be presumed from doubtful statutory provisions. From the examination, we find that the earliest of our statutes relating to married women and their property, and in any way changing the common-law rules which theretofore prevailed, is found in section 105, chap. 71, Rev. Stat. 1851,—territorial legislation. This section appears in a chapter entitled "Issues, and the Mode of Trial," and as a part of the provisions respecting the issuance, levy, and satisfaction of executions in civil proceedings; and it seems to be a rearrangement and enlargement of the terms of chapter 375, N. Y. Laws 1849. We are unable to say more than this of its origin. It provided that all real or personal estate acquired by a

married woman not having clearly shown an interest for the alteration of the common law or doctrine making the husband a party to such action. In the above case the action was to recover damages for slander uttered by the defendant wife.

As to the effect of the amendments to the New York Code of 1880, see *infra*, IV.

The Ohio act of May 1, 1861, as amended by acts March 23, 1866, and March 30, 1871, "concerning the rights and liabilities of married women," does not relieve the husband of his common-law liability for torts committed by his wife during coverture, and there is nothing in the act which evinces in any degree whatever an intent to change or abrogate the rules of the common law in this respect, and its provisions cannot be extended by implication. *Fowler v. Chichester*, 26 Ohio St. 9 (1874), in which case exemplary damages were awarded against husband and wife for the latter's slander.

The Pennsylvania statute of 1848, by its purpose, limitation, and specifications, shows that no exception is given the husband from liability for the torts of the wife other than as expressly named therein, and under the act of April 8, 1872, the husband is not relieved from any duties or liabilities except the provision that he shall not be liable for the debts of his wife contracted before marriage, but if a judgment be obtained against him for the torts of his wife, execution shall first be had against her property. *Quick v. Miller*, 103 Pa. 67 (1883).

But under the second section of the Pennsylvania married woman's act of June 3, 1887 (Pamphlet Laws, 333), a husband is no longer liable for torts committed by his wife alone, and therefore a verdict in an action against husband and wife for slanderous words uttered by the wife alone, which judgment was rendered against both, is a nullity as to the husband, and executions issued thereon are also null and void as to him, and such a judgment rendered against the husband will be set aside. *Kuklence v. Vocht*, 21 W. N. C. 521 (1888).

In *Whalen v. Gabel*, 120 Pa. 234 (1888), it was held that although, by virtue of the Pennsylvania statute of June 3, 1887 (Pamphlet Laws, 332), a married woman might sue and be sued for torts in all respects as if she were a *feme sole*, yet such statute did not authorize her arrest under a *capias ad respondendum*. In the above case the action was in trespass for certain slanderous words uttered by the defendant of the plaintiff.

And in *Vocht v. Kuklence*, 119 Pa. 365 (1888), it was held that the Pennsylvania act of 1887 did not

female before her marriage, or to which she became entitled after marriage by inheritance, gift, grant, or devise, should be and continue hers after marriage, not liable for her husband's debts or liabilities, but liable for all of her debts contracted before marriage. We need not specially refer to the provisos, as they do not bear upon the question in hand. In Pub. Stat. 1848-59, this section, with a proviso added in 1858 (of no consequence here), appeared as section 106, chap. 61, which chapter was also entitled "Issues, and the Mode of Trial." It is further to be noticed that it still retained its position among the provisions regulating the issuance, levy, and satisfaction of executions upon judgments in civil proceedings. While this statute was in force, it was assumed by this court that the common-law rule of a husband's liability still prevailed. *Brasil v. Moran* (1868) 8 Minn. 286 (Gil. 205), 88 Am. Dec. 772. By chapter 122 of the General Statutes of 1866, all of the legislation we have referred to was

expressly repealed; and, in place thereof, there was enacted chapter 69, entitled "Married Women," which radically changed the status of married women, and greatly enlarged their rights, powers, duties, and liabilities. This was the first law upon the subject after statehood. The first section provided when and how married women might hold property in their own right, not to be disposed of without the consent of their husbands; the record of a schedule of the property owned by them when married being necessary to protect it as against their husband's creditors. The next three sections are not pertinent to this discussion, but, by the fifth, provision was made for the transaction of any business or trade by a wife in her own name and for her own benefit when abandoned by her husband, or in case he neglected to properly care for his family. All contracts made by the wife in the usual course of the business or trade were declared to be as valid and binding upon her as if she were sole, and

abrogate the common-law doctrine exempting a married woman from arrest under a *capias ad satisfaciendum*, in which case the action was to recover damages for slander uttered by the defendant wife.

Although the Texas statutes relating to married women secure to the wife her separate property, and protect her with reference to it against the recognized and controlling influence of the husband over her conduct, yet the common-law liabilities attaching to the husband for the acts of the wife are not abolished by implication. *McQueen v. Fulgham*, 27 Tex. 463 (1864). In that case the action was sustained against both husband and wife for the wife's slander.

The common law, except in so far as it is modified by the Constitution and statutes of the state of Texas, regulates the relationship of husband and wife, and his liabilities for her torts, and although many changes have been made by statute in reference to the property rights of married women, yet such statutes have not changed or altered the liability of the husband for the torts of the wife. *Zelliff v. Jennings*, 61 Tex. 458, 470 (1884), wherein the husband was held liable for the wife's slander.

In *Seroka v. Kattenburg*, L. R. 17 Q. B. Div. 177, 55 L. J. Q. B. 375, 34 Week. Rep. 542, 54 L. T. N. S. 649 (1886), it was held that the English married woman's property act of 1882 did not abolish the liability of a husband for his wife's wrongful acts, —in that case libel and slander of the female plaintiff by the female defendant,—and that the plaintiff might sue the husband and wife jointly, or the wife alone for wrongs committed by her after marriage.

The words used in the section of the English married woman's property act, § 1, subsec. 2 (Stat. 45 & 46 Vict. chap. 75), are as follows: "A married woman shall be capable of . . . suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by, or taken against, her . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise." With respect to the words "need not be joined" as used in the above section, the court was of opinion that they did not discharge the husband from his old liability, that they were intended to give to the plaintiff the option of suing the hus-

band and wife together, or suing the wife alone, and that judgment might be entered against the wife and execution issued against her separate property if she had any, but that where she had none the plaintiff was entitled to add the husband as a codefendant, the act not affecting the liability of the husband except in those instances where there was a specific limitation in his favor. *Seroka v. Kattenburg*, *supra*.

III. The question of the husband's presence and coercion.

In *Kosminsky v. Goldberg*, 44 Ark. 401 (1884), where the husband alone was sued, the complaint did not show whether the defendant was present or absent at the time the slander was uttered, and therefore a demurrer was sustained for nonjoinder of the wife. Plaintiff proposed to amend by stating that the injurious words were spoken in the presence and hearing of the husband, but such amendment was stricken out, the court looking upon the opinion of the court below as deciding that the amendment stated no case materially different from that which had already been adjudged insufficient, and as having insisted that the wife be brought in as a party. The plaintiff declining to plead further and electing to rest on his amended complaint, final judgment was entered dismissing the action; but this judgment was reversed and the defendant directed to answer the amended complaint.

Where the allegation was that the wife uttered the words complained of without alleging the husband's connection with such commission, it was held he could not be held responsible. *Story v. Downey*, 62 Vt. 243 (1890).

In *O'Connor v. Welsh*, 29 W. N. C. 92 (1891), upon a rule to show cause why the defendant husband should not be discharged on common bail, he having been arrested upon a *capias* for slanderous words uttered by his wife, the affidavit not averring that the words were spoken in the presence of the husband or with his knowledge or consent, the damages being payable out of her separate property and not otherwise, under the Pennsylvania act of June 3, 1887, it was held that the husband ought not to have been arrested and required to give bail.

Where the husband and wife were sued for slander uttered by the latter, and the absence of the husband when the words were spoken was not averred, an arrest of judgment of the court below was held error, the omission of the absence of the

she was to be free from all interference by her husband and his creditors in relation to the business or trade. To this section was appended a proviso "that the husband shall not be liable for any contract, default, or tort of the wife made, done, or incurred in the course of transacting any such business or trade." Among the provisions of this chapter is one to the effect that a married woman may be sued upon any contract made or wrong committed before her marriage, the same as if she were single. In the order of legislation, we now come to Gen. Laws 1869, chap. 56, now incorporated into Gen. Stat. 1894 as sections 5581 *et seq.*; and this enactment entirely superseded the law of 1866, *supra*. By this statute, further innovations were introduced, and again were the rights, powers, and liabilities of a married woman extended and enlarged, and she was expressly charged with personal liability for her torts; and it was enacted that the husband should not be held for her debts or contracts. Then, as if

to emphasize the matter, and place the legislative intention beyond all doubt, it was provided (sec. 5586) that nothing in the act should be construed as exempting a husband from liability for torts committed by the wife.

Counsel for appellant have not called our attention to any other legislation which, in their opinion, is pertinent, except Gen. Laws 1887, chap. 207 (Gen. Stat. 1894, § 5590), and of that we shall hereafter speak; nor have we been able to discover any, and we are justified in asserting that there is none. The argument of counsel is mainly rested upon an application of the maxim, "*cessante ratione legis, cessat ipsa lex*," to the territorial legislation found in Rev. Stat. 1851, chap. 71, with the amendments in Pub. Stat. 1849-58, chap. 61. Commenting upon the subsequent enactment (Gen. Stat. 1866, chap. 69), and especially that part of it which absolves the husband from liability for a tort committed by the wife in the course of transacting a

husband in the averment being cured by the verdict. *Quick v. Miller*, 108 Pa. 67 (1883).

But the presumption of coercion by the husband arising merely from his presence, in the case of crimes, has been abolished by the Arkansas statute, and the execution has been left to be made out by proofs. *Gantt's Ark. Dig.* § 1238; *Kosminsky v. Goldberg*, 44 Ark. 491 (1884).

In a case where the slanderous words were alleged to have been uttered in the husband's presence, but not at his instigation, it was held that his presence raised a presumption that his wife was acting under compulsion, and that therefore a complaint in an action against the husband alone *prima facie* stated a cause of action against him, the presumption, however, being subject to rebuttal by proof that he did not authorize or influence her act. *Kosminsky v. Goldberg*, *supra*.

Where it was sought to charge the husband with a letter written by a defendant wife containing a libelous charge, it was held that in order to render the husband liable it must be shown that he assisted in or authorized the composition of the libelous letter. *Mills v. State*, 18 Neb. 575 (1886). In this case the husband was prosecuted under an indictment for libel contained in a letter written by his wife and signed in his name, and, the evidence not showing that he aided or assisted in the composition of such letter, or authorized the use of the language therein contained, the court reversed the judgment of the court below and held him not responsible. See also *McNicholl v. Kane*, 2 City Ct. Rep. 57 (1884) *supra*, II.

IV. Joinder of parties and actions.

Two actions by a man and his wife, one against a man and his wife, the other against the wife only, for slander, cannot be consolidated. *Switlin v. Vincent*, 2 Wils. 227 (1764).

In *Penters v. England*, 1 McCord, L. 14 (1821), it was held that it was error to join a wife in an action for words spoken by a husband only, and therefore if the slander was uttered by the husband and wife they must be sued separately, one action being against the husband for the slander spoken by him, and the other action against the husband for the slander spoken by the wife, and in such a case the court would never order such actions to be consolidated.

So an action against a husband for a slander committed by him cannot be joined with an action against him for his wife's slander. *Malone v. Stillwell*, 15 Abb. Pr. 421 (1863).

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And with respect to the joinder of husband and wife as parties, it has been held that the wife has a personal interest in the suit and ought to have her day in court, for the reason that her interest may become antagonistic to that of her husband, for he may collude with the plaintiff, or he may have coerced her to commit the tort. *Smith v. Taylor*, 11 Ga. 20 (1852).

In *Baker v. Young*, 44 Ill. 42, 47, 32 Am. Dec. 149 (1867), the words were spoken by the wife alone, and the question raised was, whether a judgment could be recovered against the husband for slander uttered by the wife. The court held that the rule that for torts committed by the wife during marriage, as for slander, assault, etc., or for any forfeiture under a penal statute, they must be jointly sued, but that they could not be jointly sued for slander by both, was fully supported by authority, and that from it, if the jury found that the wife spoke the words, they were compelled under the issue and the law to find a verdict against both defendants they being husband and wife, and that a verdict which failed to state that the jury found them guilty in manner and form as alleged in the declaration was not defective.

Where the only question was whether an action would lie against a man and his wife for slanderous words spoken by the wife before marriage, the court stated that it was a question which did not admit of doubt, as the wife could not sue without her husband, and if the action did not lie against both it followed that a married woman by her own act might defeat the plaintiff's action, a principle not to be endured unless a positive adjudication on the point could be produced in support of it. *Hawk v. Harman*, 5 Binn. 43 (1812).

At common law the husband was a necessary party in an action for slander by the wife as well as in action for other torts. *McQueen v. Fulgham*, 27 Tex. 463 (1864).

And it has been held that he may be sued alone in such cases. *Ibid.*; *Hasbrouck v. Weaver*, 10 Johns. 247 (1813).

The husband is properly joined as a party to an action against a wife to recover damages for slanderous words spoken by the wife. *Moulder v. Harding*, 33 Ind. 176, 180, 5 Am. Rep. 195 (1870).

The Acts of the 13th General Assembly of Iowa, chaps. 126 and 167, § 11, did not change the common-law rule and exempt the husband from liability in such cases, the section in question simply providing a rule of practice. It enacts that a married woman may in all cases sue and be sued without

business or trade for herself, they argue that it cannot be allowed to have the effect of preventing the prior legislation or the remaining sections of chapter 69 from having its and their legitimate and natural result; namely, of relieving the husband from the burden imposed at common law. And, referring to the act of 1869 (now found in Gen. Stat. 1894), they insist that, if the earlier statutes had the force and effect claimed for them,—had actually changed the rule,—the fact that the legislature which incorporated section 5536 into the law did not comprehend the situation and appreciate what had theretofore been accomplished is of no consequence, and that nothing less than a positive re-enactment of the common-law rule upon the subject could overcome the effect of the prior statutes.

It is evident from the provision found in Gen. Stat. 1866, chap. 69, exempting the

husband from liability for all torts committed by the wife in the course of her separate business transactions, that it was then understood by the legislators that the common-law rule was still in force. If this had not been the understanding, and if it had not been the legislative intent to continue the liability as to other torts, this particular feature of the law would not have appeared. It is certain that there would have been no exemption from certain torts if it had been supposed that, under the earlier statutes, the husband had been absolved from all, and such legislation would have served no purpose whatsoever. The same thing can be said of the act of 1869, and with greater force, for in that act the legislature expressly provided in one section that the husband should no longer be liable for the wife's debts or contracts, not mentioning torts at all, and in

joining her husband with her, except in cases where the cause of action exists in favor of or against both, thus recognizing the fact that there is, or may be, a class of cases in which they must be joined, whether they sue or are sued. *McElfresh v. Kirkendall*, 38 Iowa, 224 (1873).

Under the Revised Statutes of Iowa of 1880, § 2771, the husband is, as at common law, a necessary party jointly with the wife in an action for slander when the words are actionable *per se*. *Enders v. Beck*, 18 Iowa, 86 (1884).

In *Burt v. McBain*, 29 Mich. 200 (1874), error was brought to reverse a judgment for slander uttered by the defendant wife, in which action the husband was joined, the question as to the right of the plaintiff to join the husband as a defendant being raised. The court held that although he was not absolutely a necessary party to such an action, yet he was still a proper party, and no objection could be raised upon the ground of his being improperly joined, even though §§ 6129, 7332, of the Compiled Laws of Michigan wholly removed his responsibility, the words of the statute, "has been or shall be joined as defendant with his wife," showing that the joinder of the husband was assumed.

The New York cases prior to 1890 do not seem to be unanimous as to the necessity of joining the husband in such action, although the court of last resort decided in favor of his being made a party.

In an action against a wife for slander uttered by her the husband must be joined. *Malone v. Stillwell*, 15 Abb. Pr. 421 (1868).

The New York statutes of 1862 do not abrogate the common-law rule or the provision of the Code which requires that the husband be joined with the wife in actions against her for her tort. *Horton v. Payne*, 27 How Pr. 374 (1864).

By § 114 of the New York Code, as well as by the common law, the husband must be joined with the wife as a defendant in an action to recover damages sustained by reason of a libel written and published by the defendant wife. *Ibid*. In that case the action, which was originally commenced against the wife alone, was stayed until the husband was made a party.

But under such section (Laws 1862, chap. 172) the husband is not a necessary party if the action has relation to or concerns the sole or separate property of the wife. *Ibid*.

The husband is properly joined in an action against a wife for a tort committed by her, but a complaint for assault and battery and for slander by the wife will be bad upon demurrer. *Anderson v. Hill*, 53 Barb. 238 (1869).

In *Tait v. Culbertson*, 57 Barb. 9 (1869), the only question before the court was whether an action 30 L. R. A.

could be maintained against husband and wife for a libel uttered and published by the wife. The court held that the common-law rights and duties in respect to such matter had not been changed by the New York statutes, and that the husband and wife were correctly sued and judgment rendered against them jointly.

To the same effect is the decision of the court in the case of *Fitzgerald v. Quann*, 109 N. Y. 441 (1888), as to the joinder of the husband in actions to recover damages for slander uttered by the wife, which was followed and approved of by the court in the later case of *Austin v. Bacon*, 49 Hun, 386 (1888), the court in the latter case stating that the decision was regarded as decisive of the question.

In an action for slander brought against a married woman, wherein her husband was not made a party defendant, the wife demurred upon the ground of a defect in parties, and the question was whether § 450 of the Code had abrogated the common-law rule making the husband liable for the torts of the wife. The court gave judgment for the defendant unless the plaintiff, within twenty days after entry and service of the order, amended his summons and complaint by adding the husband as a party defendant, the court approving of the construction of the Code as arrived at in *Fitzsimons v. Harrington*, 1 N. Y. Civ. Proc. Rep. 360 (1881), which latter case was one of assault and battery by the wife. *Trebing v. Vetter*, 2 N. Y. Civ. Proc. Rep. 391 (1883). See also *Hoffman v. Lachman*, 1 N. Y. Civ. Proc. Rep. 273, note (1878), and *McNicholl v. Kane*, 2 City Ct. Rep. 57 (1884), *supra*, II.

But the rule laid down in the above cases was departed from in the case of *Laude v. Smith*, 6 N. Y. Civ. Proc. Rep. 51 (1888), where the defendants were sued to recover damages for slander uttered by the defendant wife of and concerning the plaintiff, and there was no allegation that the words were uttered in the presence, or by the direction, of the husband. The only reason for making him a party was the allegation that he was the husband, the sole question being whether the husband in an action against the wife for her personal tort was a proper party defendant, the court holding that, under §§ 450, 1204, of the New York Code of Civil Procedure, the husband was not a proper party defendant in such a case.

The amendments to the New York Code of Civil Procedure, § 450, made in 1890, however, would seem to settle the question, for they declare that "the husband is not a necessary or proper party" to actions for damages for the wife's torts "committed without his instigation."

In *Story v. Downey*, 62 Vt. 243 (1890), it was held error to join the husband as a codefendant with

another it specifically declared that the prior sections of the statute should not be construed as exempting husbands from the common-law liability. Again do we find emphatic expression of the legislative understanding and its purpose and intent. We do not speak of the legislative understanding of the scope of some prior statutes, because it can be allowed to control such statutes, but simply in connection with the intent and purpose of the legislatures enacting the laws of 1866 and 1869. The intent of both of these statutes is exceedingly clear; and that, believing the common-law rule still in existence, it was the fixed purpose of the lawmakers to retain it, is obvious.

We are now brought to a consideration of the statute of 1851, which, in so far as affects the present question, stood unchanged until 1866. It is to be observed that section 105,

chap. 71, Rev. Stat. 1851, was not passed as a "Married Woman's Act," as were its successors, and that it simply appeared among statutory provisions regulating procedure upon executions in civil actions. Its design was to protect the property of the married woman from seizure to satisfy a husband's debts. It did not purport to confer upon the wife any new duties, nor did it grant any rights not theretofore belonging to her, except as it declared in few words that her real and personal estate acquired before marriage by her personal industry, or before or after marriage by inheritance, gift, grant, or devise, should remain her own after marriage, and that none of it should be subjected to seizure to satisfy her husband's debts, engagements, or liabilities. She was prohibited from disposing of such property during coverture without the consent of her husband, except

the wife in an action to recover damages for slander uttered by the wife, the third section of the Vermont act of 1864 limiting the liability of the husband to torts committed by his authority or direction, so that, in order to render him liable under that statute for a tort committed by his wife, it must be alleged and proved that the tort was committed by his authority or direction.

V. Necessity of service upon wife.

If the wife is a defendant in an action to recover damages for slander, she must, by virtue of the Georgia act of 1799, be served with process in the state of Georgia, she being a party even with rights of defense distinct from those of her husband. *Smith v. Taylor*, 11 Ga. 20 (1852).

But such want of service will be waived by the wife's appearing and answering to the merits, and the judgment in such case is binding upon her and will not be arrested. *Ibid.*

VI. Effect of death pending action.

If the tort of the wife, for which she and her husband were jointly sued, was not committed by her in his presence or by his coercion, the suit does not abate by his death. *Douge v. Pearce*, 18 Ala. 127, 129 (1848), in which case the husband and wife were sued for damages for slander uttered by the wife concerning plaintiff.

In such a case the suit survives against her. *Smith v. Taylor*, 11 Ga. 20 (1852).

But it does not survive against his personal representatives. *Mousler v. Harding*, 38 Ind. 176, 180, 5 Am. Rep. 195 (1870).

In such a case the wife is liable to the judgment against herself alone. *Sunman v. Brewin*, 52 Ind. 140, 144 (1875).

Where, in an action against the husband and wife for slander, the defendant husband died before judgment, and his widow married again pending the suit, upon a motion to abate the action the court inclined to the opinion that the same ought to be abated, but took time to consider the question. *White v. Harwood*, *Style*, 188 (1848).

VII. Husband and wife as witnesses.

In an action against husband and wife to recover damages for slanderous words uttered by the defendant wife, against the wife of the plaintiff, the wife is a competent witness in her own behalf, as is also her husband. *Mousler v. Harding*, 38 Ind. 176, 180, 5 Am. Rep. 195 (1870).

The wife has a right to testify because the cause of action is directly against her, and for her individual act, and she would therefore testify directly for herself, and the mere fact that her evidence

might incidentally and unavoidably tend to benefit the husband would be no reason for excluding it. *Ibid.*

But from the opinion of the court in the above case Justice Elliott dissented, contending that the position of the husband was the reverse of that of the wife, and that as his evidence would be directly for the wife and only incidentally for himself it ought for that reason to be excluded. *Ibid.*

And in the later case of *Bonham v. Keen*, 40 Ind. 197 (1872), where the question was whether the husband of the defendant wife could testify as to what words were used or spoken by his wife, the court held he could not, thus overruling the prior case of *Mousler v. Harding*, *supra*, so far as it holds that the husband may be a witness in such a case.

So, the case of *Bennfield v. Hypres*, 38 Ind. 498 (1872), discussed the question involved in the above case of *Mousler v. Harding*, as to the husband and wife being competent witnesses in such an action, and held that the wife was a competent witness in her own behalf, and that the fact that the testimony of the wife incidentally, remotely, or contingently benefited or prejudiced the husband constituted no valid reason for excluding it.

VIII. Damages and evidence in mitigation.

In an action against husband and wife for slanderous words spoken by the wife exemplary damages may be allowed. *Fowler v. Chichester*, 23 Ohio St. 9 (1874).

And in such an action smaller damages will not be assessed than would have been legally recoverable if the libel had been published by the wife while sole, and the action had been against her alone. *Austin v. Wilson*, 4 Cush. 278, 50 Am. Dec. 766 (1849).

The fact that the husband caused his wife to go to the person concerning whom she had uttered the slanderous words and retract the same is not evidence, and cannot be received in mitigation of damages as testified by the defendant husband. *Mousler v. Harding*, 38 Ind. 176, 180, 5 Am. Rep. 195 (1870).

The same principle was upheld in *Yeates v. Reed*, 4 Blackf. 463, 38 Am. Dec. 43 (1859), where, on the trial in the court below, the defendants asked the court to instruct the jury, *inter alia*, that the conduct of the defendant husband in trying to prevent the circulation of the slanderous words at the time they were spoken and afterwards, and his statement that the charge was false, might be considered by the jury in mitigation of damages; but such instructions were declined, the court instructing the jury, *inter alia*, to take into consideration

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *ex rel.* E. D. STANFORD, *Appt.*,

v.

J. C. ELLINGTON.

(.....N. C.)

1. A quorum shown to have been present will be presumed to continue present at proceedings taken the same day, until the contrary is shown.
2. The fact that less than a quorum of a legislative body are reported by the tellers as voting when the roll is called overcomes any presumption that a quorum present earlier in the day still continues present.
3. It seems that the presiding officer of a legislative body is powerless to count those who are present and do not vote, for the purpose of making a quorum, in the absence of any rule of the House or other express authority to do so.
4. A majority of the members of a legislative body constitute a quorum, unless the number is otherwise fixed by the Constitution or the power that creates the body.

(November 19, 1895.)

APPEAL by relator from a judgment of the Superior Court for Wake County in favor of defendant in a quo warranto proceeding to test defendant's right to the office of state librarian. *Affirmed.*

The facts are stated in the opinion.

Mr. Thomas R. Funnell, for appellant:

The office of state librarian—if it be an office—is a legislative office created by statute and unknown to the Constitution.

Code, § 3604.

The general assembly had power to make such changes as to the election, term of office, etc., as the public good demanded.

King v. Hunter, 65 N. C. 603, 6 Am. Rep. 754; *State v. Gales*, 77 N. C. 283; *Taylor v. Stanly*, 4 Dev. L. 31, note; *People v. Whitlock*, 93 N. Y. 191; *State v. Brady*, 42 Ohio St. 504; Cooley, Const. Lim. *177, and note; Paine, Elections, 128, 199, 210.

The state Constitution expressly recognizes elections by the general assembly.

Const. art. 2, § 9, art. 6, § 3.

And these elections have been upheld by this court.

State v. Jones, 116 N. C. 570.

Was the relator duly elected librarian on the 18th of March, 1895? Upon this the journals are conclusive evidence.

Gallin v. Tarboro, 78 N. C. 119; *Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 787; Cushing, 2896; *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 821.

If a quorum were present a majority of a quorum could elect.

Cleveland Cotton Mills v. Cleveland County Comrs. 108 N. C. 678; Brightly, Lead. Elect. Cas. 126; Paine, Elections, § 665; *Tracy's Case*, Taft, 26; *Blair's Case*, Id. 36; *Sevier's Case*,

Id. 7; *State v. Hyde*, 121 Ind. 20; Willcock, Mun. Corp. § 546; *State v. Dillon*, 125 Ind. 65; *Com. v. Read*, 3 Ashm. 261; *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 6 L. R. A. 315.

A quorum, having been present, is presumed to continue until the contrary is made to appear.

Cushing, 329.

Courts must assume that the legislative discretion was properly exercised.

Carr v. Coke, 116 N. C. 223, 28 L. R. A. 787; Lawson, Presumptive Ev. 58, notes; Best, Presumptive Ev. 43; Cooley, Const. Lim. 187, note 8.

Neither House shall proceed to business until a majority is present.

Const. art. 3, § 2.

There is but one method of raising the question of no quorum, *i. e.*, as prescribed in the rules of the House.

Rule 56.

This was not done.

United States v. Ballin, 144 U. S. 1, 36 L. ed. 831; *Com. v. Read*, *supra*.

Mears, MacRae & Day also for appellant.

Mears, E. W. Pou [and *Shepherd & Busbee* for appellee.

Furches, J., delivered the opinion of the court:

This is an action in the nature of quo warranto, in which plaintiff claims to be state librarian, and alleges that defendant is in possession of the office and unlawfully withholds the same from him. Defendant, answering, admits that he is in possession of the office, performing its duties and receiving its emoluments; but he denies that he is holding it wrongfully or unlawfully, and alleges that he was duly elected thereto on the 8th day of January, 1895, for a term of two years next ensuing. Under the view we take of the case it is not necessary for us to consider or pass upon defendant's right to this office. The plaintiff's right to recover depends upon his right to the office. If he is not entitled to it, it is a matter of no importance to him who is. It is true that if plaintiff is entitled to the office it necessarily follows that defendant is not, but it does not necessarily follow that defendant is entitled to it if plaintiff is not.

Prior to the 18th day of March, 1895, the board of trustees of the state library, under existing law, elected to and filled this office. On that day (March 13, 1895) the legislature passed and ratified an act repealing the law authorizing the board of trustees to elect, and provided for the election of this officer by the legislature. And on the same day, to wit, the 18th day of March, 1895, the plaintiff claims that he was duly elected state librarian by the legislature pursuant to said act. And this not being a bill enacted into a law ratified and signed by the presiding officers of Senate and House, and deposited in the office of secretary of state, which then becomes the evidence of its passage (*Carr v. Coke*, 116 N. C. 223, 28 L. R. A. 787; *United*

NOTE.—As to what constitutes a quorum, see note to *Lawrence v. Ingersoll* (Tenn.) 6 L. R. A. 303, 30 L. R. A.

States v. Ballin, 144 U. S. 4, 36 L. ed. 324), it became necessary for plaintiff to introduce the record of the legislature for the purpose of proving his election and right to the office he was claiming. These records show that on the morning of the 18th of March there was a roll call of the House, a quorum answered, and the House proceeded to business. They also show that there was a proposition in both branches of the assembly (Senate and House) to go into the election of state librarian; that these motions prevailed, and both the president of the Senate and the speaker of the House appointed two tellers, each, to take this vote. And they reported that in the Senate there were 26 votes cast 25 being for the plaintiff and 1 against; and in the House there were 48 votes cast for the plaintiff, and none against him. It is admitted by plaintiff that there must be a quorum present to do business, or, in this case, to elect the plaintiff to the office he claims. But he claims that it appearing there was a quorum present that morning, and it not appearing there had been an adjournment since, it will be presumed that there continued to be a quorum present. We think this is undoubtedly true,—that the quorum will be presumed until it shall appear there is not one. Cushing, *Contested Elections*, 2d ed. 369. This is usually made to appear by what is called a "division;" and this is usually had after a vote by yeas and nays, when the presiding officer announces the vote and some opposing member doubts the correctness of the announcement and demands a division,—a call of the body. *Id.* § 1798. And strictly speaking this is what is called a "division." Cushing, *Parliamentary Law*, § 1814. The original purpose of a division was for the purpose of ascertaining who voted "Aye" and who voted "No," and it was effected in this way: the eyes occupied one part of the hall and the noses another, and there remained until the tellers appointed counted them. In this way it came to be called a "division." In more modern assemblies it is more usually affected by a call of the House,—a yea or nay vote when each member's name is called. Cushing, *Contested Elections*, § 1615. This mode is used for two purposes,—one to determine on which side the majority voted, and also for the purpose of determining whether there is a quorum present. *United States v. Ballin*, *supra*. In this case there was no *viva voce* vote preceding the roll call. With this exception, there seems to have been all done that is usually done before a division, which is now usually had by a call of the roll. Cushing, *Contested Elections*, § 1615. Why this was not done, we do not know. U. S. Const. art. 1, § 5, requires that in all elections under this Constitution the vote shall be *viva voce*. And if this section applies to this election it does not mean a roll call, but a vote by voice, and not by ballot. And if the vote had been taken that way, and announced by the presiding officers in favor of plaintiff, and no division called for, the presumption contended for by plaintiff

would have availed him. But when the roll was called, the name of each member voting recorded, and the tellers appointed report the number voting for plaintiff and the number voting against him,—a modern division,—we have the facts, and they must prevail over the presumption which existed in favor of a quorum before that time. Cooley, *Const. Lim.* p. 168; *United States v. Ballin*, *supra*. It may be there was a quorum present when this vote was taken. But if there was it does not appear to us, and we have no means of finding out whether there was or not, and no authority to do so if we had the means. And if they were present, whether they could have been compelled to vote is not before us, as there was no such proposition made, so far as we know. But it seems to be conceded that the speaker of the house of representatives of the United States could not compel a member to vote. Nor had he any right to count members present and not voting, to make a quorum, until the House adopted a rule to that effect. He then counted nonvoting members present to make up a quorum, and the Supreme Court of the United States sustained his action. *United States v. Ballin*, 144 U. S. 1, 36 L. ed. 321. So may the legislature of North Carolina adopt a similar rule, as there is nothing in the Constitution to prevent its doing so. But it has not adopted such a rule, and under the authority of *United States v. Ballin*, *supra*, we suppose the presiding officers were powerless, if a quorum was actually present, either to make them vote or to count them to make up a quorum. This brings us to the consideration of what is a quorum. They are of two kinds,—one fixed by the Constitution or power creating the body or assembly. In this way a majority of a majority may constitute a quorum and do business. But, where the quorum is not fixed by the Constitution or the power that creates the body, the general rule is that a quorum is a majority of all the members (*Cleveland Cotton Mills v. Cleveland County Comrs.* 108 N. C. 678; Cushing, *Contested Elections*, § 247; *United States v. Ballin*, *supra*), and a majority of this majority may legislate and do the work of the whole. There is no constitutional quorum; that is, a number prescribed by our Constitution that shall constitute a quorum. We therefore fall under the general rule applying to legislative bodies. *United States v. Ballin*, *supra*. The legislature of North Carolina consists of 170 members,—50 in the Senate and 120 in the House. Therefore it takes the presence of 26 senators to constitute a quorum in the Senate, and 61 members of the House. In this election 26 senators voted, which was a majority of that body, and a quorum. But in the House there were but 48 members who voted. This we see was less than a quorum. For this reason plaintiff has failed to establish his right to the office.

There were various questions presented as to the defendant's rights, but the view we have taken of the case makes it unnecessary for us to consider them, and we do not.

The judgment of the court below is affirmed.

MINNESOTA SUPREME COURT.

Adelhoe GURNEY *et al.*, *Appts.*,

v.

MINNEAPOLIS UNION ELEVATOR
COMPANY, *Respt.*

(.....Minn.....)

*1. *Scott v. St. Paul & C. R. Co.* 21 Minn. 322, followed, as to the effect of a provision in the charter of a railway company authorizing it to take an "absolute fee" in lands condemned for public purposes.

2. **The erection and operation of a public elevator and warehouse** upon land acquired by a railway company by condemnation, for public purposes, either by itself or its lessee, are neither a misuser nor an abandonment of its easement in the land occupied by such structure, and the owner in fee cannot maintain ejectment for the land so occupied.

(December 2, 1895.)

APPPEAL by plaintiffs from an order of the District Court for Hennepin County overruling a demurrer to the answer in an action brought to recover possession of certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. Louis A. Reed, for appellants:

The railway company did not acquire the title in fee, because the act in question, under which it condemned, was unconstitutional so far as it purported to give the right to a title in fee, and the court had no power to grant a title in fee.

If by reason of the provisions of the Constitution, the company could acquire nothing more than an easement by condemnation, this provision of Laws 1857, chap. 1, § 18, would be qualified accordingly, on the theory that the greater includes the less. By condemning under the provision a fee-simple title, they would at least acquire an easement.

Scott v. St. Paul & U. R. Co. 21 Minn. 322; *Cotton v. Mississippi & R. R. Boom Co.* 22 Minn. 374; *Fairchild v. St. Paul*, 46 Minn. 540; *Kaiser v. St. Paul, S. & T. F. R. Co.* 23 Minn. 149; *Weaver v. Mississippi & R. R. Boom Co.* 30 Minn. 477.

Except as restrained by the Constitution, the mode of exercising the right of eminent domain rests in the discretion of the legislature.

Wilkin v. First Div. of St. Paul & P. R. Co. 16 Minn. 271.

The judgment and decree of the district court, in so far as it purports to adjudge and decree a fee-simple title to the railroad, are void and beyond its powers.

Freeman, Judgm. § 116; Black, Judgm. §§ 170, 518.

If a court grants relief which under no cir-

*Headnotes by START, Ch. J.

cumstances it has any authority to grant, its judgment is to that extent void.

1 Freeman, Judgm. § 120, chap. 625; *Bridges v. Clay County Supra.* 57 Miss. 253; *Feillett v. Engler*, 8 Cal. 76; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872; *Little v. Evans*, 41 Kan. 578; *Munday v. Vail*, 34 N. J. L. 418; *Reynolds v. Stockton*, 43 N. J. Eq. 211; *Seamster v. Blackstock*, 83 Va. 232; *Anthony v. Kasey*, Id. 338; *Wade v. Hancock*, 76 Va. 620; *Fithian v. Monks*, 43 Mo. 502; *Gillitt v. Truax*, 27 Minn. 528; *Ramsey County v. Stees*, 23 Minn. 326; *Dobberstein v. Murphy*, 44 Minn. 526; *Black*, Judgm. §§ 242, 518; *Miller v. Barkeloo*, 8 Ark. 318; *Agnew v. Adams*, 26 S. C. 101; *Dunklin v. Wilson*, 64 Ala. 162; *Hancock v. Flynn*, 28 N. Y. S. R. 854; *Gage v. Hill*, 43 Barb. 44; 1 Black, Judgm. § 218; *Johnson v. Johnson*, 80 Ill. 215; *St. Louis & S. Coal & M. Co. v. Sandoval Coal & M. Co.* 111 Ill. 32; *Bowers v. Chaney*, 21 Tex. 363; *Holland v. Johnson*, 80 Mo. 84.

A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained.

Freeman, Judgm. § 117; Black, Judgm. § 518; *Agnew v. Adams*, 26 S. C. 101.

The railroad company could not divert its right of way to the private uses of the elevator company, nor confer on it the right to use the same.

Curtis v. St. Paul, S. & T. F. R. Co. 20 Minn. 28; *Miller v. Troost*, 14 Minn. 364.

The erection of houses to rent to employees or officers of the road, of warehouses as such, of ships to accommodate vessels bringing freight to or taking it from the railroad, are not such uses as to justify the exercise of eminent domain under a general authority to construct a railroad and its appendages.

Mills, Em. Dom. § 59; *Eldridge v. Smith*, 34 Vt. 484; *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 187; *State v. Mansfield Comrs.* 28 N. J. L. 510; *Nashville & C. Railroad v. Cowardin*, 11 Humph. 348; *Hamilton v. Annapolis & H. R. R. Co.* 1 Md. 553.

The railroad company, having permitted the elevator company to erect and operate an elevator on the right of way acquired for railroad purposes, has abandoned its rights in the premises.

Mills, Em. Dom. § 57; *Heard v. Brooklyn*, 60 N. Y. 242; *Proprietors of Locks & Canals v. Nashua & L. R. Co.* 104 Mass. 1, 6 Am. Rep. 181; *Whittek v. Clark*, 15 Johns. 438; *Strong v. Brooklyn*, 68 N. Y. 1.

There is no "color of title" in the defendant, as the judgment does not purport to give title to it, and hence cannot set color of title in the railroad company.

Seigneur v. Fahey, 27 Minn. 63; 3 Washb. Real Prop. 510; Angell, Limitations, 407; 3 Wait, Act. & Def. 17; *Hodges v. Eddy*, 38 Vt. 327; *Brooks v. Bruyn*, 35 Ill. 392; *Russell v.*

NOTE.—For the right of a railroad company to sell its land, see *Chamberlain v. North Eastern R. Co.* (S. C.) 25 L. R. A. 129, and note.

As to the right acquired by condemnation generally, see *Lyon v. McDonald* (Tex.) 9 L. R. A. 226; 30 L. R. A.

Fort Worth & R. G. R. Co. v. Jennings (Tex.) 3 L. R. A. 181, and some cases in note thereto, and also in note to *Illinois C. R. Co. v. Houghton* (Ill.) 1 L. R. A. 213.

Edwin, 88 Ala. 44; *Edgerton v. Baird*, 6 Wis. 527, 70 Am. Dec. 478; *O'Mulcahy v. Florer*, 27 Minn. 449; *McLellan v. Omodi*, 87 Minn. 157.

The provisions of Gen. Stat. 1878, chap. 75, § 15, commonly known as the "Occupying Claimant Act," apply only to improvements made on land under color of title in fee.

Wheeler v. Merriman, 80 Minn. 873; *Wilson v. Red Wing School Dist.*, 22 Minn. 488; *O'Mulcahy v. Florer*, *supra*; *Lunquist v. Ten Eyck*, 40 Iowa, 218; *Winslow v. Newell*, 19 Vt. 164; *Whitney v. Richardson*, 81 Vt. 800.

Messrs. Koon, Whelan, & Bennett and W. E. Dodge, for respondent:

Under its charter rights the railroad had the power to acquire, and did acquire, a fee simple, and not merely an easement or right of way, in the lands condemned.

The act was approved May 23, 1857; the Constitution of the state of Minnesota was adopted August, 1857. This cannot affect the contract obligation of the charter and the already vested rights of the Minnesota & Pacific Railroad Company.

McRoberts v. Washburne, 10 Minn. 23; *De Graff v. St. Paul & P. R. Co.*, 23 Minn. 144; *Cass County v. Morrison*, 28 Minn. 257; *Mower v. Staples*, 32 Minn. 284; *State v. Young*, 29 Minn. 474; *Cotton v. Mississippi & R. R. Boom Co.*, 22 Minn. 872; *Fairchild v. St. Paul*, 46 Minn. 540; *Scott v. St. Paul & C. R. Co.*, 21 Minn. 322; *Weir v. St. Paul, S. & T. F. R. Co.*, 18 Minn. 155.

The charter of the Minnesota & Pacific Railroad is a contract whose obligation cannot be impaired by the action of the legislature.

McRoberts v. Washburne and DeGraff v. St. Paul & P. R. Co. supra; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629.

The use of the railroad right of way in question for a public warehouse and grain elevator, as a necessary adjunct of, and in connection with, the business of the railroad, is a use within the purposes of the condemnation proceedings in question.

Scott v. St. Paul & C. R. Co. supra.

The particular manner in which an easement is exercised, or the particular mode of burdening the fee, may be changed without necessarily changing the easement of its burden.

Brainard v. Missisquoi R. R. Co., 48 Vt. 107; *Hatch v. Cincinnati & I. R. Co.*, 18 Ohio St. 92; *Harvey v. Walters*, L. R. 8 O. P. 162; *Robbins v. St. Paul, S. & T. F. R. Co.*, 22 Minn. 286.

The easement of use for railroad purposes is not exceeded nor lost by the use of the lands for purposes connected with, and auxiliary to, railroad purposes, although the particular purposes may not have been contemplated, and in fact may not have been known or in vogue at the time of the condemnation of the lands.

Illinois C. R. Co. v. Wathen, 17 Ill. App. 582; *Illinois St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 70, 83; *Peirce v. Boston & L. R. Corp.*, 141 Mass. 481; *Evans v. McLucas*, 15 S. C. 67; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 856; *Western U. Teleg. Co. v. Rich.*, 19 Kan. 517, 27 Am. Rep. 159; *Hoggatt v. Vicksburg, S. & P. R. Co.*, 84 La. Ann. 624; *Roby v. New York O. & H. R. R. Co.*, 142 N. Y. 176; *Re New York O. & H. R. R. Co.*, 77 N. Y. 248; *Hooper v. Great Western R. Co.*, L. R. 2 Q. B. Div. 339.

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Railroad necessities are so near to the public needs that a railroad will be allowed to take streets and water fronts for railroad purposes.

Re New York O. & H. R. R. Co. supra; *Hoggatt v. Vicksburg, S. & P. R. Co.*, *Western U. Teleg. Co. v. Rich.*, *Evans v. McLucas*, *Peirce v. Boston & L. R. Corp.* and *Hooper v. Great Western R. Co. supra*; *Chicago, B. & Q. R. R. Co. v. Wilson*, 17 Ill. 128; *Illinois, St. L. R. & Canal Co. v. St. Louis*, *Roby v. New York O. & H. R. R. Co.*, *Grand Trunk R. Co. v. Richardson*, *Re New York O. & H. R. R. Co.* and *Illinois C. R. Co. v. Wathen, supra*.

The trade customs of Minnesota have constituted the use and operation of grain elevators a part of the use and operation of railroads.

Hole v. Barlow, 4 O. B. N. S. 334; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Oregon Cascade R. Co. v. Bailly*, 3 Or. 164; *Munn v. Illinois*, 94 U. S. 118, 24 L. ed. 77.

What the railroad can itself do, it can license or permit another to do.

Illinois C. R. Co. v. Wathen, 17 Ill. App. 582; *Evans v. McLucas*, 15 S. C. 67; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 856; *Roby v. New York O. & H. R. R. Co.*, 142 N. Y. 176; *Evans v. Haefner*, 29 Mo. 141.

If the respondent has no right to occupy under either the easement or the fee, then, under the occupying claimant act, it is entitled to compensation for the improvements made.

Seigneuret v. Fahey, 27 Minn. 62; *Wheeler v. Merriman*, 80 Minn. 873; *Hall v. Torrens*, 33 Minn. 537.

Start, Ch. J., delivered the opinion of the court:

Action of ejectment to recover the possession of the premises described in the complaint, and the rents and profits thereof. The answer put in issue the allegations of the complaint, and, for a second or further defense, alleged title in fee to the premises to be in the St. Paul, Minneapolis, & Manitoba Railway Company, under which it claimed right of possession, as licensee. To this second defense the plaintiffs demurred, and from an order overruling the demurrer they appealed.

The material facts alleged in the answer and admitted by the demurrer are substantially as follows: The land in question is a part of a strip 220 feet in width, adjacent to the right of way of the railway company and the whole of the strip was acquired by it by the judgment of the district court of the county of Hennepin, in proceedings instituted by it under its charter and the laws of the state, and pursuant to the provisions of chapter 1, Laws 1857 (Ex. Sess.), and subsequent acts amendatory thereof. The condemnation proceedings were duly instituted and carried on, and the value of the land taken thereby was assessed and adjudged to be the sum of \$17,075.82. Henry S. Gurney was at this time the owner of the land taken, and judgment was duly rendered in the condemnation proceedings by the court in his favor, and against the railway company, for such sum for the value of the land, and it was therein further adjudged that, upon the payment of such judgment, an absolute estate in fee simple to the land so taken and con-

demned should vest in the railway company, which judgment it paid, and the amount thereof was accepted by Gurney, and the railway company thereupon took possession of the land, and has ever since occupied and used it for railroad purposes. The answer further alleges that, after the railway company had so acquired the land, "it licensed and permitted this defendant to erect and construct upon the land, for the uses and purposes of the railway company, and in connection with, and as a necessary adjunct of, the business of the railway company, a public grain elevator and warehouse, with the necessary power house, engines, annexes, railway tracks, and other appurtenances useful and necessary in connection therewith, which grain elevator, warehouse, and appurtenances were erected upon, and occupy, substantially, that portion of the land described in plaintiffs' complaint herein. The defendant entered upon the land, and erected the elevator and warehouse thereon, and still occupies the same, under and by virtue of the license so granted to it, and not otherwise. That relying upon the title of the railway company in and to the land, and believing the same to be perfect, it in good faith erected the elevator, warehouse, and elevator plant, as aforesaid. That this defendant never had any notice or knowledge, in any manner, of any defect in the title of the railway company to the land, and that the plaintiffs in this action, and those through or from whom they claim, well knew of the occupation being made, and the possession of the land being taken, by the defendant, and that the plaintiffs, nor either of them, nor any of those through or from whom they claim made any objection thereto, legally or otherwise. That defendant in good faith actually expended and paid, in the construction and erection of the elevator, warehouse, and improvements, as aforesaid, the sum of \$522,192.74, and that this defendant is now the owner of said elevator, warehouse, and appurtenances, as aforesaid, and is in possession, occupancy, and operation of the same, as a public grain elevator and warehouse, and has been since the erection thereof."

The law under which the condemnation proceedings were had gave the railway company the right to condemn lands for "the purpose of constructing bridges, dams, embankments, excavations, spoilbanks, turnouts, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said railroads. . . ." It also provided: "An absolute estate in fee simple in such lands shall be and become vested in the said company as against all persons so receiving notice from the said commissioners, as aforesaid, and all such persons as, having received such notice, shall be forever concluded from questioning such title, so acquired by the said company."

1. The defendant asserts and the plaintiffs controvert the proposition that, under its charter rights, the railway company had the power to, and did, acquire a fee-simple title, and not a mere easement in the lands con-

demned (Laws 1857, § 13, chap. 1 [Ex. Sess.]); and the judgment in the condemnation proceedings, in terms, gives the railway company title in fee absolute to the land taken. But the plaintiffs urge that section 18 is unconstitutional. In the view we take of this case, it is unnecessary to consider or decide this question, or the effect of the judgment, for, in any event, the railway company acquired, by the condemnation proceedings and judgment therein, a perpetual easement in the land for all the public purposes for which it was authorized to take lands by the exercise of the power of eminent domain. *Scott v. St. Paul & O. R. Co.* 21 Minn. 323.

2. The railway company having acquired such easement in the land, the plaintiffs, even if it be conceded that they are the owners of the fee, cannot maintain ejectment for the premises, unless the company has abandoned the easement. The answer, then, states a defense, unless the act of the railway company, in licensing the defendant to erect and operate upon the land, for the uses of the railway company, and as a necessary adjunct of its business, "a public grain elevator and warehouse," constitutes in law an abandonment of its easement in the land. This case might be properly disposed of upon the ground that the mere use of an easement for a purpose not authorized, or a temporary disuse thereof, is not, of itself, sufficient to constitute an abandonment; and therefore, the defendant being a mere licensee of the railway company, the latter has not abandoned its easement in the premises by reason of such license to the defendant. *Roby v. New York, O. & H. R. R. Co.* 142 N. Y. 176; *Peirce v. Boston & L. R. Corp.* 141 Mass. 481. But, in view of the importance of this case, we place our decision upon the broad ground that the erection and operation of a public grain elevator or warehouse upon land acquired by a railway corporation in condemnation proceedings, either by the company, or its licensee or lessee, are neither a misuse nor an abandonment of its easement in the land occupied by such elevator or warehouse. Courts will, as a rule, take notice of whatever ought to be generally known within the limits of their jurisdiction, and we may well take judicial notice of the fact that the handling and transportation of grain constitute a very important part of the business of the railways of the state, and that grain elevators and warehouses are reasonably necessary, if not absolutely essential, to the feasible, prompt, and economical handling, storing, and transporting of grain by railroads. The erection and operation of grain elevators and warehouses upon the right of way of railroads, with side tracks thereto, are a matter of such general and public interest that the law has made provisions for the acquiring of the right to locate and operate them upon the right of way of railway companies without their consent. Gen. Stat. 1894, §§ 7724-7729. The defendant's licensor, the railway company, was expressly authorized by its charter to condemn lands for the purpose, among others, of constructing and maintaining all buildings necessary for the complete operation of its railroads. That elevators are rea-

sonably, if not absolutely, necessary for the complete operation of a railway in this state is a fact so obvious that it may be safely assumed without argument. How could a single railway system of our state handle and transport 60,000,000, or any less number of millions, of bushels of grain each year without the use of elevators along its right of way? It cannot be doubted that the railroad company has the right to erect and maintain on its right of way, as against the objection of the owner of the fee, elevators and warehouses, to facilitate the handling and transporting of grain by it; and, if the company may do this, why may it not license others to do this work for it? There is no reason nor consideration of public policy that forbids it. On the contrary, by the terms of the statute we have quoted, a railway company may be compelled to permit elevators and warehouses to be erected and operated on its right of way by private parties. How, then, can

it be claimed that they may not voluntarily license the erection and operation, on land condemned by it for public purposes, of what is described in the answer demurred to as a public grain elevator and warehouse, for the uses and purposes of the railway company, in connection with, and as a necessary adjunct of, its business. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 23 L. ed. 356; *Illinois C. R. Co. v. Wathen*, 17 Ill. App. 582. The use which the railway company permits the defendant in this case to make of a portion of the land condemned by it is a use not inconsistent with the public purposes for which the land was acquired, but, on the contrary, it is a use directly in aid of such purposes; therefore, the railway company has neither misused nor abandoned any portion of the land so acquired by it by the act complained of.

Order affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James T. WHITE *et al.*
v.

James M. SOLOMON.

(184 Mass. 516.)

1. The refusal to accept an article which a person has expressly agreed in consideration of its delivery to an express company to pay for in instalments does not relieve him from liability to pay the whole price or restrict the seller to his remedy for damages.
2. A contract to pay the whole value of a chattel before the title passes may be lawfully made.
3. Refusal to answer a cross interrogatory which does not appear to have been material will not prevent the admission of a deposition in evidence.
4. There is evidence of a signature to a contract where the party testifies that it resembles his, but that he wishes to have the contract identified before answering further, if there is no later denial of the signature.

(Field, Ch. J., and Allen and Morton, JJ., dissent.)

(November 26, 1895.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during the trial of an action brought to recover the price of a manikin alleged to have been sold to defendant which resulted in a verdict in plaintiff's favor. *Overruled.*

The facts are stated in the opinion.

Mr James E. Kelley, for defendant:

There is no evidence of a tender of delivery to the defendant as called for by the said al-

leged contract or order; and such acts by the parties as would pass the title of said merchandise to the defendant are not shown. The plaintiff is therefore not entitled to recover the price of the said article.

Pittsburgh, C. & St. L. R. Co. v. Heck, 50 Ind. 808, 19 Am. Rep. 718.

If an action lies, it is for damage for breach of said alleged contract; and the measure of damages is not the contract price of the merchandise, it not having been manufactured for a special purpose to the defendant's order, or of a kind unsalable in market.

Gordon v. Norris, 49 N. H. 388; *Allen v. Jarvis*, 20 Conn. 38.

The alleged contract or order is not a contract of sale, but an order to deliver upon certain conditions named in said order, which are not fulfilled by delivery, even, and title could not pass to the defendant by mere tender of delivery.

Hirschorn v. Oanney, 98 Mass. 150.

Whenever personal property is sold upon a condition precedent, the title does not pass until the performance of the condition, even though the goods have been actually delivered into the possession of the buyer.

Whitwell v. Vincent, 4 Pick. 449, 16 Am. Dec. 355; *Salomon v. Hathaway*, 126 Mass. 482.

The title of the merchandise involved in this case has never passed from the plaintiff.

Coggill v. Hartford & N. H. R. Co. 8 Gray, 549; *Benner v. Puffer*, 114 Mass. 376.

The law will not tolerate the palpable injustice of permitting the vendor to hold the property and also recover the price of it.

Pittsburgh, C. & St. L. R. Co. v. Heck, 50 Ind. 808, 19 Am. Rep. 718.

NOTE.—For effect of delivery to a carrier to pass title, see note to *Ramsey & G. Mfg. Co. v. Kelsea* (N. J.) 22 L. R. A. 415.

As to the right to recover price before title 30 L. R. A.

passes, but on delivery to carrier, the above case is unusual and presents a very close distinction between such a case and one of delivery or attempted delivery to the purchaser in person.

The refusal to answer any material cross in interrogatory renders the deposition inadmissible.

Chase v. Kenniston, 76 Me. 209; *Smith v. Griffith*, 8 Hill, 883, 38 Am. Dec. 639.

Mr. George H. Ryther, for plaintiffs:

The refusal of the defendant to accept the manikin from the express company was equivalent to a refusal to pay the first instalment, and the refusal to pay any instalment, according to the contract, made the whole amount due and payable.

Wilkie v. Day, 141 Mass. 78.

The deposition was properly received.

Gould v. Hawkes, 1 Allen, 170; *Todd v. Bishop*, 136 Mass. 386; *Akers v. Demond*, 108 Mass. 818.

No evidence of the execution of the contract sued on was necessary.

Spooner v. Gilmore, 136 Mass. 248.

Holmes, J., delivered the opinion of the court:

This is an action upon the following contract:

"White's Physiological Manikin.

"Place and date: 75 Court Street, Boston, Mass., June 7, 1889.

"Messrs. J. T. White & Co., Publishers, New York—Gentlemen: Please deliver according to shipping directions given below, one White's Physiological Manikin, Medical Edition, price \$35.00. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of \$35.00, as follows: \$10.00 upon delivery at the express office, and the balance in monthly payments of \$5.00, each payable on the first of each and every month thereafter, until the whole amount is paid, for which the publishers are authorized to draw when due.

"It is expressly hereby agreed that, in case of the failure to pay any one of the said instalments after maturity thereof, all of said instalments remaining unpaid shall immediately become due and payable, and the said James T. White & Co. may take, or cause to be taken, the said manikin from the possession of the said subscriber or their representatives, to whom he may have delivered the same, without recourse against said James T. White & Co. for any money paid on account thereof; it being expressly agreed that the money paid on account shall be for the use and wear of said manikin.

"Shipping directions to be filled out by the agent.

"To whom sent, J. M. Solomon, 75 Court Street.

"Town, Boston. County of Suffolk.

"State, Massachusetts.

"James M. Solomon, 75 Court Street.

"Agent, W. F. Byrd."

There was evidence, and we must assume the judge who tried the case to have found, that the manikin was delivered, as agreed, to the express company, freight prepaid; that the defendant refused to receive it; that, in consequence, the express company, after a time, left the manikin at the plaintiffs' place of business, in pursuance of a rule of 30 L. R. A.

the company, and without the plaintiffs' assent; and that it is held subject to the defendant's order. There had been no repudiation of the contract by the defendant before the delivery of the manikin at the express office.

The main question is whether the judge who tried the case ought to have ruled that "the plaintiffs are not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract." A majority of the court is of opinion that this ruling properly was refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office; but that assumption does not dispose of the case. In an ordinary contract of sale, the payment and the transfer of the goods are to be concurrent acts; and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and, although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly *solvendum in futuro*), of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words "in consideration of its delivery" are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. See the observations of Blackburn, J., in *Martineau v. Kitching*, L. R. 7 Q. B. 486, 455. Benjamin, Sales, 4th ed. 716, 717. When, as here, all the conditions have been complied with, the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot, by an act of his own repudiating the title, gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See *Smith v. Bergengren*, 153 Mass. 236, 238, 10 L. R. A. 768.

If the first payment of \$10 upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to

accept the manikin or to pay the \$10, the sellers' only remedy would be for a breach, and that they could not leave the manikin at his house, and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company, and the provision for payment of \$10 "upon delivery at the express office" must mean after the delivery; so that the delivery is the first act, and by itself, without more, fixes the rights of the vendors to the price, just as the transfer of the stock did in *Thompson v. Alger*, 12 Met. 428, 444. Our decision is in accord with the following cases; we know of no decisions to the contrary: *Martin Safe Co. v. Emanuel*, 21 Abb. N. C. 181; *Brewer v. Ford*, 54 Hun, 116, 120; *Id.* 59 Hun, 17, 19, 126 N. Y. 648; *Cornahan v. Hughes*, 108 Ind. 225. See further *Burnley v. Tufts*, 66 Miss. 48; *Tufts v. Griffin*, 107 N. C. 47, 10 L. R. A. 526. But compare *Tufts v. Grever*, 88 Me. 407; *Swallows v. Emery*, 111 Mass. 855, 857.

Two remaining exceptions may be disposed of in a few words. It is objected that a deposition of one of the plaintiffs was not admissible, because he refused to answer a cross interrogatory. The cross interrogatory was whether or not one Byrd had made other sales than the contract in suit for the plaintiffs. It does not appear to have been material. Therefore the deposition properly was admitted. We need not consider whether, if the question had been material, the deposition ought to have been excluded, unless before the trial the defect had been brought to the attention of the court, that it might pass such order on the subject as should seem proper.

It was objected that there was no evidence of the defendant's signature. But the defendant's answer to an interrogatory, "The signature resembles mine. I wish to have the contract identified before answering further," coupled with the absence of any later denial, was enough.

Exceptions overruled.

Field, Ch. J., dissenting:

It is not easy, perhaps, to reconcile all our decisions upon the measure of damages in actions for goods bargained and sold or for goods sold and delivered; but the general rule is, I think, that where the title passes to the vendee by the contract, and the contract has been executed by a delivery, or by what is equivalent to a delivery, the vendee is liable to the vendor for the price; but where the title does not pass to the vendee by the contract, and he declines to receive and accept the goods sold, the damages are the injury suffered from the breach, which usually is the difference between the price agreed upon and the market value of the goods at the time and place of delivery. *Collins v. Delaporte*, 115 Mass. 159; *Whitney v. Thacher*, 117 Mass. 528; *Schramm v. Boston Sugar Ref. Co.* 146 Mass. 211; *Tufts v. Bennett*, 163 Mass. 898; *Laird v. Pim*, 7 Mees. & W. 474-478. This question, in a contract for the sale of stock in a corporation, was considered in *Thompson v. Alger*, 12 Met. 428, 443. In that case the court held 80 L. R. A.

that the plaintiff was entitled to recover as damages the price agreed to be paid, and says: "The argument against such recovery is, that this stock was never accepted by the defendant; that this, at most, was a mere contract to purchase; and that the defendant, having repudiated it, is only liable to pay the difference between the agreed price and the market value of the stock on the day of the delivery. Such would be the general rule as to contracts for the sale of personal property; and such rule would do entire justice to the vendor. He would retain the property as fully in his hands as before, and a payment of the difference between the market price and that stipulated would fully indemnify him. Such would have been the rule in this case, if nothing had been done to change the relation of the parties. If, for instance, the defendant had repudiated the contract, before any transfer of stock to him had been made on the books of the corporation, it might properly have applied here. But this is a case of somewhat peculiar character in this respect. The contract of the vendor to sell to the defendant 180 shares of railroad stock required a previous transfer of the shares on the books of the corporation. This, from the very nature of the case, was a previous act; and when done it passed the property on the books of the company to the defendant. This was done by the vendor as early as October 14, 1841, in respect to all the shares stipulated to be sold. At this time the defendant had not repudiated the contract. . . . In this state of the case, as it seems to us, the true rule of damages is the contract price. The stock has been transferred to Alger on the books of the corporation, and the vendor, having done this, in the proper execution of the contract, and before it was repudiated by the defendant, may well insist upon this rule as the measure of damages." This rule of damages has been applied in this commonwealth to contracts for the sale of stock in corporations where the vendor has before trial duly tendered the stock, or offered to transfer it, and has renewed the tender or offer in court at the trial. *Thorndike v. Locke*, 98 Mass. 340; *Pearson v. Mason*, 120 Mass. 53. See *Nichols v. Morse*, 100 Mass. 528; *Frazier v. Simmons*, 189 Mass. 531.

If the contract in this case could be considered as an absolute contract of sale, it may be that the court could have found from the evidence such a delivery as, in accordance with our decisions, might be held to pass the title as between the parties. But then it might be necessary to consider whether, if the manikin was of value, it would not be necessary for the plaintiffs to keep the delivery good in some manner, as by storing it for the defendant at or near the place of delivery, or by tendering it to him at the trial, in order to enable the plaintiffs to recover the entire price. If the manikin had been sent by the plaintiffs from a distant foreign country, and, on the defendant's refusing to receive it, had been sent back to them with their assent, and retained by them there, it would seem more reasonable to permit the plaintiffs to recover their damages caused by the defendant's refusal than to re-

cover the entire price agreed to be paid, and to leave to the defendant only the chance of obtaining possession of the manikin in such manner as he could. If, on the vendee's refusing to receive the property bought, it is resold by the vendor by public auction, after notice to the vendee, the damages recovered are, of course, the difference between the price agreed to be paid and the sum obtained by the vendor from the resale, if reasonable care is taken to obtain for the property all that it is worth.

It becomes necessary in the present case to consider the nature of the contract. The contract, I think, is in effect a contract for a conditional sale, and the intention is that the title shall not vest in the defendant until the price is paid. If the price is not paid according to the terms of the contract, the plaintiffs are authorized to retake the manikin without being accountable to the defendant for any of the money paid by him on account of the price. If the plaintiffs exercise this right of retaking the manikin into their possession because the price is not paid, they have both the title and the possession, because they have never parted with the title. What, then, is the rule of damages under such a conditional contract of sale, when the vendee refuses to receive the article, and it is returned to and retained by the vendor? I think that the construction to be given to the contract is, that if the defendant does not pay the price according to the contract, the plaintiffs may retake the manikin from the possession of the defendant, and retain what he has paid on account of the price, or they may leave the manikin in the possession of the defendant, and sue him for the instalments of the price which remain un-

paid. But the plaintiffs cannot collect the whole price, and also retake the manikin. They cannot hold the title to the property, and also recover the price of it.

But it is said that the plaintiffs have not retaken the manikin. The manikin has been returned to the plaintiffs, and is retained by them, subject, as they say, to the order of the defendant. It is retained in New York City, and, by retaining it there, I think it must be held that the express company returned it to them with their assent, and that the plaintiffs have ratified this action of the express company. The damages to be recovered when a vendee in a conditional contract of sale refuses to receive the property, and it is returned to the vendor by his assent, and is retained by him, seem to me analogous to the damages to be recovered when a vendee in an executory contract of sale refuses to receive the property. *Morse v. Sherman*, 106 Mass. 480-484; *Tufts v. Bennett*, *supra*. See *Tufts v. Grever*, 88 Me. 407. The title in each case remains in the vendor; and the damages, when the thing sold is a commodity usually bought and sold in the market, are generally the difference between the price agreed to be paid and the market value of the property at the time and place of delivery. In my opinion, such should be the rule in this case. I find nothing in the agreement which distinguishes the present case from the ordinary one where the vendee of property agrees to pay a part of the price on delivery, and the remainder of the price in instalments after delivery.

Allen and Morton, JJ., concur in this opinion.

FLORIDA SUPREME COURT.

JACKSONVILLE ELECTRIC LIGHT COMPANY, *Appt.*,

City of JACKSONVILLE *et al.*

(.....Fla.....)

***1. A municipal corporation can exercise only such powers as are granted to it in express terms, or those necessarily or fairly implied in or incident to the powers expressly granted, or those that are essential and indispensable, not simply convenient to the declared objects and purposes of the corporation. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation.**

2. While a strict construction should be applied to the grant of powers, and especially those which result in public burdens, or

* Headnotes by MABRY, Ch. J.

NOTE.—The power of a municipality to furnish electric lights to private persons as decided in the above case is also sustained in *Linn v. Chambersburg* (Pa.) 25 L. R. A. 217, and *Crawfordsville v. Braden* (Ind.) 14 L. R. A. 208, and *note thereto*.
30 L. R. A.

which are out of the usual range of corporate action, yet if a power is fairly or necessarily implied in or incident to those clearly given, it should not be impaired by a strict construction.

3. All the powers conferred upon a municipal corporation should be construed with a view of carrying out the objects and purposes of its creation as a public agency.

4. Supplying the inhabitants of a city with electric light for use in their private residences and houses is such a municipal purpose as to authorize its delegation by the legislature to municipal bodies.

5. The charter act of the city of Jacksonville (Acts of 1887, chap. 3776) conferring power upon the city council to provide for lighting the city by gas or other illuminating material, or in any other manner, together with other specified powers,—Held, sufficient to authorize the erection and maintenance at public cost of an electric plant of sufficient power and capacity to light, not only the streets and public places in the corporation, but also for the purpose of supplying the inhabitants of the city with electric light for use in their private residences and houses.

(October 15, 1896.)

A PPEAL by complainant from a decree of the Circuit Court for Duval County in favor of defendants in a suit brought to enjoin defendants from constructing and operating an electric light plant. *Affirmed.*

Statement by Mabry, Ch. J.:

The appellant company, a corporation existing under the laws of Florida, was complainant in the circuit court, and owned an electric plant of the value of \$30,000, and subject to taxation, in the city of Jacksonville. It alleged that it had been and was then engaged in furnishing electric light to the city of Jacksonville and the inhabitants thereof in their private houses and places of business, and that its plant had sufficient power and capacity to furnish all the electric light that the city and its inhabitants might desire; that the city, through its board of public works, had entered into a contract with the General Electric Company, a corporation existing under the laws of New York, for the purpose of constructing an electric light plant within said city, and also contracted with other persons and corporations, unknown to complainant, for the purpose of purchasing engines and boilers to provide motive power for said plant. The right of the board of public works to so act is claimed under and by virtue of some ordinance of the city. That, under the agreement with the General Electric Company, the city had contracted to purchase material, machinery, apparatus, lamps, and lights, not only for the purpose of establishing an electric plant to light the streets, public buildings, and places of the city, but for the purpose of furnishing and selling electric light to the inhabitants of the city in their private residences and places of business. For the material, apparatus, and lamps to be procured from the General Electric Company, the city was to pay \$47,500, and for the engines and boilers the sum of \$25,000 was to be paid, making a total of \$72,000. That the city intended to appropriate the public revenues of the municipality to pay for such electric plant, and it was the design of the city and its board of public works to construct said plant with such power and capacity as would be necessary to supply lamps and light to all the inhabitants of said city in their private houses and places of business, and for this purpose had provided in said contract to purchase 4,000 incandescent lamps which were not necessary and could not properly be applied to light the streets and other public places of the city, and that independent of said 4,000 lamps, the city had provided for all lamps, both arc and incandescent, necessary and proper for lighting the streets and public places in the city. The cost of the plant, engines, boilers, machinery, and attachments, it is alleged, exceeds the cost of such plant in full and adequate power to light the streets and public places of the city by between \$35,000 and \$40,000, and that the expenditure of such excess was improvident, unauthorized by the laws of the state, and a wrong to the taxpayers of the city. That the city had no power to appropriate any of its revenues or levy and collect taxes for any purpose and object other than a strictly municipal purpose, and that the appropriating of its revenues for the purpose

of buying machinery and apparatus to furnish lights to the inhabitants of the city in their private houses and places of business was not a municipal purpose, and the city had no authority to do so. It is also alleged that the board of public works and the city had violated the 9th and 13th sections of the charter act of the city, being chapter 8775, in reference to letting contracts for over \$200 to the lowest responsible bidder, and that the General Electric Company was not the lowest bidder for furnishing machinery and apparatus for said electric plant, but other responsible parties bid a less sum for the same material than the said General Electric Company.

The bill prays that the city and the board of public works be enjoined from executing and performing the contract entered into between the board of public works and the General Electric Company, and from applying any revenues of the city towards the execution of the said contract, and also that the city and board of public works be enjoined from appropriating any revenues of the city to pay for the 4,000 incandescent lights and the other portions of the apparatus and machinery designed for commercial purposes, or to pay for any engines, boilers, or machinery other than strictly necessary to furnish motive power for an electric plant of sufficient power and capacity to light the streets and other public places and buildings of the city of Jacksonville.

The answer of the city and the board of public works on information alleges that complainant's plant did not have as much as one half the necessary power or capacity to furnish all the electric lights that the city and its inhabitants desired or would pay for if electric lights were furnished to them at a reasonable price. The contracts with the General Electric Company and other companies for the construction of an electric light plant in the city of Jacksonville are admitted, and it is alleged that they were entered into by virtue of and in compliance with the laws of the state and ordinances of the city of Jacksonville. It is also averred that, in making the contracts for the erection of said electric plant in the city provision was made for such a plant as would have the power and capacity to furnish all the lights needed for lighting the streets and public places of the city, and also for furnishing some electric lights to the inhabitants of the city in their private residences and places of business. The answer further alleges that under the provisions of the laws of this state and ordinances of the city of Jacksonville the city had authorized the issue and sale of \$75,000 of bonds to pay for the erection of an electric plant, and it was not contemplated that the plant contracted to be erected would be paid for from the ordinary revenues of the city derived from taxation. It is denied that the city of Jacksonville contemplated, or any of her authorized officers or agents had ever declared their design to construct an electric light plant with sufficient power and capacity to furnish lamps and lights to all the inhabitants of the city in their private residences and places of business, and it is averred that the city had not contracted for sufficient lamps and material for furnishing such amount of lights. It is further stated that the officers of the city hav-

ing in charge the erection of said electric light plant had used their best discretion in contracting for the same, and had contracted for the erection of a plant sufficient, and only sufficient, to furnish adequate lights for the streets and public places of the city, and such number of private residences and business houses as complainant's plant was unable to supply, and to supply a want in this respect that complainant, through a long term of years, had deliberately abstained from supplying. The answer claims that defendants had authority, under the laws of the state and the ordinances of the city, to contract for the erection of such plant as was contemplated. The allegations of the bill in reference to not letting out the contract to the lowest bidder are denied, and defendants say that they believe the contracts were made with the lowest and best responsible bidders. It is also further alleged that the Jacksonville Electric Light Company was, and had been for many years, the only electric light company in the city, and that the persons who control this, the only electric light company in the city, also control, and for several years have controlled, the only gas company in the city, so that there has been practically, if not in fact, a single corporation controlling the supply of gas and electric light to the city of Jacksonville and its inhabitants, and that for years the price of gas and electric lights has been maintained at such extortionate rates that a very large proportion of the people of the city who desired and would use at reasonable prices, has been forced to abstain from the use thereof, and the city and other of its inhabitants have been forced to pay very largely more than a reasonable price for the gas and electric lights used; also the city has been unable to procure from either the gas or electric company proper lights for lighting the city as it should be; and, in fact, to properly light the city and furnish the lights for private residences and business houses would require a plant of very much more capacity than that of the complainant. The General Electric Company, of New York, demurred to the bill.

A motion for temporary injunction on bill, answer, affidavits, and documentary evidence, was made and denied.

Subsequently a supplementary bill was filed, in which reference is made to the allegations of the original bill, the answer thereto and the proceedings thereon, and further alleging that since the order denying the temporary injunction the city of Jacksonville, acting through its board of public works, had given it to be understood that the city intended engaging in the business of furnishing electric lights to any person, natural or artificial, who may desire to contract for the same, and also to furnish electric light to private residences and business houses and to charge therefor at a schedule of prices which had been published for the information of the public by way of inducement to persons to contract for electric light. It is alleged that the city had no power under its charter to contract with individuals to furnish electric light, or to furnish the same for private residences or business houses, or to in any way enter commercially into the business of furnishing electric lights, and that such proposed action on the part of the city is not a

municipal purpose within the scope of the powers granted by the legislature, and also that such proposed action violated complainant's rights in bringing a branch of the government into competition with the complainant, chartered for the special purpose of furnishing electric light and engaging commercially in the electric lighting business. The prayer in the supplemental bill is that the city and its board of public works be restrained from engaging commercially in the business of electric lighting, and from furnishing electric lights to persons, either natural or artificial, or to private residences or business houses.

A motion for temporary injunction was again denied, and the bill dismissed for want of equity. The order denying the motion and dismissing the bill recites that the cause came on to be further heard upon the original and supplemental bills, the motion of complainant for temporary injunction, and defendant's motion to dismiss for want of equity.

Complainant appealed from all the orders of the circuit court to the June term, 1895, of this court, and upon the transcript of the record has moved here for a temporary injunction as prayed for the original and supplemental bills.

Messrs. John E. Hartridge and Henderson & Raney, for appellant:

Any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied.

1 Dill. Mun. Corp. ¶ 80.

Messrs. A. W. Cockrell & Son, for appellees:

The furnishing of light by the city to individuals is a public service or "public purpose." *Crawfordville v. Braden*, 180 Ind. 149, 14 L. R. A. 268; *Opinion of the Justices*, 150 Mass. 592, 8 L. R. A. 487.

If to provide the "city" with water, etc., means the mayor and city council have the power by ordinances to provide and supply water to each and every inhabitant of the corporation in their residences and places of business (*Grealey v. Jacksonville*, 17 Fla. 174), then the grant of power to provide for lighting the "city," etc., is the grant of authority to provide for and supply to each and every inhabitant the means of lighting their residences and places of business with "gas or other illuminating material, or in any other manner."

Smith v. Nashville, 88 Tenn. 464, 7 L. R. A. 469; *Linn v. Chambersburg*, 160 Pa. 511, 25 L. R. A. 217; *Williams v. Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266; *Fleming v. Montgomery Light Co.* 100 Ala. 657; *Spaulding v. Lowell*, 28 Pick. 71; *Gale v. Kalamazoo*, 28 Mich. 344, 9 Am. Rep. 80; *State v. Hamilton*, 47 Ohio St. 52; *Thompson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 728.

Mabry, Ch. J., delivered the opinion of the court:

The motion made by appellant in this court involves its power to grant a temporary injunction pending an appeal in a case where such injunction had been refused by the circuit court. If this court had such power, it must be because of its authority to issue all

writes necessary or proper to the complete exercise of the jurisdiction conferred on it by the Constitution in other matters than those in which it exercises original jurisdiction. The case of *Cohen v. L'Engle*, 24 Fla. 542, does not expressly affirm the jurisdictional authority of this court to grant the injunction asked for, and we are without a direct adjudication on the point in this state. An examination of this question has led to an investigation of the entire case presented by the record, and as it has been argued by counsel, and we have reached a conclusion thereon, we have decided to dispose of the appeal on its merits, without reference to the power of the court to grant a temporary injunction pending the appeal.

The question presented on the merits is whether the city of Jacksonville has the power to erect and maintain an electric plant of sufficient power and capacity to light the streets and public places of the city, and at the same time supply from said plant the inhabitants thereof with electric lights for their private residences and business houses. The original bill alleges that the city, through its board of public works, had failed to comply with the law regulating the letting out of contracts to the lowest bidder, in awarding the contract for the erection of the plant in question, but this is denied by the answer, and it is not contended here that appellant was entitled to an injunction on this ground. The supplemental bill would seem to go to the extent of alleging that the city had declared its purpose to engage in the manufacture and sale of electricity for commercial purposes without reference to its use by the inhabitants of the city, but there is nothing to show a purpose to dispose of electric lights to any other persons than the inhabitants of the city for use in their private residences and houses, and the question presented is as we have stated it. We have been unable to find any authorities bearing directly on the question involved in the merits of this case than those cited in the briefs of counsel, and the decisions cited speak of the paucity of adjudications on the point. The general rule stated by Judge Dillon (vol. 1, Mun. Corp. § 89) is recognized as a correct summary of the decisions on the question. The author states the rule as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void. Much less can any power

be exercised, or any act done, which is forbidden by charter or statute." The same author says (sec. 91) that "the rule of strict construction of corporate powers is not so directly applicable to the ordinary clauses in the charter or incorporating acts of municipalities as it is to the charters of private corporations; but it is equally applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant." While a strict construction should be applied to the grant of power, yet if a power is necessarily or fairly implied in or incident to those clearly given, it is not to be impaired by a strict construction. *Kyle v. Malin*, 8 Ind. 84. In speaking of the powers of municipal corporations, it is said in *Bridgeport v. Housatonic R. Co.* 15 Conn. 475: "They may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must (unless restricted in this respect) have a choice of means adapted to ends, and are not to be confined to any one mode of operation."

In construing a charter giving to a city the right to pass ordinances for the prevention and suppression of fires, and to appoint and remove fire wardens, and to prescribe the powers and duties of such fire wardens and of fire engineers and firemen, and to raise money to support the fire department, it was held that although no express grant of power was conferred to purchase engines and apparatus, yet such power was necessarily or fairly implied as incident to the power expressly given. *Green v. Cape May*, 41 N. J. L. 45. The charter of the city of Greenville, construed in the case of *Moulton v. Greenville*, 38 S. C. 1, 8 L. R. A. 291, provided that the council might purchase, hold, possess, and enjoy any estate, real, personal, or mixed, and sell, lease, alien, and convey the same, provided that it did not exceed at any time \$100,000, and also to make and establish all such rules, by-laws, and ordinances respecting roads, streets, markets, and police department of the city, and the government of the city, as should appear necessary and requisite for the security, welfare, and convenience of the city for preserving health, life, and property, and securing the peace and good government of the same. The further power was given to levy taxes sufficient to discharge and defray all expenses of carrying into effect the ordinances, rules, and regulations established as provided, with the limitation that the tax should not exceed 75 cents upon every \$100 of real and personal property assessed. The city was also authorized to borrow money for the public use of the corporation by issuing bonds bearing a certain rate of interest, and not to exceed \$100,000. It was held that the city had the express power to purchase, and the implied power to operate an electric light plant, so far as it is used for lighting the streets and public buildings of the city, but so far as it was used for

furnishing light to private residences and places of business at a compensation, it was not for the public use of the corporation, and therefore its purchase and maintenance to that extent were *ultra vires*. Aside from the express power to buy and hold property, the city had only the powers granted by what is usually called the "general welfare clause," in municipal charters. After referring to the rule announced by Judge Dillon, given above, the court says: "Now, tested by this principle, so clearly stated, how does the matter stand? Clearly the charter does not give the power to purchase this plant in express words. It does not so give even the power to light the city, but we assume that this latter power may be fairly implied from the grant of the police power." Under a statute giving cities power to establish and maintain electric light plants, or to authorize the erection of the same, upon a majority vote of the city, and to issue bonds for the purpose of establishing electric plants, the total amount not to exceed 5 per cent of the assessed taxable property within the city, Judge Shiras held that the city had the power to erect an electric plant for the purpose of furnishing light to its inhabitants in their stores and houses, as well as for lighting the streets and public places of the city. He says that it had been "the uniform rule that a city, in erecting gas works or waterworks, is not limited to furnishing gas or water for use only upon the streets and other public places of the city, but may furnish the same for private use; and the statutes of Iowa now place electric light plants in the same category." *Thompson-Houston Electric Co. v. Newton*, 42 Fed. Rep. 723; 3 Am. Electrical Cas. 507. An Indiana statute conferred upon municipalities the power "to light the streets, alleys, and other public places" of cities and towns with electric light or other form of light, and to contract with any individual or corporation for lighting such streets, alleys, and public places with electric light or other forms of light, on such terms and for such times, not exceeding ten years, as might be agreed upon. Other provisions in the act authorized the granting to any person or corporation the right to erect and maintain the necessary fixtures for supplying electric light to the inhabitants of the municipality, but it was conceded by the court, in the case of *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, that no provision was made in terms for the municipality to supply electric light to its inhabitants. It would seem from the terms of the act in conferring power upon the municipality to light the "streets, alleys, and other public places," that it was the purpose of the legislature to confine the corporation to such use in supplying electric light, but the court held that the corporation had the right to furnish the inhabitants light for their private residence and business houses, as well as lighting the streets and public places of the city. It appears that this right is based, in the case cited, upon the general police power of the city. The charter of the city of Nashville conferred the power "to provide the city with water by waterworks, within or

beyond the boundaries of the city, and to provide for the prevention and extinguishment of fires, and organize and establish fire companies." The right of the city to establish waterworks, and in addition to making provision for the extinguishment of fires, to furnish water to the inhabitants, was affirmed in the case of *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469. The act passed on in the case of *Linn v. Chambersburg*, 160 Pa. 511, 25 L. R. A. 217, expressly authorized any incorporated borough to manufacture electricity for commercial purposes for the use of the inhabitants of said borough, and the constitutional power of the legislature to confer such right was recognized. The court said: "In view of the fact that electricity is so rapidly coming into general use for illuminating streets, public and private buildings, dwellings, etc., why should there be any doubt as to the power to authorize such corporations to manufacture and supply it in like manner as artificial gas has been manufactured and supplied?" A statute in Kansas gave to cities of the second class authority to provide for and regulate the lighting of the streets, and to make contracts with any person, company, or association for such purpose. The city of Hiawatha entered into a contract with the General Electric Company to construct a plant to be used by the city exclusively for the purpose of lighting the public streets, without any intention to furnish lights to private citizens or to use of the same for any private purpose. The court held that the city had the right to construct the plant. *State v. Hiawatha*, 58 Kan. 477. The right to furnish to individuals for use in their private houses was not involved or considered. It was enacted in Ohio that "the council of any city or village shall have power, whenever it may be deemed expedient and for the public good, to erect gasworks at the expense of the corporation, or to purchase any gasworks already erected therein." Former statutes gave municipalities the right to contract with gas companies to supply cities with gas, and the right of a city to erect gasworks therein without any avowal of the purpose for which they were erected, although a contract had formerly been made with a gas company to supply gas, was affirmed in the case of *State v. Hamilton*, 47 Ohio St. 52. The power of the legislature to authorize incorporated cities and towns to erect and maintain electric plants to light the streets and other public places of the municipality, as well as supply light to private individuals, is expressly stated in *Linn v. Chambersburg*, *supra*, and the *Opinion of the Justices*, 150 Mass. 593, 8 L. R. A. 487.

The authority of the city of Jacksonville to erect the electric plant in question, and, in addition to lighting the streets and public places therein, to supply the inhabitants light for their private residence and houses, must depend upon the charter act of 1897, chap. 3775. The act of 1893, chap. 4339, gave the right to the city to issue bonds under conditions therein stated to refund the bonded indebtedness of the city, and for such other municipal purposes as might be provided by ordinance in submitting the ques-

tion of the issuance of the bonds to a vote of the people. The issue of \$75,000 of bonds for the erection of an electric plant having been carried, the city undertook the construction of the plant. Unless the erection of the plant was a municipal purpose within the meaning of the charter powers of the city, it could not be erected at public expense. The act of 1887 provides that the city "may purchase, lease, receive, and hold property, real and personal, within said city; and may sell, lease, or otherwise dispose of the same for the benefit of the city; and may purchase, lease, receive, and hold property, real and personal, beyond the limits of the city, to be used for the burial of the dead; for the erection of waterworks; for the establishment of poor houses, pest houses, houses of detention and correction; for public parks and promenades, and for any other public purpose that the mayor and city council may deem necessary or proper; and may sell, lease, or otherwise dispose of such property for the benefit of the city to the same extent as natural persons may." Among the powers conferred upon the city council are the following: "To make regulations to secure the general health of the inhabitants and to prevent and remove nuisances; to provide the city with water by waterworks within or beyond the boundaries of the city; to provide for the prevention and extinguishment of fires and to organize and establish a fire department; to provide for lighting the city by gas or other illuminating material, or in any other manner; . . . to make appropriations for lighting the streets and public buildings, and for the erection of all buildings necessary for the use of the city; . . . to pass all ordinances necessary for the health, convenience, and safety of the citizens, and to carry out the full intent and meaning of this act, and to accomplish the object of this incorporation." Among the limitations upon the city council are the following: "The mayor and city council are forbidden to make any appropriations of money or credit in the way of donation, festivities, pageants, excursions, or parades; nor shall they be authorized to subscribe for stock in any railroad company or in any other corporation, or give or lend any money, aid, or credit to any person or corporation whatever; and they are hereby prohibited from employing or appropriating the revenues and taxes in any other manner than for purposes strictly municipal and local according to the provisions of this act." Under the provisions regulating the duties of the board of public works, that body is given exclusive control over the lighting of all such public places as may be deemed necessary, and "shall have exclusive power to organize and control the fire department, the waterworks and its appurtenances, the gas and other illuminating works of the city, and its jails and houses of correction and detention."

There can be no doubt about the power of the city of Jacksonville to erect and maintain at public cost an electric plant of sufficient power and capacity to light the streets and public places in the corporation. Counsel for appellant do not insist here that the city

does not possess such power, but the contention is that no power exists to erect and maintain such plant for the additional purpose of supplying the inhabitants of the city with electric light for use in their private residences and houses. Under a strict construction, as applied in the South Carolina decision, the city would have the power, even under the general welfare clause, to erect and maintain an electric plant to supply light for the streets and public places of the city. The grant of power to the city of Jacksonville to provide for lighting the city by gas or other illuminating material, or in any other manner, is clear and explicit, and this carries with it the power of choice of means to accomplish the end. Should this power be construed into a right to light the streets and public places of the city, but not to supply the inhabitants thereof with light for use in their private houses? The power of lighting the city is given in connection with the powers of providing the city with water and the establishment of fire departments for the prevention and extinguishment of fires. The Tennessee court construed a clause in the charter of the city of Nashville, similar to the one in the Jacksonville charter, into a power to supply water, not only for the public use of the city, but for private use by the inhabitants. The statute in Iowa simply gave the power to cities to erect electric plants without designating the purposes for which light might be generated, and it was held that it could be furnished by the city to its inhabitants for private use in their residences. The Indiana decision clearly sustains the power claimed by the city of Jacksonville in this case; and if the South Carolina case can be considered the other way, the preponderance of adjudication seems to be in favor of sustaining the power claimed in the case before us. The South Carolina court did not have before it a statute like ours, and we are of the opinion that a fair construction of the grant "to provide for lighting the city by gas or other illuminating material, or in any other manner," will authorize the erection and maintenance of an electric plant, not only for lighting the streets and public places of the city, but also for supplying, in connection therewith, electric light for the inhabitants of the city in their private houses. The power given is to light the city, and the connection indicates that the legislature was conferring powers for the benefit of the people generally of the city. The restrictions contained in the 5th section, prohibiting the appropriation of the revenues of the city in any other manner than for purposes strictly municipal and local and according to the provisions of the act, do not curtail the right if given in the grant of the power mentioned. Express authority is given to appropriate revenue to accomplish the purposes of the act. The city of Jacksonville is a municipal body, and of course all the powers conferred upon it should be construed with a view of carrying out its creation as a public agency of the state. None of its grants should be held to confer powers disconnected with municipal purposes. That the supplying the inhabitants of a city with electric

light is such a municipal purpose as will authorize its delegation by the legislature to municipal bodies is sustained by all the authorities we have found. To the extent of supplying light to the inhabitants of a city for use in their private houses, we discover nothing that cannot, in the light of the decisions, be called a municipal purpose, and beyond this we are not called upon to go, and do not go, in this decision.

It is not insisted here that the dismissal of the bills, independent of the refusal to grant the injunctions prayed for, was error. No other relief was asked for except the injunctions.

Our conclusion is that *the decrees appealed from should be affirmed*, and it will be so ordered.

MINNESOTA SUPREME COURT.

Hannah R. MORRISON *et al.*, *Appts.*,
v.
ST. PAUL & NORTHERN PACIFIC RAIL-
WAY COMPANY, *Repts.*

(.....Minn.....)

"The plaintiffs conveyed to the defendant by deed a right of way along the street in front of their lots. The deed contained the agreement 'that, in case the second party shall sell the above-mentioned right of way to any other company, the party of the first part shall be entitled to receive one half of the purchase money.' The defendant leased to another company its entire railway property, including this right of way, reserving rent payable quarterly, for the term of 999 years. *Held*, construing the agreement with reference to the allegations of the answer as to the inducement and consideration for the execution of the deed, and the terms and conditions of the lease, that the latter was not a sale of the right of way within the meaning of the contract.

(Duck, J., dissents.)

(December 2, 1895.)

APPEAL by plaintiffs from an order of the District Court for Hennepin County overruling their demurrer to the answer in an action brought to recover the sum which defendant had contracted to pay to plaintiffs upon selling a right of way which it had procured from them. *Affirmed*.

The facts are stated in the opinion.

Messrs. Ripley & Brennan, for appellants:

Defendant was incorporated for fifty years. The grant was therefore for the life of the company twenty times renewed, and was practically as valuable as the fee.

Robbins v. St. Paul, S. & T. F. R. Co. 23 Minn. 286; *Vandermulen v. Vandermulen*, 108 N. Y. 195.

A case somewhat similar to the present one was *National Car & L. Builder v. Cyclone Steam Snow-Plow Co.* 49 Minn. 125.

*Headnote by START, Ch. J.

NOTE—The above case, holding that a lease of a railroad for 999 years is not a sale, turns on facts peculiar to itself, but may quite likely be important by analogy, if not as a direct precedent, in other cases of long railroad leases.

As to the right of a railroad company to sell land, see *Chamberlain v. North Eastern R. Co.* (S. C.) 25 L. R. A. 136, and *note*.
80 L. R. A.

The term "sale" does not always mean a technical sale in such cases.

Watson v. King, 78 Hun. 340; *Dennison v. Chapman*, 105 Cal. 447; *Hill v. Sumner*, 132 U. S. 118, 33 L. ed. 284.

Mr. John H. Mitchell, Jr., for respondent:

"Sale" is a word of a precise legal import both at law and in equity. It means at all times a contract between parties to give and to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold.

Williamson v. Berry, 49 U. S. 8 How. 495, 12 L. ed. 1170.

A sale is an entire and absolute disposition and transfer of all the grantor's rights of property, to the extent of the interest granted, in the thing sold.

Benjamin, Sales, § 1; *Taylor, Land. & T.* § 14; *Hufschmacker v. Harris*, 38 Pa. 491, 80 Am. Dec. 503; *Schermerhorn v. Talman*, 14 N. Y. 98; *Barker v. Marine Ins. Co.* 2 Mason, 369, 2 Fed. Cas. 817; *Park & L. Co. v. White River Lumber Co.* 101 Cal. 37.

A careful analysis of all the provisions of the lease, considered in connection with the provisions of the deeds and the relations of the parties thereto, justifies the conclusion that respondent's transfer was a lease, and not a sale within the meaning of that term as used in the deeds.

Herryford v. Davis, 109 U. S. 235, 26 L. ed. 160.

There is now no limitation to the extent of a term of years of a lease, either in England or the United States.

Taylor, Land. & T. § 78; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 51 Fed. Rep. 309.

It is not reasonable to contend that the respondent has parted with its entire interest in this property merely because the term of the lease extends beyond the period of its corporate existence as specified in its articles of incorporation.

Union P. R. Co. v. Chicago, R. I. & P. R. Co. 51 Fed. Rep. 309; *Wood, Land. & T.* §§ 61, 144; *Gere v. New York O. & H. R. R. Co.* 19 Abb. N. C. 198; 1 Beach, Priv. Corp. p. 602.

Start, Ch. J., delivered the opinion of the court:

The plaintiffs on October 6, 1884, were the owners of certain lots described in the complaint, fronting on a street in Minneapolis, and on that day they executed and delivered

to the defendant two deeds, and thereby conveyed to it, its successors and assigns, the right to construct and perpetually maintain and operate its line of railway in the street in front of the lots. Each of the deeds contained the following agreement: "It is mutually understood by the parties that, in case the second party shall sell the above-mentioned right of way to any other company, the party of the first part shall be entitled to receive one half of the purchase money." The defendant leased its entire line and system of railway, including the right of way along the street in front of plaintiffs' lots, to the Northern Pacific Railroad Company, for the term of 999 years. The plaintiffs, claiming that the lease was a sale of the right of way in front of their lots, within the meaning of the agreement in their deeds to the defendant, brought this action for an accounting, and to recover from the defendant one half of the amount received by it from the lessee on account of the lease to the latter of the right of way in front of the lots. The defendant answered, admitting the execution to it of the two deeds, and the making of the lease by it, and alleged that the deeds were executed to the defendant by the plaintiffs as an inducement to secure the construction and maintenance of its line of railway to points north and in the vicinity of the plaintiffs' lots, whereby a benefit and advantage would accrue to them in the enhanced value of their lots by the location of industries in their vicinity, as a result of the construction of a line of railway along the street, and its operation in connection with the defendant's system of railroads, and that such was a part of the consideration for the execution of the deeds. The answer also alleges that the line of railway was constructed and has ever since been operated as intended by the parties, and that the lease was entered into for the purpose of securing to the defendant, for its system of railway, including the line along the street in front of the plaintiffs' lots, transcontinental connections east and west, and thereby securing the safe, economical, and profitable operation of its lines of railroad. The answer also alleged the terms and conditions of the lease. It is unnecessary to here set them forth in detail, for they are the usual ones found in leases of railroads, and they negative any suggestion that the lease was made, instead of an absolute sale, for the purpose of defeating the agreement in plaintiffs' deeds. The lease, as set out in the answer, does not include the defendant's right to be a corporation, and by its terms was terminable at any time after the expiration of ninety days, upon default in the payment of rent, or in any of the covenants and conditions contained in the lease; and upon its termination for any cause the defendant is given the right of entry, possession, and the continuous use and enjoyment of the property, including all improvements, the same as if the lease had never been made. The plaintiffs demurred to the answer, and from an order overruling it they appealed.

The record presents only one question for our decision: Was this lease a sale of the

right of way, within the meaning of the agreement in the deeds? The term "sale," as ordinarily used, does not mean a lease, but an entire and absolute transfer of the thing sold, without reservation. The term, however, is not always used in this sense, and, in determining whether this lease was in fact a sale, the name which the parties have given to the instrument, or its form, or any particular provision it contains, disconnected from all others, is not controlling; but the intention of the parties, and the legal effect of the instrument, are to determine its classification. The lease in question, unless terminated by the default of the lessee in the performance of its conditions and covenants, is in legal effect a perpetual one; and if it can be collected from the instrument as a whole that the real intention of the parties was a sale of the railway property, and the form and name of the instrument were adopted for the purpose of defeating the plaintiffs' rights under the agreement in the deeds, it would be the duty of the court to construe the transfer by virtue of the lease as a sale. *National Car & L. Builder v. Oyocone Steam Snow-Plow Co.* 49 Minn. 125. In the case cited the defendant had agreed to pay for certain advertising when it sold its first machine, and in form and name it made a lease of the machine for ninety-nine years, but in fact it was a sale, and so intended, and the name and form were but a device to enable the defendant to postpone the payment of its debt. The court gave effect to the transaction according to the intention of the parties, and held it to be a sale. So in the case of *St. Paul & C. R. Co. v. McDonald*, 84 Minn. 195, a transaction in name and form a mortgage was held to be a sale for the reason that the real character of the transaction was a sale of the lands described in the instrument, which the parties called a mortgage for the purpose of keeping the lands exempt from taxation. But these cases have no analogy to the one at bar, for the allegations of the answer as to the consideration for the deeds, the intention of the parties, and the terms and conditions of the lease, are all admitted by the demurrer; and there is no ground for claiming, and it is not claimed, that the transaction between the defendant and its lessee was or was intended to be anything except an actual and bona fide lease of its railroad property, or that the transaction was given the form of a lease, instead of an absolute sale, to defraud the plaintiffs. The plaintiffs are by the terms of their agreement entitled to one half of the purchase price when the defendant sells the right of way, not one half of the amount the defendant may receive for the use of the right of way, whether operated by itself or its lessee. To so construe the contract as to give the plaintiffs one half of the amount received by the defendant for the use of the right of way would be to make a new contract for the parties, by adding to the agreement in the deeds the words, "or, in case of a lease of the right of way, one half of the rent received." That the transfer of the defendant's system of railway to the Northern Pacific Railroad Company was a lease, and not a sale, would seem

to be quite clear. Suppose that the subject-matter of the deeds in question was two city lots, instead of the right of way in the street in front of them, and that the defendant had leased the lots for ninety-nine or any other number of years, reserving an annual rent equal to 6 per cent of their value; would this be a sale of the lots, within the meaning of the agreement in the deeds? If so, suppose, further, that the defendant and lessor, after a time, actually sold and conveyed the lots to a third party, subject to the lease, for the full value of the lots; would not this be a sale, and the amount received the purchase price, and one half thereof belong to the plaintiffs, under their contract in their deeds? If this last proposition is true (and it must be), what becomes of the first one,—that the lease was a sale, and the rent the purchase price? Where does the supposed case differ in principle from the one we are considering? The defendant, notwithstanding its lease, may sell its railway at any time it sees fit, subject to the lease, and thereby invest the purchaser with the right to receive the rent reserved in the lease. In case of such a transfer the subject-matter of the sale would be the railway property itself, and the purchase price a sum approximating the real value of the property as an income-bearing estate, as shown by the stipulated rent reserved in the lease. We are of the opinion that the word "sale," as used in the deeds, cannot be construed as including the lease of the right of way in question in connection with the defendant's entire railway property; especially so in view of the allegations of the answer as to the inducement and consideration for making the deeds, and the terms and conditions of the lease.

Order affirmed.

Buck, J., dissenting:

I dissent. The defendant agreed with the grantors in the deed to pay them one half of the proceeds in case of a sale to another railroad company,—an event which both parties evidently contemplated might probably be done at some future time. Judging from the allegations of the complaint, this right of the grantors to half the proceeds of a sale was a valuable one; but by a cunning, and that which seems to me an indefensible, proceeding, if the construction thereon placed by the majority opinion is the correct one, the defendant has accomplished indirectly, for its own benefit, what the parties intended should only be done directly and for the equal benefit of both parties. If this is not

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practically and in legal effect a sale, then the defendant, by this sharp practice, has entirely defeated its power to make any sale for a period of 999 years, and thus cheated the grantors or their successors in interest out of any right or interest in the premises during all that long period of time. The practical difference between a lease for such a long time and a sale is too dim and gauzy, and should not be tolerated, because, in my opinion, it is one of those attempted multi-form methods of practising fraud under the guise of legal formality which should not receive judicial sanction. The defendant could not practically do any more to effect a sale for a period of 999 years than to make the lease which it has done, and which, in my opinion, is an unconscionable attempt upon its part to evade the provisions in the deed, which required it to pay the grantors one half of the proceeds in case of a sale to another railroad company. "A lease is properly a conveyance of any lands or tenements in consideration of rent or other annual recompense, made for life, for years, or at will." Wood, Land. & T. § 75. "Independently of the idea of a contract, a lease also possesses the property of passing an interest, and thus partakes of the nature of an estate." Taylor, Land. & T. § 14. "A lease is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, in consideration of a certain annual or stated rent, or other recompense." *Gray v. La Fayette Co.* 65 Wis. 567. A devise of the rents and profits of land is equivalent to a devise of the land itself, and will convey the legal as well as the beneficial interest therein. 2 Jarman, Wills, 38; *Thompson v. Schenck*, 16 Ind. 194. So this lease conveyed the legal as well as the beneficial interest in the premises for 999 years, and its practical effect is equivalent to a sale thereof. In the case of *Watson v. King*, 73 Hun, 840, the construction of a contract was under consideration which contained a provision that "one half the avails of any sales hereafter made of the lands now unsold" should be equally divided between the parties, and it was construed by the court as including rents of the same land. And I think that disposal by the defendant of the right of way, either by the technical sale or term lease, entitled the grantors or their successors in interest to one half the proceeds thereof. I also think that any other construction imposes a great wrong upon the plaintiffs herein.

WISCONSIN SUPREME COURT.

Lottie THAYER, *Appt.*,

v.

H. L. HUMPHREY, Assignee, etc., *Respt.*Charles DAVIES, *Appt.*,

v.

SAME, *Respt.*

(.....Wis.....)

1. Partnership creditors may prove *pari passu* with separate creditors against the estate of a partner, when there is no living solvent partner and no partnership assets applicable to the partnership debts, either at law or in equity.
2. Creditors who have trusted persons as partners and a business as that of the firm may hold the property used to carry on the business of the ostensible partnership subject to their claims in case of insolvency, to the exclusion of any claim of either of the ostensible members of the firm or of their separate creditors.
3. Partnership creditors have no lien on the partnership assets independent of the equities of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members.
4. On a sale of the interest of a partner his equity to have the assets of the firm applied to the existing partnership debts ceases, even if the purchaser agrees to pay them as part of the consideration, unless there is an express or implied agreement to apply the assets to such purpose.
5. A sale by a partner of his interest in an insolvent firm for the purpose of paying the old firm debts, and thus winding up the old partnership concern by applying the assets to such debts, does not change the equity of the outgoing partner and of the firm creditors to have the assets applied to such debts.
6. Creditors of the old and of the new firm may prove their claims *pari passu* and be preferred over individual creditors of the members of the new firm, when the new firm assumed the debts of the old with the intention of all parties to have the business continue and pay the old debts out of the business, but the new firm has made an assignment for the benefit of creditors.

(Newman and Pinney, JJ., dissent.)

(November 8, 1895.)

A PPEALS by claimants from orders of the Circuit Court for St. Croix County disallowing claims against the assigned estate of A. J. Goss. *Affirmed.*

Statement by Marshall, J.:

Each of the above-named appellants filed

a claim against respondent's assignor in his assignment proceedings, and such proceedings were had that an issue was made up as to each in respect to whether he was entitled to share *pari passu* with the other creditors of such assignor. The decision was against the claimants, upon the ground that they were partnership creditors. The facts in regard to the existence of a partnership doing business at River Falls, Wis., composed of J. D. Putnam and A. J. Goss, its dissolution, and the subsequent existence of the ostensible firm of J. B. Goss & Co., composed of J. B. Goss, the actual owner, and A. J. Goss, the ostensible partner, as stated in *Thayer v. Goss* (Wis.) 64 N. W. Rep. 312, *Thayer v. Humphrey* and *Gibbs v. Humphrey*, (Wis.) Id. 750 (decided at this term), may be considered as facts here; and otherwise the facts necessary to present the legal questions involved are sufficiently set out in the opinion.

Messrs. F. M. White and J. S. White, for appellants:

Any and every claim, legal or equitable, in any form, recoverable against an assignor, may be filed against his estate in the hands of the assignee.

Sanborn & Berryman, Anno. Stat. § 1700.

That this was a claim recoverable against A. J. Goss is set at rest by the judgment in the case.

Thayer v. Goss (Wis.) 64 N. W. Rep. 312; *Freeman*, Judgm. § 249; *Lawrence v. Milwaukee*, 45 Wis. 306; *Woodward v. Hall*, 6 Wis. 148; *Van Pelt v. Kimball*, 18 Wis. 368; *Bruen v. Hone*, 2 Barb. 596; *Clemens v. Clemens*, 87 N. Y. 72.

The assignments of A. J. and J. B. Goss were both individual, and made about the same time. She had the right to file and prove the whole amount of her claim against the estate of each of them.

Re Meyer, 78 Wis. 615, 11 L. R. A. 841.

The company's indebtedness is admitted, making A. J. Goss jointly liable without assumption.

Collyer, Partn. § 6.

From the day A. J. Goss assumed and promised to pay, it became and remained his individual obligation.

Kimball v. Noyes, 17 Wis. 696; *McDowell v. Laev*, 85 Wis. 175; *Houghton v. Mulburn*, 54 Wis. 561; *Warren v. Farmer*, 100 Ind. 598; *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 448.

Taking the new note signed J. B. Goss & Co., in the belief that A. J. Goss was the continuing responsible party therein and continued bound by such note, was not payment or substitution of debtors.

Ford v. Mitchell, 15 Wis. 808; *Matteson v.*

NOTE.—As to the rights of creditors of an ostensible partnership when no real partnership exists the above case is very important, as the question is almost a new one in the courts of this country. The case also presents other important questions concerning the distribution of assets between creditors of a firm and of its members, which are 80 L. R. A.

discussed with great fullness both in the opinions and briefs. See the somewhat similar case of *Darby v. Gilligan* (W. Va.) 6 L. R. A. 740, and note.

As to the power of a firm to assume a debt of an individual partner, see note to *Goddard-Peck Grocery Co. v. McCune* (Mo.) 22 L. R. A. 681.

Ellsworth, 38 Wis. 502, 14 Am. Rep. 766; *Hoeftinger v. Wells*, 47 Wis. 631; *First Nat. Bank v. Case*, 68 Wis. 504.

The surrender of the old note does not raise any presumption of extinguishment of the original debt.

Dan. Neg. Inst. § 1266a; *First Nat. Bank v. Case*, 63 Wis. 509.

Including the accrued interest in the new note did not affect the character of the debt or the liabilities of the parties.

Campbell v. Floyd, 153 Pa. 84.

Retirement from the firm would not release from liability for the old debts.

Jones v. Foster, 87 Wis. 296.

A. J. Goss being thus, long before and at the assignment, personally and individually liable for his debt, it was a proper claim against his estate, in common with his other personal liabilities, and stood on an equal footing.

Re Lloyd, 22 Fed. Rep. 88; *Warren v. Farmer*, 100 Ind. 593; *Alexander Bros. v. Gorman*, 15 R. I. 421; 2 Bates, Partn. § 832.

Even were this claim yet a partnership debt, and the payment thereof unassumed by A. J. Goss, there being no partnership property and no solvent partner, the individual creditors would have no priority over the firm creditors, in the distribution of the separate estate of A. J. Goss.

Curtis v. Woodward, 58 Wis. 499, 46 Am. Rep. 647; 2 Bates, Partn. § 833; *Shackelford v. Clark*, 78 Mo. 491; *Huteler Bros. v. Phillips*, 26 S. C. 136; *Harris v. Peabody*, 73 Me. 262; *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 443; *Brock v. Bateman*, 25 Ohio St. 609; *Camp v. Grant*, 21 Conn. 41, 54 Am. Dec. 321; *Higgins v. Bector*, 47 Tex. 361; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Alexander Bros. v. Gorman*, *supra*; *White v. Dougherty*, Mart. & Y. 309.

The firm, and its assets as such, ceased to exist on the day of dissolution and transfer to A. J. Goss individually; both firm and firm assets then relegated to oblivion, and A. J. Goss thereafter stood forth sole owner of the property and debtor to the creditors.

Warren v. Farmer, 100 Ind. 593; *Pool v. Seney*, 66 Iowa, 503; 1 Bates, Partn. §§ 559-824; *Ladd v. Griswold*, 9 Ill. 25, 46 Am. Dec. 443.

If this yet remained a joint obligation in virtue of the old copartnership only, there being no J. D. Putnam & Company funds, and no solvent partner, the joint creditors could come upon the separate estate of Goss *pro rata* with his separate creditors.

Bates, Partn. §§ 832, 833; *Brock v. Bateman*, 25 Ohio St. 609; *Ladd v. Griswold*, *supra*; *Shackelford v. Clark*, 78 Mo. 493; *Harris v. Peabody*, 73 Me. 262; *Huteler Bros. v. Phillips*, 26 S. C. 136; *Curtis v. Woodward*, 58 Wis. 499, 46 Am. Rep. 647; *Bardwell v. Perry*, 19 Vt. 292, 47 Am. Dec. 687; *Camp v. Grant*, 21 Conn. 41; *Re Lloyd*, 22 Fed. Rep. 88.

The rule for marshalling firm assets as between firm and individual liabilities is for the benefit and protection of the partners themselves, and has no application where there is no available property.

1 Bates, Partn. § 559; *Pool v. Seney*, *supra*; *Haggood v. Cornwell*, 48 Ill. 64, 95 Am. Dec. 516; *Shackelford v. Clark*, *supra*.

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The moment the property was deeded to A. J. Goss it became his individual property. A. J. Goss then transferred the property to J. B. Goss, by which transfers the property as to appellant ceased to be partnership property.

Re Lloyd, *supra*; Bates, Partn. §§ 547, 548; *Glenn v. Gill*, 2 Md. 1.

The right or equity of partnership creditors to share in partnership assets to the exclusion of individual creditors is derived from the rights of the partners themselves, and can be worked out only through the partners themselves.

Grabenheimer v. Rindskoff Bros. 64 Tex. 49; *Glenn v. Gill*, 2 Md. 16; Bates, Partn. § 840.

Messrs. Spooner, Sanborn, Kerr, & Spooner, for respondent:

Partnership creditors cannot prove against individual assets in competition with individual creditors.

Story, Partn. 6th ed. § 876; Parsons, Partn. 4th ed. § 833; Burrill, Assignm. 6th ed. § 179; *Peters v. Bain*, 133 U. S. 670, 83 L. ed. 696; *Davis v. Howell*, 38 N. J. Eq. 72; *Severson v. Porter*, 78 Wis. 70.

The equities of the creditors are worked out through the equities of the partners, and each partner has a right to require the firm assets to be exhausted by firm creditors before contributing from his private funds; and where there are two funds it is equitable, all things considered, to confine the two classes of creditors each to a separate fund.

Story, Partn. 6th ed. §§ 876, *et seq.*; Burrill, Assignm. 6th ed. § 180; 17 Am. & Eng. Enc. Law, p. 1199; *Hankey v. Garret*, 1 Ves. Jr. 236, note to page 241; *Emanuel v. Bird*, 19 Ala. 596, 54 Am. Dec. 200; *Harris v. Peabody*, 73 Me. 262.

At the time of the transfer from J. D. Putnam & Co. to J. B. Goss & Co. of all their assets, the first-named firm was insolvent. J. D. Putnam & Co. could not, as against their creditors, transfer their property in this way, and such creditors had the right, at their election, to treat the transfer as void and go against the assets in the hands of J. B. Goss & Co.

Cribb v. Morae, 77 Wis. 322.

Marshall, J., delivered the opinion of the court:

There are no findings of fact in these cases, but the evidence distinctly shows that the firm of J. D. Putnam & Co., on the 3d day of November, 1891, when Putnam sold out as hereafter stated, was hopelessly insolvent; that J. D. Putnam, the managing partner of the firm, was insolvent as well; that he desired to retire from the business and have its affairs closed up, and, in order that this might be done without an assignment on his part and on the part of the firm as well, which, it was thought, would imperil the private business of A. J. Goss, it was agreed that the firm should be dissolved, and that Putnam should transfer his interest in the firm property, and also his individual property, for the benefit of the firm, and that the business should be thereafter continued under some new management, in which the old debts should be assumed and paid through its operations. J. B. Goss, the son of A. J.

Goss, conducted the negotiations for the latter, but it was concluded in such a way that Putnam believed, and had a right to believe, that the son was to take his (Putnam's) place in the firm; that Putnam was simply to step out, and J. B. Goss to step in. When the transfer was made, it was in form to A. J. Goss, but it satisfactorily appears that Putnam supposed that J. B. Goss was the real purchaser, and that the business was to be carried on so as to liquidate the firm debts, and eventually relieve him from liability. The agreement of dissolution expressly stated that the business would be conducted by J. B. Goss & Co., who would settle all claims of the old partnership. It was so advertised to the world, over the signatures of J. D. Putnam and A. J. Goss; J. B. Goss managing the whole affair. At this time the legal title to the property was in A. J. Goss, but he soon afterwards conveyed it to J. B. Goss, who thereafter held it as the real owner of the business, though the same was always carried on under the name of J. B. Goss & Co., and all the old creditors, pursuant to the agreement made at the start, as they presented their claims, were recognized as creditors of J. B. Goss & Co., down to the time of the assignments of J. B. Goss and A. J. Goss, hereafter mentioned. Through the confusion surrounding the sale, by reason, among other things, of the claim on the part of Putnam that J. B. Goss was the purchaser and came in and took his place, while the title was, nevertheless, at first made to A. J. Goss; that the business was, however, from the start, advertised as that of J. B. Goss & Co.; and that, soon after the new arrangement, the property was actually conveyed to J. B. Goss; and that it continued to the end to be administered by him as J. B. Goss & Co., and the old debts to be recognized as the debts of J. B. Goss & Co., while there was no firm in fact,—it may be clearly seen that the real purpose on the part of Putnam was to turn over his property for the benefit of the creditors of the partnership; that this was well known to both A. J. and J. B. Goss; that J. B. Goss immediately took charge of all the assets of the concern, and administered them according to such understanding; that A. J. Goss made the title over for the same reason, and for the purpose of having the partnership business settled up without involving him in his private enterprises,—to have it so run along, pending the settlement, that all the old debts might become really the debts of his son, while the delusion was kept up that there was a firm, J. B. Goss & Co., and that the "& Co." stood for A. J. Goss. In short, it is clear that J. D. Putnam, J. B. Goss, and A. J. Goss intended, in all they did, to have the business and the assets of J. D. Putnam & Co. devoted to the payment of the debts of the old partnership and of the new management, and all their acts are consistent with such intention, and not with any other, though, of course, J. D. Putnam was not a party to the scheme by which it was attempted to convert the liabilities of J. D. Putnam & Co. into the personal liabilities of J. B. Goss.

It is quite clear that while, after the Putnam sale, the business was run by J. B. Goss as J. B. Goss & Co., and though he was at law the actual owner of the property, A. J. Goss was, by his consent, so held out to creditors generally as a partner; that all persons who had dealt with the old firm and constituted its creditors, and all who dealt with the new firm as well, had a right to, and did, consider that the only change that had taken place was that J. D. Putnam had stepped out, and that J. B. Goss had stepped in, and that the debts of the old firm had been assumed by, and became the debts of, the new firm. We must assume, in the absence of evidence to the contrary, though the evidence fairly establishes the fact, that all persons who did business with J. B. Goss & Co. supposed that there was a firm in fact as well as in name, and that the "& Co." stood for A. J. Goss. The ostensible firm actually assumed, by agreement with the creditors, nearly all the debts of the old concern, and among them the debt of Lottie Thayer, but did not so assume the debt of Davies. Such ostensible firm also incurred other obligations. It was insolvent from the start, and, in the course of events,—in effect by the act of J. B. Goss,—made an assignment for the benefit of creditors; and A. J. Goss, being insolvent, made an assignment for the benefit of creditors as well. There was then in fact no firm, though there was an ostensible firm; no firm assets, strictly so called, because there was no firm in fact; yet there are assets that were owned and used in the business of the ostensible firm of J. B. Goss & Co., and that passed into the possession of the assignee of J. B. Goss,—hence assets of the ostensible firm; there is no living, solvent partner.

Now, in this situation, can the creditors of J. B. Goss doing business as J. B. Goss & Co., who are so circumstanced as to be entitled to hold J. B. Goss and A. J. Goss liable as members of an ostensible firm,—and all the creditors, at least of the new concern, including those having claims against the old firm that, by arrangement with them, have been assumed and made debts of J. B. Goss & Co., are so circumstanced in fact,—prove their claims *pari passu* with the individual creditors of A. J. Goss in his assignment? Also, can the creditors of the firm of J. D. Putnam & Co. so prove? This presents interesting questions of law, some of which have not heretofore been presented to or decided by this court,—questions upon which there is such conflict of authority in this country that the true rule to be adopted has not been arrived at without difficulty, and then not with the unanimous decision of the court, which is to be regretted. Nevertheless, after careful consideration of the state of the law as held by the courts of this country and of England as well, we have, as we believe, reached a conclusion thoroughly grounded in the well-recognized principles of equity jurisprudence, which should be applied in the progressive spirit that ever has and should ever characterize the growth and application of such principles. They should not only not be lost sight of, but they should not be fenced in and restricted within such narrow

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limits as to lead to a suspicion of their correctness, but should be applied on such well-defined lines as to leave no doubt in respect to their true character and scope.

There are several propositions of law that apply which are well established,—too well to need to be more than stated,—among which are that the assets of an insolvent partnership, in insolvency proceedings, must be applied first to the payment of the partnership debts; that, generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner; that the fixed rule is that joint estate must go to joint creditors, and separate estate to separate creditors, though the former may prove *pari passu* with separate creditors when there is no living solvent partner and no partnership assets. Now, in this case there is no solvent partner. J. D. Putnam, J. B. Goss, and A. J. Goss are all insolvent. So, keeping in mind the above-stated propositions of law, the vital question is: Are there any partnership assets to which appellants can resort? If there are such, then the foundation stone upon which they construct their claim of right to share *pari passu* with the individual creditors of A. J. Goss disappears.

On that subject we shall not attempt to harmonize the large number of cases that can be found in this country. The simple question of whether, when there is an ostensible firm by holding out to creditors generally, the property of such firm is to be considered, in equity, joint property for the administration thereof in insolvency, the same as if such property belonged to a firm in fact,—is the key to the situation. That it ought to be so considered is, we assume, too clear for argument; that is to say, if A and B do business with persons generally as A & Co., and incur liabilities to such persons, who deal in good faith, believing that there is a firm in fact as well as in name, and under such circumstances that they have a right to believe it is composed of A and B, and the business becomes insolvent, the property of the ostensible firm should be considered, to all intents and purposes, in regard to the administration of the business in insolvency under the control and direction of a court of equity, the same as if they were partners in fact. The doctrine that estops B from saying that he is not a partner of A at the suit of the creditors of the ostensible firm should estop A from holding that the property is his individual property, to the prejudice of those who dealt with the firm as a firm in fact, and should estop the creditors of the ostensible firm, in the case of the bankruptcy of such firm, from resorting primarily to the individual property of the members of such firm; in short, should work effectually to compel liquidation in all respects the same as if the members of such firm were just what they seem to be. This is what the doctrine of estoppel is for; that is what equity is supposed to accomplish,—to prevent fraud and promote justice between man and man in the administration of human affairs. And we are therefore prepared to find that such is the law as substantially declared by the court of appeals in chancery of England.

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In *Re Rowland & Crankshaw*, L. R. 1 Ch. 421, the precise question here under consideration was presented. The business was conducted in the name of Rowland & Co. Crankshaw was held to be the ostensible partner, in a contest to determine whether the property should be administered in bankruptcy as joint property of Crankshaw and Rowland, partners, or as the individual property of the one who was the actual owner. The opinion of the court, which, being short, can best be stated by quoting it in full so far as relates to the particular question under consideration, is by Lord Cranworth, as follows: "In the administration of bankruptcy, it has been the object from the earliest times to apportion the assets, as fairly as possible, between the joint and separate creditors. There is found much difficulty in doing this satisfactorily, but some rules have been clearly laid down; for instance, that the joint property pays the joint creditors, and the separate property pays the separate creditors. Now, what is said here is that this estate, though said to be joint, is in fact separate. These two gentlemen traded under the name of Rowland & Co., and tradesmen supplied them with large quantities of goods, and thus they became bankrupt; and now it is said that they were not partners, and that the real arrangement between them was that everything belonged to Crankshaw. That is no reason; and as Crankshaw suffered Rowland to trade in the name of the firm, any persons trading with him are entitled to say that Rowland & Co. are the persons with whom they dealt, and the goods are joint goods." This is a most concise statement of the law as held by the English court of chancery. The meaning is too plain and unmistakable to leave any room for discussion, and we find that the rule so tersely stated has been adhered to, and repeatedly approved, in subsequent cases, in language rather tending to extend than restrict the principle involved. In *Ex parte Sheen (Re Wright)*, L. R. 6 Ch. Div. 385, the question was again before the court, where the circumstances were that there was no general holding out, and the court held that where there is no ostensible partnership by a holding out to creditors generally, but only a holding out to two or three creditors, the facts are not sufficient to make the property of the alleged ostensible firm joint estate. This, though not referring to, inferentially approves, *Re Rowland & Crankshaw*. In *Ex parte Hayman (Re Pulsford)*, L. R. 8 Ch. Div. 11, the question again came before the court of chancery, on appeal from the chief judge in bankruptcy, and *Re Rowland & Crankshaw* was expressly approved. The case so clearly covers the two cases under consideration that we quote liberally from the opinion, after stating the facts. Such facts are as follows: Prior and up to August 31, 1875, Hayman, Catford, and Pulsford carried on business as Hayman, Pulsford, & Co. On that date the firm was dissolved, and notice was published stating the fact. At the same time a letter was sent to each of the persons with whom the firm had done business, stating the fact of dissolution, and that thereafter the busi-

ness would be carried on by Thomas Pulsford under the style of Pulsford, Son, & Co. Thereafter the business was so conducted. Tom Pulsford, the son of Thomas Pulsford, took an active part in conducting the business up to the time the insolvency occurred, when Thomas Pulsford filed a petition in bankruptcy; and on the suggestion that, on account of the way the business had been conducted, it might be held that the father and son were partners, a petition was also filed by them as joint traders. The creditors resolved upon a liquidation by arrangement, and such resolution was registered. Hayman, a separate creditor of the father in respect to matters outside the firm of Pulsford, Son, & Co., appealed from the order for a liquidation of the business as that of a firm, on the ground that there was no partnership. He prevailed, and the registration was canceled, and the decree was not appealed from. Thereafter the father and son signed a declaration in insolvency, upon which Ravenscroft, a creditor, presented a petition alleging that they had treated father and son as partners under the firm name of Pulsford, Son, & Co., on which an adjudication was made against them by consent. Hayman then appealed to the court to annul the adjudication. On this application, following *Re Rowland & Crankshaw*, the application was dismissed on the ground that, though no actual partnership had subsisted between father and son, yet the son had been held out as a partner to the petitioning creditor to such an extent as to enable him to maintain the adjudication. This decision was not appealed from. Hayman then applied to the court for an order declaring that all, or such portion as the court should think proper, of the estate which appeared in the acts of the bankrupts or either of them as joint estate, formed part of the separate estate of the father, and for a direction that the trustee should treat the same accordingly as separate estate of the father. Hayman was the only separate creditor; that is, creditor outside those of the business of Pulsford, Son, & Co. On the hearing, the evidence showed that substantially all the creditors did business with Pulsford, Son, & Co. as a firm consisting of the father and son, though it appeared that the father was the actual owner of the business, and that there was no firm in fact. Hayman's application was refused, and he appealed. On the hearing of this appeal in the chancery division of the high court of justice, James, L. J., propounded to appellant's counsel the following interrogatory: "If I go to a shop, and find the names Thompson & Jones on the door, and I go in, and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?" to which answer was made in effect: "That would not change the nature of the assets, and make property which belonged to the father in fact the joint property of father and son,"—just as it is claimed in this case, it will be observed. Appellants contend that the fact of holding out sufficient to constitute an ostensible firm of J. B. Goss & Co. will not change the nature of the assets so as to make the in-

dividual property of J. B. Goss joint property, in equity, of J. B. Goss & Co. The positions are identical. In the opinion of the court this is answered by James, L. J. After reciting the facts in *Re Rowland & Crankshaw*, as in Lord Cranworth's opinion in that case, he says: "Every point of that judgment applies to this case, with this single exception, which fact is in favor of the decision of the registrar, that, instead of the words used being '& Co.,' which is an ambiguous term, and might mean anybody in the world, the words are 'Pulsford, Son, & Co.' But it is said that this conclusion will work hardship to the appellant, who is a creditor of the father alone. I think that is only one of those misfortunes which occur to persons who deal with others who afterwards become insolvent and become bankrupt, having partners. The hardship would have been exactly the same upon Hayman if there had been a real partnership created by a formal instrument. The same consequences would then have happened as happen where there is only an ostensible partnership." It will be distinctly noted at this point that the court makes no distinction in the administration of estates of an ostensible and an actual firm in bankruptcy. The Lord Justice proceeds: "The rule has been established that joint creditors take the joint estate, and separate creditors take the separate estate; and you only have to consider what is joint and what is separate estate; and you must apply the rule independently of the hardship. The supposed hardships are those which it may inflict in any particular case. We can only apply the fixed rule that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors."

The reasoning of these cases is, in our opinion, unanswerable, and we deduce therefrom the principle of law that, if a persons allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact, the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in competition with the creditors who have trusted the two as partners and the business as that of the two. To the same effect is *Van Kleeck v. McCabe*, 87 Mich. 599. Applying the law thus stated to the question under consideration, the conclusion is easily reached that, while there are no firm assets at law of the ostensible firm of J. B. Goss & Co., all the property used by J. B. Goss in conducting the business, in equity, is the joint property of such ostensible firm, and to it all the creditors of such ostensible firm can resort, the same in all respects as if there had been a firm in fact.

This effectually disposes of the appeal of appellant Lottie Thayer, though it is as effectually ruled by the law applicable to the Davies appeal, as will appear by what follows. Appellant Davies never became a cred-

itor of J. B. Goss or of J. B. Goss & Co., by any agreement to which he was a party; and, while his appeal presents the question of whether there is any joint property to which he can resort, such question involves a different question from the one discussed as particularly applicable to the Thayer appeal.

We must start the discussion of the Davies appeal with the propositions of law—in respect to which, though there is some conflict, they are too well established by the great weight of authority to be questioned by this court—that partnership creditors have no lien on the partnership assets independent of the equity of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members; that, so long as the equity of the individual members of the partnership exists to have the partnership property applied to the partnership debts, the creditors have the equity to compel its enforcement; that if one member sells his interest, bona fide, to his copartner or a stranger, without in any way retaining his equity to have the partnership creditors paid out of it, the joint property is thereby converted into the individual property of the purchaser. The question to be determined is, in view of the facts that the sale was made by Putnam in consideration of the debts of the partnership being paid; that the firm was insolvent at the time; that the whole transaction was really made by him to relieve himself from the partnership liability; that the property was put into the possession of J. B. Goss for the purpose of continuing the same business with the same assets, and effecting a settlement of the old partnership affairs,—all of which clearly appears, can it be held that the equitable title to the property was changed so as to affect the equitable right of Putnam to have the creditors of the old firm paid out of it, or were the equitable rights of the outgoing partner and the creditors preserved by reason of the facts, and the assets in the hands of J. B. Goss impressed with a trust to carry out the intention of the parties? In discussing these questions, full effect should be given to the significant controlling words in the rule correctly stated in *Willis v. Thompson*, 85 Tex. 301, “bona fide,” without in any manner retaining the lien. In *Conroy v. Woods*, 18 Cal. 628, 73 Am. Dec. 605, it was held that where a sale is made by one partner to his copartner, and the consideration for the sale is the payment of the partnership debts, the sale is not “bona fide,” within the meaning of the rule, so as to cut off the equity of the vendor to have the property applied to the payment of the partnership debts. Very few cases can be found that go as far as the California court on this subject, except in the New Hampshire court, which does so, holding that the creditor has an equitable interest independent of the equity of the individual partner. In *Ex parte Cooper*, 1 Mont. D. & De G. 358, and *Ex parte Williams*, 11 Ves. Jr. 3, it is held that where an outgoing partner sells bona fide to his copartner, and takes for his consideration an agreement that the purchaser shall pay the

debts, no equitable interest in the property is retained. To the same effect are *Stanton v. Westover*, 101 N. Y. 265; *Fulton v. Hughes*, 63 Miss. 61; *Dimon v. Hazard*, 32 N. Y. 65, and many other cases that might be cited. In *Darby v. Gilligan*, 38 W. Va. 246, 6 L. R. A. 740, it is held that where a firm is insolvent, if a partner sells out to his copartner, and the purchaser agrees to pay the firm debts, the sale cannot be considered bona fide so as to cut off the equity of the firm creditors to be preferred; and to the same effect is *Olson v. Morrison*, 29 Mich. 395. In the latter case Olson and Jones were partners. Olson sold out to Morrison, the consideration being that the vendee should pay the debts of the firm. It sufficiently appears that the firm was insolvent. The vendee neglected to comply with his agreement, and the creditors, joining with the vendor, brought suit to compel performance of the agreement, and to subject the property to the payment of the partnership debts. Held, that the agreement to pay the debts as consideration for the transfer was a sufficient recognition of the equitable lien of the partnership creditors, tracing the same through the equity of the vendor, to enable them, joining with him, to enforce such equity. In *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683, it was held that, as between the firm and its creditors, the title of the former to the joint property is not divested by any separate transfers to outside parties for the individual benefit of the respective vendors, and that, when there has been no transfer by the firm as such, conveying the corpus of the property, and it remains *in specie*, though transferred by the separate transfers of the individual members, it may yet be followed and reached in the hands of those claiming under such separate transfers, by creditors of the firm. This is upon the theory that neither partner separately has any interest in the corpus of the property; that his interest is limited to his proportionate share of what remains after a settlement of all partnership obligations and an accounting between himself and his copartner. A distinction is drawn in this case between a bona fide sale by one of a partnership to two of his copartners without reservation, which, under the prevailing rule of *Ex parte Ruffin*, 6 Ves. Jr. 119, operates to liberate the assets from the partnership liability, and a sale made by one member of a firm of more than two, to one of the partners, or to an outside party. In that class of cases the New York courts have uniformly held, since *Menagh v. Whitwell*, that the partnership effects are not liberated from the partnership liability. In this case, if it is held that the sale was really to J. B. Goss, under the New York rule the corpus of the property never passed by any act of the firm, so as to change the equitable title in respect to creditors existing at the time of the sale. The trend of the New York cases since *Menagh v. Whitwell* has been to extend the rule which preserves the equity of the creditors in case of the sale by one of the members of an insolvent firm, the purchaser assuming the partnership obligations in place of the outgoing partner, whether such sale is to a copartner

or otherwise. This clearly appears by the following from the opinion in *Bulger v. Rosa*, 119 N. Y. 465: The equity of the firm creditors cannot be defeated by any attempted conversion of the assets of the insolvent firm into the individual assets of one of the partners, through a transfer by one partner of his interest therein to the other. In such a case, till the assets come to the hands of a bona fide purchaser the same can be reached by the partnership creditors. To the same effect are *Nordlinger v. Anderson*, 123 N. Y. 544, and *Peyser v. Myers*, 135 N. Y. 599. In the latter case there had been a change in the firm some time prior to the assignment for the benefit of creditors, the new firm not having made any express contract to pay the old firm debts. There were two sets of creditors, and, in discussing the subject of their equitable rights, the court said: "The priority of the lien of firm creditors is not defeated by a transfer by an insolvent firm of the firm assets to one or more of the partners, nor can it be affected, as we conceive, by any mere change in the personnel of the firm, as by the withdrawal of one partner from the firm or the introduction of a new member." See also *Phelps v. McNeely*, 66 Mo. 554, 37 Am. Rep. 878, where it was held that if a partner sells out his interest in the firm to his copartner, who agrees to pay the debts, the firm being at the time insolvent, the equities of the creditors are preserved. The evidence in that case tended to show that there was no property, other than that formerly belonging to the partnership, out of which the firm debts could be paid; but it does not clearly appear whether the court rested its decision on the ground that there was an implied promise under the circumstances to pay the firm debts out of the partnership assets, or on the ground that the insolvency of the firm impeached the bona fides of the transaction. The court went further, and held that, notwithstanding the vendee of the property had turned the same out to secure his individual creditors, who had received it as security in good faith, it could, nevertheless, be reached by the partnership creditors; but this was subsequently overruled in *Re Edwards & Wigginton's Estate*, 123 Mo. 426, 29 L. R. A. 681.

We might go on at great length, reviewing decisions on this subject, and cite numerous authorities where outgoing partners have been held to retain their equity to have the firm debts paid, and the rights of the creditors to the assets which have come under the control of equity have been worked out through the equity of such partners. Probably there are few questions upon which there is such a conflict of authority as the one under consideration; but nearly all are in harmony with the principle that if the bona fides of the transaction are impeached, or if the equity is retained by agreement, express or implied, then the creditors can enforce such equity. The conflict chiefly arises in regard to what circumstances or facts are sufficient to impeach the good faith of the transaction, and in respect to what is sufficient to show a contract that the partnership debts shall be paid out of the partner-

ship assets, and impress a trust upon such assets for that purpose.

By the mere fact of the dissolution of a partnership by one member selling out to his copartner or to a stranger, the purchaser or purchasers agreeing, as consideration for the purchase, to pay the partnership debts, the firm being insolvent at the time, no presumption of a bona fide agreement arises which will operate to change the equitable title of the property; and such agreement must clearly appear to exist inconsistent with the continuance of the equitable rights of the partner, and, through him, of the partnership creditors; else it is retained. *Lindley, Partn.* 699. If the circumstances are such as to show that the property was merely transferred for the purpose of winding up the affairs of the concern, there being no express agreement that the property shall be exclusively that of the vendee, it will, in case of bankruptcy, be distributed as joint estate. *Id.* 699, 700. This is upon the presumption that such was the intention of the parties. The presumptions to be indulged in, in such cases, rather go to support an implied agreement to do what in equity and good conscience the parties ought to do. In *Sedam v. Williams*, 4 McLean, 51, Fed. Cas. No. 12,609, and *Marsh v. Bennett*, 5 McLean, 117, Fed. Cas. No. 9,110, it was held that the equity was retained to have the partnership creditors paid out of the partnership assets, and that such assets were impressed with a trust for that purpose by virtue of an express agreement. In *Re Dawson*, 59 Hun, 239, which does not appear to have been appealed from or criticised, it was held that where one member of a firm retires, selling out his interest to a third party who continues the business with the remaining partner, with whom he enters into partnership, and the partnership assumes the debts of the previous firm, and such new firm becomes insolvent, and makes an assignment for the benefit of creditors, the property transferred to the new firm becomes charged in equity with a trust for the payment of the debts of the old firm, which the outgoing partner may enforce. Such holding is certainly equitable and just when applied to a state of facts, as in this case, which leaves no room for doubt but that it was the intention of all the parties dealing with the property to preserve and administer the partnership assets in the nature of a trust to liquidate the old debts; and to this extent we expressly approve of and apply it here.

This does not in the least trench upon the rule that if a partner sells out, bona fide, his interest in the partnership assets and business, without in any manner retaining his equity to have the partnership creditors paid out of such assets, he waives his equity in that regard, but is perfectly consistent with it. If the agreement was express that the debts shall be paid out of the assets, then the equity is retained by express contract; if the circumstances of the transaction show that the contemplation of the parties was that the debts should be so paid, then the equity is retained by implied agreement; and the assets are, in the administration of

the affairs of the purchaser in insolvency, as effectually impressed with a trust in favor of the vendor, and, through him, the creditors of the old partnership, in the one case as in the other. The circumstances involved in these appeals point unerringly to the conclusion that it was the intention of J. D. Putnam, J. B. Goss, and A. J. Goss that the new concern of J. B. Goss & Co. should continue the old business with the same assets, for the primary purpose of winding up such business and liquidating the debts theretofore contracted in it out of the old assets, so far as practicable. Hence the court below, sitting as a court of equity in the administration of the affairs of A. J. Goss and J. B. Goss, was warranted in concluding that the property of J. B. Goss is impressed with a trust to carry out the intention of all the parties concerned in the dissolution of the old firm and formation of the new concern of J. B. Goss & Co., that the debts of the old firm should be assumed by the new concern, and be paid out of the property turned over to it and the operations of the business, so far as this can be done with due regard to the equities of the creditors who trusted such new concern.

On the subject of whether the two sets of creditors—those of the old firm of J. D. Putnam & Co., and those of the ostensible firm of J. B. Goss & Co.—can all prove in the insolvency proceedings of J. B. Goss, though that subject need not be decided here, we cite *Ex parte Chuck (Re Starkey & Whiteside)*, 8 Bing. 469, an early English case which covers the subject; and, so far as we are able to find, it has never been criticised or overruled. The facts were that S. & S. had been doing business for some time as copartners, and were, as such, indebted to various persons. They took in W., and thereafter the business was conducted by S., S. & W., as copartners. The new firm became bankrupt, and there were creditors of both the old and the new firm as well. The court held substantially as follows: "We are of the opinion that the creditors of S. & S. and those of S., S. & W. should be admitted to prove *pari passu* upon the joint assets of the new firm." To the same effect is *Re Frow, Jacobs, & Co.'s Estate*, 78 Pa. 459. Foresman sold out his interest in an existing firm having creditors, to the remaining members, who agreed to pay the debts. The vendees continued business as a firm with the same assets for a time, and finally made an assignment for the benefit of creditors. Held, that the two sets of creditors—those of the old firm and those of the new firm—might prove *pari passu* against the assets of the new firm; that Frow, Jacobs, & Co. were liable for the debts as partners in the firm of Foresman & Co., which they took upon themselves when Foresman retired from the firm and they continued the business. When Foresman sold out, the purchasers intended to continue the business. They took all the assets, and assumed the debts. The assets became the capital of the new firm, and the old debts became its debts. Under these facts, the court readily reached the conclusion that the creditors of the old and of the new firm should stand on an equal

footing in the settlement of the new firm in bankruptcy. To the same effect are, *Re Dawson*, 59 Hun. 389; *Shedd v. Bank of Brattleboro*, 82 Vt. 709; *Filley v. Phelps*, 18 Conn. 294; and *Wright v. Carman*, 47 N. Y. S. R. 126. Held, in the latter case, and in *Re Frow, Jacobs, & Co.'s Estate*, *supra*, and *Re Dawson*, *supra*, that the debts of the old became, by reason of the facts, the debts of the new firm. To the same effect is *Peyser v. Myers*, 185 N. Y. 599, where it is distinctly held that if there is a change in the personnel of an insolvent firm, and it subsequently makes an assignment for the benefit of creditors,—there being an agreement, express or implied, at the time of the change, that the new firm shall assume and pay the old debts,—the equity of the old creditors is equal to that of the new. There was no express agreement in that case, but the court held that there was an implied agreement.

This effectually disposes of all the questions presented, and leads to the conclusion that neither of the appellants can prove *pari passu* with the individual creditors of A. J. Goss in his assignment, but they can both prove *pari passu* with all the creditors of the ostensible firm of J. B. Goss & Co. in the assignment of J. B. Goss.

This opinion has been quite lengthy, but it may be well justified from the importance of the questions involved. In reaching the conclusion arrived at by the majority of the court, we resort to cases merely to determine what well-defined principles have been established applicable to the facts of the appeals before us. Having come to a satisfactory conclusion in that regard, we endeavor to broadly apply them so as to satisfy effectually the ends of justice, which are obviously the legitimate ends for which such principles have been worked out in the growth of equity jurisprudence. By so doing, the assets of J. B. Goss, held and used by him as those of the ostensible firm of J. B. Goss & A. J. Goss, will be marshaled and administered along definite lines, without confusion or uncertainty as to the rights of the various sets of creditors and parties interested.

In order, now, that the principles of equity jurisprudence here applied may definitely appear, we recapitulate as follows:

1. In the administration of the affairs of a partnership and of the individual members thereof, the fixed rule must be applied that joint estate goes first to joint creditors, and separate estate to separate creditors, with the exception that where there are no partnership assets, and there is no living solvent partner, partnership creditors may prove with the separate creditors of a partner in the settlement of his estate *pari passu*.

2. Partnership creditors have no "lien," strictly so called, on partnership assets, but must work out their preference over the creditors of the individual members of the partnership through the equities of such members.

3. If one of a partnership sells out, bona fide, his interest to his copartner or to another, without in any way retaining his equity to have the partnership creditors paid

out of the assets, the property is converted into the individual property of the purchaser, free from all the equities of the seller, even if the purchaser, as the consideration for such purchase, agrees to pay the firm debts; otherwise, if the purchaser agrees expressly or impliedly to apply the assets to such purpose.

4. The word "assets," used in No. 1, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts, under the well-defined principles for the administration of the affairs of insolvent partnerships under the direction of a court of equity.

5. Those who deal with persons representing themselves to creditors generally as partners in a certain business are entitled to have the property used in such business applied to the payment of the debts incurred in such business, in preference to the individual debts of the members of the partnership, and the ostensible member of such partnership is likewise entitled to have the assets of the ostensible firm so applied.

6. If a member of an insolvent firm sells out with the understanding that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts, and to wind up the old partnership concern, by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues.

7. If one of the members of an insolvent firm sells out his interest to an outside party or to his associates, and thereby a new firm is formed, which assumes the debts of the old firm, the intention of all the parties being that the new firm shall continue the business in substantially the same way, with substantially the same assets, and that the old debts shall be paid out of such business, and such new firm subsequently makes an assignment for the benefit of creditors, in the administration of the assignment the creditors of the old and the new firm may prove their claims *pari passu*, and be preferred over individual creditors of the members of such new firm.

The orders appealed from are affirmed, and the causes remanded for further proceedings according to law.

THAYER v. HUMPHREY.

Newman, J., dissenting:

Lottie Thayer was a creditor, for money lent, of the milling copartnership of J. D. Putnam & Co. The firm comprised J. D. Putnam and Alfred J. Goss. It was afterwards dissolved by mutual consent. The business was thenceforward carried on, at the same place, under the name of J. B. Goss & Co., who assumed all the debts of J. D. Putnam & Co. The firm property of J. D. Putnam & Co. was conveyed to James B.

Goss, who alone carried on the business under the name of J. B. Goss & Co. Thayer took the note of J. B. Goss & Co. for her claim against J. D. Putnam & Co., and surrendered the old note. She afterwards recovered a judgment on her new note, against James B. Goss and Alfred J. Goss, in form joint and several. The trial court found that Alfred J. Goss was not a partner with James B. Goss in the firm of J. B. Goss & Co., but that he was liable to Thayer by reason of his being held out to her as a partner. Both Alfred J. Goss and James B. Goss are insolvent, and have made assignments for the benefit of their creditors. Alfred J. Goss assigned to H. L. Humphrey, the respondent; James B. Goss, to one Weld. The assignment of James B. Goss includes all that remains of the property which was received of J. D. Putnam & Co. No mention is made in either assignment of partnership property. J. D. Putnam, also, is insolvent. Thayer filed her claim, based on her judgment, with the respondent. It is stipulated that her original claim has become merged in this judgment. The respondent filed objections to the claim. The court held that she must first go against the partnership assets, and could not go against the individual assets of Alfred J. Goss until his separate creditors were paid. From this order Thayer appeals.

The rule is fully settled, in the administration of the estates of insolvents, that the partnership debts are primarily payable out of the partnership assets, and are entitled to a preference over the individual debts of the insolvent; and so, in the reverse case, the individual debts are primarily payable out of the individual assets of the insolvent, and possess a like preference. The surplus only, after satisfying such priorities, can be reached by the other class of debts. For this purpose the joint estate and the separate estate of the insolvent constitute separate funds, to be administered separately. Story, Partn. 7th ed. § 376; 17 Am. & Eng. Enc. Law, p. 1202, and cases cited in note 1; T. Parsons, Partn. 4th ed. § 383; note to *McDulloh v. Dashiell*, 18 Am. Dec. 271; *Murphy v. Neill*, 49 U. S. 8 How. 414, 12 L. ed. 1185; *Curtis v. Woodward*, 58 Wis. 499, 46 Am. Rep. 647. There are certain exceptions to this rule, which go to prove and ascertain it. One such exception, which is as well settled as the rule itself, is the case where there are no partnership assets to be administered, and no living solvent partner. Where there are no partnership assets to be administered, and no living solvent partner, then the joint creditor is entitled to share *pari passu* with the individual creditors of the separate estate. Story, Partn. 7th ed. § 378; 17 Am. & Eng. Enc. Law, p. 1205, and cases cited in note 4; *Curtis v. Woodward*, *supra*; T. Parsons, Partn. 4th ed. § 384, note 1.

In the instant case there was, in fact, no partnership. There are no partnership assets. There is no living solvent partner. The case seems to come clearly within the exceptions to the rule as above stated. There was no partnership. The trial court so decided, and that is conclusive here. The fact that there was no partnership is absolute

proof that there are no partnership assets. It is undisputed that J. D. Putnam, Alfred J. Goss, and James B. Goss, all the debtors involved in the controversy, are all and each insolvent. J. D. Putnam conveyed all his interest in the partnership property of J. D. Putnam & Co., in November, 1891, to Alfred J. Goss. Alfred J. Goss conveyed the entire property to James B. Goss. James B. Goss assigned the entire property for the benefit of his creditors. Alfred J. Goss has assigned all his property for the benefit of his creditors. There is absolutely no property in existence which any one claims to be partnership assets of James B. Goss and Alfred J. Goss. To require the petitioner to pursue for her remedy any such supposititious partnership assets is to mock her with the delusive promise of a remedy which must inevitably disappoint the expectation which it fosters.

The circumstances that the property which James B. Goss assigned for the benefit of his creditors is in part, the same property which was once the firm property of J. D. Putnam & Co., is of no significance. No equity of the creditors of J. D. Putnam & Co. followed this property into the hands of James B. Goss. There is no hint of bad faith in the transfer, or that it was made in contemplation of insolvency. The rights of creditors in the assets of a partnership must be worked out through the equities of the partners. If the partner has no right, the creditor has none. The right of the partners is, in effect, a right to share in the surplus left after discharging all the firm debts. Each partner has the right to require all the firm assets to be applied to the payment of the firm debts; for so, only, can his liability *in solido* for them be diminished. But this right of a partner is property which can be sold and transferred. It is effectually sold and transferred by a sale and transfer, in good faith, of all his interest in the firm property, whether to his partner or to a stranger. Such a sale and transfer dissolves the partnership, and extinguishes every right which the retiring partner had in the firm property, including the right to require it to be applied to the payment of firm debts, unless such right is preserved by the terms of the sale. Story, Partn. 7th ed. §§ 307, 358, 360; Bates, Partn. §§ 528, 540, 550-553; T. Parsons, Partn. 4th ed. §§ 178, 246, 248, 294, note 1 on page 330, and cases cited; Collyer, Partn. Perkin's ed. §§ 894, 904, 905; Lindley, Partn. Am. ed., with Audenreid's notes, 1888, §§ 407, 765; 35 Cent. L. J. 418, and cases cited in note 3 on page 420; 17 Am. & Eng. Enc. Law, pp. 970-975, and cases cited in note 3; *Case v. Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Fitzpatrick v. Flannagan*, 106 U. S. 648, 27 L. ed. 311; *Huiskamp v. Moline Wagon Co.* 121 U. S. 810-823, 30 L. ed. 971-975; *Baker's Appeal*, 21 Pa. 76, 59 Am. Dec. 753; *Ladd v. Grinstead*, 9 Ill. 25, 46 Am. Dec. 443; *Re Lloyd*, 22 Fed. Rep. 88; *Saunders v. Reilly*, 105 N. Y. 12, 59 Am. Rep. 472; *Davis v. Delaware & H. Canal Co.* 109 N. Y. 47; *Robb v. Mudge*, 14 Gray, 534. The effect is the same where the remaining partner or other purchaser assumes the debts of the firm. This

is a personal contract only, and leaves the retiring partner in the condition of an unsecured creditor. Bates, Partn. § 528; Story, Partn. 7th ed. 559; 17 Am. & Eng. Enc. Law, p. 975; *Robb v. Mudge*, *supra*. Such sales of a partner's interest in firm property are presumed to be valid. *Kimball v. Thompson*, 18 Met. 283. The authorities are nearly uniform. Only a few cases are out of line.

These considerations seem to show sufficiently that there are no joint assets of Alfred J. Goss and James B. Goss, and so that the petitioner has the right to go against the individual assets of either in the hands of their respective assignees. The case properly ends here. This covers all the issues tried and on which there was evidence. Whatever else is decided is in the absence of necessary parties, and is based upon inference and conjecture, instead of evidence. The property which the court says is subject to the petitioner's claim, as the joint property of the two Gosses, is now actually in the possession of the assignee of James B. Goss for the benefit of his individual creditors. It is held for them, and is claimed by them. But they have not been represented in this proceeding, nor their rights investigated. No opinion of their rights, volunteered in their absence, is binding on them. When the petitioner presents her claim for proof against these assets, she meets a fresh contest with these new creditors. And it may not be so easy to put them down, being present, as when they are absent. It is easy to put the absent in the wrong. *Les absents ont toujours tort*. Whether she has a remedy against those assets can only be known at the end of that contest.

It may be true—it is not necessary to question it—that Alfred J. Goss is estopped, as against this petitioner, to deny that he was a partner with James B. Goss, and that there were, in fact, partnership assets. But this does not aid the petitioner, nor bring her nearer to a remedy against these assets, until it is also established that James B. Goss and his individual creditors are bound by a like estoppel. That cannot be established in this proceeding, because neither the necessary parties are before the court, nor the evidence by which it is to be established. And there is great danger of doing the petitioner an irreparable wrong if, with so little knowledge of the actual situation, her remedy is limited by the court to those assets; for, at the best, it is but a desperate chance. It is said that James B. Goss is also estopped to deny the alleged partnership and the joint ownership of the property used in it. But the court has not listened yet to James B. Goss's side of that question. It is assumed, without proof, that he permitted Alfred J. Goss to hold himself out as a partner, and the property and business as partnership property and business. Certainly, the other side of this question should have an opportunity to be heard before any person's rights should be limited or destroyed by a decision of it. In truth, it is neither alleged nor shown—as, indeed, it could not well be, in the absence of proper parties—that James B. Goss did in fact hold out Alfred J. Goss as a

partner, or as having an interest in the property or business; while it does appear that he conducted the business alone, and had the sole ostensible possession of the property and business, while Alfred J. Goss lived in another city, miles away, and had no apparent connection with the business. Apparently the principal part, if not all, of the ostensible property used by James B. Goss in conduct of the business, was the mill itself. It may be a question of some difficulty whether the bare occupation of the mill for the purpose of carrying on the business, without a positive representation of ownership, could estop any person to claim ownership of it according to the true recorded title. Mere occupation of real estate, by carrying on a business in it, must create a very slight, if any, presumption that the occupant is the owner; for, perhaps, a majority of the business of the country is carried on in rented premises. It has not been claimed before, so far as known, that the mere occupancy of real estate by a business created any presumption against its owner that he was a partner to the business being carried on in his property; and no case has been found which holds that the mere occupancy of real estate by a business creates any estoppel against the owner to claim his own.

But it is not very important whether James B. Goss shall, when the question is presented, be held to be estopped or not. A much more important question will be whether his individual creditors are estopped from claiming that these assets, which are in the hands of his assignee for their benefit, were really his individual assets. No one questions that they were his individual assets in law, and they are his individual assets in equity, unless these individual creditors are estopped to claim them as such. Now, there really is no evidence in the case which shows the nature of these debts to the individual creditors of James B. Goss. It seems to be assumed by the majority that they were all debts contracted to persons who gave credit to an ostensible partnership; while, in truth, there is no evidence on the subject. There is nothing to show that these debts are not all due to persons who dealt with him, in good faith, relying upon his apparent sole responsibility, from the possession of this property, and his sole conduct of the business. Nor does it appear whether these debts were contracted in the milling business, or whether they were the misfortunes of independent enterprises. In this condition of the case, it certainly cannot be prudent to decide this question of which set of creditors have the superior equity to these assets. It is sufficient to decide such questions as have been tried before the trial court, between the parties who were before the court, and which are before this court upon the appeal. If there are bona fide individual creditors, they may not be estopped to claim according to the true legal title of the assets, although their debtor be so estopped. *Bates, Partn.* § 105, and cases cited in note 1, p. 123.

The case really made shows that there are no joint assets, practically available to the petitioner. If there are any, they are desperate and nominal only. It is not equity

to relegate the petitioner to them for her only remedy, for it is not expected that there will be a surplus in either separate estate after the individual creditors are paid. It is a forlorn hope. She should be permitted to share *pari passu* with the individual creditors of Alfred J. Goss.

Pinney, J. :

I dissent from the opinion of the court, and concur in the opinion of Mr. Justice Newman.

DAVIES v. HUMPHREY.

Newman, J., dissenting :

This case arises out of the same failures and assignments as *Thayer v. Humphrey*, but in some of its circumstances differs from that case. The appellant was also a creditor of J. D. Putnam & Co., but he did not accept of J. B. Goss & Co. as a substitute for his original debtor. So he is not a creditor of either James B. Goss or J. B. Goss & Co.; and neither are in any way liable for his claim. The appellant seeks to prove his claim against the estate of Alfred J. Goss, in the hands of his assignee for the benefit of his creditors. It is answered to his application: "Your remedy is against the assets of James B. Goss, which are in the hands of his assignee for the benefit of his creditors." And so he is turned away. It is not claimed that there are any firm assets of J. D. Putnam & Co. in existence, nor that either partner is solvent, nor that the transfer to J. B. Goss & Co. did not pass the legal title to all the assets of J. D. Putnam & Co. to J. B. Goss & Co. But it is held that the right of the partners to have these assets applied first to the payment of the debts of the firm was reserved by the terms and conditions of the transfer. This is believed to be without a shadow of foundation in fact. It is put upon the ground that the transaction was for the purpose of applying the assets of the firm to the payment of its debts; and this in the teeth of all the evidence. The firm of J. D. Putnam & Co. was composed of J. D. Putnam and Alfred J. Goss. Both partners signed and published a notice of the dissolution of the firm, in which the public was notified that the same business would be continued by J. B. Goss & Co., who assumed all the debts of the firm; and the same business was, in fact, carried on at the same place, by J. B. Goss & Co., for two years and upward. It does not seem necessary to say that the intent to have the business carried on with the same property is incompatible with the purpose to have the property applied to the payment of the debts. The greater part of the property received by J. B. Goss & Co. was the gristmill itself. J. B. Goss & Co. got nothing of value for the promise to pay the debts of the old firm, unless they got the right to carry on the business with the property received from the old firm. The real intention of the transaction is obvious. It was to make a novation of the debts of the old firm,—to substitute a new debtor in place of the old one. This was not altogether effected, because some of the old creditors did not consent to the substitution. If the pur-

pose was to apply the firm property to the payment of firm debts, the obvious way to make the purpose effectual was to make an assignment of it for the benefit of the firm's creditors. It seems that this clearly was the ordinary case of a transfer of the firm's assets for the purpose of a novation. In such a case all are agreed that the partners of the old firm lose their equity to have the assets transferred applied to the payment of the firm debts.

This case, too, is decided in the absence of parties and evidence necessary to its final disposition. The other side is not heard, as it must be before it can be bound by the decision. *Non constat* that, when these parties

and their evidence are heard, J. D. Putnam & Co. will be found estopped, as against the creditors of J. B. Goss & Co., from claiming any right in this property of which they have held out J. B. Goss & Co. to be the owners.

The appellant, on the case as it now appears, should be admitted to share *pari passu* with the individual creditors of Alfred J. Goss, on the authorities cited in the dissenting opinion in *Thayer v. Humphrey*.

Pinney, J. :

I dissent from the opinion of the court, and concur in the opinion of Mr. Justice Newman.

ARKANSAS SUPREME COURT.

LITTLE ROCK & FORT SMITH RAILWAY COMPANY, *Appt.*,

v.

Thomas H. WELLS.

(.....Ark.....)

1. An injunction against enforcing a judgment at law will be granted where the

death of the trial judge soon after the trial prevented the perfection of an appeal and the record shows that the judgment is without evidence to support it.

2. Persons are incompetent as jurors in a suit against a railroad company to recover the penalty for an overcharge for passenger carriage who only a short time before had brought similar actions against the same defend-

NOTE.—*Injunctions against judgments for matters arising subsequently to their rendition.*

I. Lack of remedy by appeal or new trial.

- a. By mistake.
- b. By act of court or officer.
- c. Other cases of defective record.
- d. By negligence.

II. Lost or destroyed record.

III. For fraud.

IV. For alteration of record.

V. Judgments set aside, reversed, or superseded.

VI. For payment or satisfaction.

VII. In behalf of surety.

VIII. For set-off.

IX. For newly discovered evidence.

The case of *LITTLE ROCK & Ft. S. R. Co. v. WELLS*, which holds that where an appeal is prevented by the death of the trial judge, preventing the bill of exceptions from being completed, and the defendant is not guilty of negligence, and the judgment is unjust, and there is no remedy at law, an injunction will be granted,—is in accord with the well-established principles of equity, and is fully sustained by the authorities.

I. Lack of remedy by appeal or new trial.

a. By mistake.

Where an appeal is prevented by reason of mistake of the officer in preparing a wrong bond, or by reason of the appeal having been taken to the wrong court, owing to the practice at that time, and the defendant is not negligent, and the claim is unjust, an injunction will be granted, although this appears to be on the ground of mistake of law, but is placed on the ground of also being against conscience, or that equity will interpose where no other relief can be had.

Where an appeal was taken, according to the practice at that time, from the marine court to the court of common pleas, and the case reversed, but judgment was not entered because the appellee paid the costs, and it was afterwards decided by the 80 L. R. A.

court of appeals that in such case the appeal should be to the general term of the marine court and therefore the common pleas court had no jurisdiction, acquiescence for nine years will not prevent enjoining the enforcement of the judgment below; and the same will be enjoined where it is erroneous and the complainant was without fault or negligence. *Jacobs v. Morange*, 1 Day, 623.

Mistake of law as to the remedy of certiorari will authorize an injunction against the judgment where, after its rendition, the supreme court has decided that the act in regard to certiorari is unconstitutional. *Cobbs v. Coleman*, 14 Tex. 594.

Or where by mistake of law the court refused to entertain jurisdiction by certiorari. *Connell v. Stetson*, 33 Iowa, 147.

Irregularities of a justice in certifying an appeal, or in the clerk in taking the appeal bond, will authorize an injunction against the judgment, although defense is made at law, where equity and law have concurrent jurisdiction. The defense of usury was made in the justice's court, and usually where a defense is made an injunction will not be granted, but by the statute the defense of usury may be made either at law or in equity, and there being other equitable grounds in this case, the right of the complainant to an injunction on the ground of usury, and that he has been deprived of his defense, entitles to relief. *Case v. Davis*, 5 T. B. Mon. 393.

And mistake in dating a bill of exceptions, preventing a review, will be relieved against in equity where there is merit, and to prevent injustice. *Kohn v. Lovett*, 48 Ga. 179.

Or where the clerk incorrectly inserted parts of two cases in the record. *Collier v. Easton*, 2 Mo. 145.

Where an appeal is prevented by mistake of the clerk in taking an improper bond, and the party prejudiced has a good defense to the action, the judgment will be enjoined, since although the mistake was one of law, yet it would be also against conscience to enforce the judgment. *Saunders v. Jennings*, 2 J. J. Marsh. 513; *Oliver v. Pray*, 4 Ohio, 177, 19 Am. Dec. 600.

ant for overcharges on the same section of track, so that the two cases involve the same issues.

(November 30, 1893.)

A PPEAL by complainant from a decree of the Circuit Court for Crawford County in favor of defendant in a proceeding brought to

enjoin the enforcement of a judgment because of defendant's inability to appeal therefrom by reason of the death of the trial judge before the perfection of the appeal. *Reversed.*

Statement by Riddick, J.:

In this case we have another application to a court of equity to grant relief against a judg-

And where an appeal was entered in the wrong place on the docket, and the defendant's attorney, unable to find the case, left an appearance to be filed if the case should be docketed, an injunction was granted. The case does not show that a valid defense to the action was shown or required. *Seymour v. Miller*, 33 Conn. 402.

But errors of the supreme court in overlooking or mistaking material facts in the record will not authorize an injunction against a writ of possession in ejectment, the remedy being by a petition for a rehearing. *Russell v. Slaton*, 38 Ga. 195.

And a mistake in a bill of exceptions will not be ground for enjoining prosecution of a writ of error where there is no charge of fraud. *Ford v. Weir*, 24 Miss. 563.

For appeal prevented by fraud, see *infra*, III.

b. By act of court or officer.

If the appeal is prevented by the action of the court in rendering judgment in such a manner or time that the complainant cannot perfect his appeal, and he has a meritorious defense against the judgment, and is not negligent, and there is no other remedy, an injunction will be granted. And injunctions have sometimes been granted although there were other remedies.

Where defense and appeal were prevented by the magistrate stating in writing that the suit was dismissed, an injunction was granted. *Austin v. Carpenter*, 2 G. Greene, 131; *Wagner v. Shank*, 59 Md. 312.

So, where the judgments were fraudulent and iniquitous, showing 1,296 judgments and \$2,848 costs, and were void, and the complainant was not in fault. *Wagner v. Shank*, *supra*.

Where a court erroneously excluded a defense of set-off, and refused to sign a bill of exceptions, so that there was no remedy by appeal, an injunction was granted on the ground that the judgment was against conscience. *Picket v. Morris*, 3 Wash. (Va.) 225.

So, where the justice wrote that the case was transferred to another township, and the justice set aside the judgment, and then without notice vacated this order of setting aside, and time for appeal expired before complainant had knowledge, an injunction was granted on the ground of fraud, even though there was a remedy by certiorari. *Merriman v. Walton*, 105 Cal. 403.

And an appeal prevented by delay in entering judgment, dating it as entered within the statutory time, but it being in fact subsequently entered without notice to the defendant, will authorize enjoining the execution, there being no remedy at law. *Patterson v. Naehr*, 6 N. Y. Supp. 512.

Where a motion for a new trial was continued by consent, to an adjourned term, which was never held on account of an accident, an injunction was granted to restrain the execution of the judgment on the ground of accident or mistake. *Harkey v. Tillman*, 40 Ark. 551.

So, where a motion for new trial was continued by the court to the next term and then overruled, and the appeal was dismissed because the circuit court had no power over the motion after the lapse of the term, an injunction was granted where the defense was meritorious, and the continuance was without complainant's application by which he lost the appeal. *Valentine v. Holland*, 40 Ark. 333.

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And the sudden dispersion of the justices composing the court, preventing a motion for a new trial which should have been granted for excessive damages, is ground for enjoining the judgment. *Knifong v. Hendricks*, 3 Gratt. 212, 44 Am. Dec. 385.

And where a motion for new trial was prevented by the sudden sickness of the judge, and the defendant was not negligent and had a meritorious cause of action, an injunction was granted holding that Gantt's (Ark.) Dig. §§ 3596-4002, providing for granting new trials after the term, do not apply. *Leigh v. Armor*, 35 Ark. 123.

So, where a motion for a new trial was prevented by failure of the court to be present. *Foushee v. Lea*, 4 Call. (Va.) 279.

But adjournment of the court before a motion for a new trial could be disposed of will not authorize an injunction, unless the judgment is against conscience. *Whitehill v. Butler*, 51 Ark. 342; *Johnson v. Branch*, 48 Ark. 535.

And an injunction will not be granted on the ground that a motion for new trial based on technical errors has been prevented by an accident, where the judgment is not shown to be unjust. *Whitehill v. Butler*, 51 Ark. 341.

And it cannot be granted by a co-ordinate court in such a case. *Chipman v. Hibbard*, 8 Cal. 238.

So, an injunction will not be granted against a judgment, where proceedings on appeal were prevented by premature adjournment of the court, where it is not shown that the trial should have resulted differently. *Ratto v. Levy Bros.* 63 Tex. 273.

And an appeal barred by the resignation of the justice before the time for perfecting an appeal had expired will not authorize an injunction against the judgment on the ground of accident, where no merit or equitable showing is made. *Galbraith v. Barnard*, 21 Or. 67.

And an injunction will not be granted on the ground that the justice of the peace left the country after judgment, thereby preventing an appeal, where it is not shown that the complainant did not know of his intended departure in time to utilize two days before he left, and a valid defense to the action was not shown. *Smith v. D'Lashmunt*, 4 Mo. 103. See also *Galbraith v. Barnard*, *infra*.

So, the failure of the judge to make out and file a statement of facts upon which proceedings in error are to be taken, thereby preventing a review of the case, will not be ground for injunction where a meritorious defense to the action is not shown. *Overton v. Blum*, 50 Tex. 417.

And the failure of the justice to enter a formal judgment on a verdict from which an appeal was taken will not authorize an injunction against the judgment on appeal, where no defense to the action is shown, as under *Wagner's* (Mo.) Stat. 1080, § 10, the injunction releases the technical errors in the proceedings. *Hazeltine v. Reusch*, 51 Mo. 50.

And in *Wiley v. Southerland*, 41 Ill. 25, an injunction was refused against a judgment of a justice who had entered the same after the time required by statute, thereby preventing an appeal, where that did not appear of record, as the record of the justice could not be impeached by parol evidence that he had made oral statements contradicting his record.

And the failure or refusal of a justice to approve an appeal bond will not authorize an injunction against the levy of the execution, where there is

ment at law. The action at law was brought by Thomas H. Wells against the appellant railway company for the purpose of collecting a penalty for overcharges alleged to have been made by the railway company for the carriage of said Wells as a passenger on its trains, between the stations of Van Buren and Dyer,

and Alma and Dyer. He alleged that on four different trips an overcharge of about 5 cents was made on each trip. The verdict was in favor of plaintiff, and the penalties assessed for the four overcharges amounted to \$700, of which amount \$300 was remitted by the plaintiff. A motion for new trial was filed and

a remedy by mandamus, and the complainant does not show that he has a valid defense to the original action. *Boyd v. Weaver*, 134 Ind. 266. See also *supra*, I. a, and *infra*, I. c, d.

c. Other cases of defective record.

An injunction will not be granted against a judgment, on the ground that the answer filed was lost, and that there was no remedy by appeal, where a good and valid defense is not disclosed. *Chinn v. First Municipality*, 1 Rob. (La.) 523.

And where the original papers have been lost by fire, and appeal has been prevented, the execution of a judgment may be enjoined, but not where complainant has been negligent and could have perfected his appeal long prior to the fire, and material error in the judgment is not shown. *Bailey v. Stevens* (Utah) 39 Pac. Rep. 823.

So, negligence in failing to supply a lost record and perfect an appeal will prevent an injunction against proceedings on the judgment and execution. *Palmer v. Gardiner*, 77 Ill. 143.

And in *State v. Judge of Dist. Ct.* 13 La. 542, it was held that the loss of the petition and bond for appeal duly filed will not authorize an injunction against proceedings on the judgment as the party injured should have prepared a new bond.

For lost record, see also *infra*, II.

For bill of exceptions, see also *supra*, I. b, and *infra*, I. d.

d. By negligence.

The negligence of complainant in perfecting his appeal will prevent obtaining relief by injunction.

As, where one of the defendants was sent to enter an appeal within the time, but the clerk supposed that it was an injunction bond which was desired to be executed, and, not being familiar with the form, requested the defendant to return home and send it afterwards, stating that that would be all sufficient, and the defendant, being ignorant of the necessity of entering an appeal at that time, failed to do so, which was unknown to the other complainants until the time for entering an appeal had elapsed, an injunction was refused. *Robbins v. Mount*, 3 Ga. 74.

So, not taking an appeal during the first eighteen days will bar relief in equity against the judgment rendered by a justice of the peace, where he resigned at that time, and the thirty days given by statute were thus cut off, where no special equity is shown, and no showing is made that the judgment is unfair. *Galbraith v. Barnard*, 21 Or. 67. See also *Smith v. D'Lashmutt*, 4 Mo. 103.

Or, delay in procuring the signature to a bill of exceptions until it is too late. *Ruppertsberger v. Clark*, 53 Md. 402.

Or failure to have a mistake in the date of the bill of exceptions corrected so as to prosecute proceedings in error. *Smith v. Fouché*, 55 Ga. 120.

And that judgment was entered after court had adjourned, and defendant was prevented from making out a bill of exceptions or appealing, will not entitle complainant to an injunction, where a showing is not made that a defense which is good was made at that trial, or no excuse for not making it was given. *Buntain v. Blackburn*, 27 Ill. 403.

So, the failure of complainant or his counsel to see that the record was correct for the supreme court prevented an injunction against proceedings on a judgment that was affirmed in the supreme
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court. *Augusta Mut. L. Asso. v. Andrew*, 68 Ga. 490.

And negligence in not taking proper steps to secure an appeal or proceedings in error or bill of exceptions will prevent an injunction against a judgment. *Bowman v. Field*, 11 Mo. App. 564; *Balance v. Loomis*, 22 Ill. 82; *Watt v. Cobb*, 38 Ala. 530; *Miller v. Bernecker*, 46 Mo. 194.

And the same was held where the judgment was not shown to be unjust or erroneous. *Dobbs v. St. Joseph F. & M. Ins. Co.* 72 Mo. 189.

And in *Morgan's Appeal*, 110 Pa. 271, the same was said to be the rule. See also *supra*, I. a, b, and *infra*, II.

II. Lost or destroyed record.

See also *supra*, I. c, Other cases of defective record.

When the record of a judgment was destroyed by fire, and was restored by order of court without notice to the defendant, an injunction will not be granted, on the ground that such order and the execution issued thereon was void, in the absence of proof showing that such record was not the true one. *Fulmer v. Little*, 69 Ill. 229.

The destruction or loss by accident or casualty of a decree of a probate court ordering a sale will not entitle a party to an injunction against the judgment for purchase money, as he may have his title perfected in chancery. *Garrett v. Lynch*, 45 Ala. 204.

The discovery, after the trial, of the record of a justice's court that was lost, will not entitle an injunction against the judgment in a case where such record was desired, if it would not have availed. *Beadle v. Graham*, 65 Ala. 102.

But in *Cyrus v. Hicks*, 20 Tex. 453, it was held that an injunction will be granted against an execution where the record of the judgment has been lost or destroyed, but the defendant in the equity suit may have the record renewed.

III. For fraud.

While fraud in preventing an appeal or the use of the judgment will generally be regarded as peculiarly within the province of a court of equity to grant relief, it will not be granted unless there is no adequate remedy at law.

So, an appeal prevented by agreement for settlement will not authorize an injunction against the judgment attempted to be enforced in violation of the agreement where there is adequate remedy in the supreme court to obtain relief at law by motion to set aside the affirmation. *Roebeling Sons Co. v. Stevens Electric Co.* 63 Ala. 39.

And the fraudulent retention of papers by opposing attorneys preventing a bill of exception will not authorize an injunction against proceedings on the judgment, where the remedy of rule to file them in court is adequate. *Smith v. Brownson*, 19 La. 313.

And for withholding the record to prevent review the remedy is not by injunction against the judgment, but by petition in error, and the court will take jurisdiction as if the record had been filed in time. *Muse v. Wafer*, 29 Kan. 279.

A sale under execution will not be enjoined on the ground that plaintiff therein in violation of an agreement to stay the execution for one year, and in fraud of plaintiff's rights, issued an execution before that time, where the plaintiff in this case made no showing in the trial court, or motion to

overruled, and sixty days allowed to file bill of exceptions. The death of the presiding judge, which happened shortly afterwards, and before the bill of exceptions was signed, prevented the appeal from being taken. The appellant then brought his suit in equity. The cause was submitted to the chancellor upon

the pleadings, exhibits, and agreed statement of facts. The evidence at the trial at law had been taken down by a stenographer; and a bill of exceptions prepared by counsel, containing that evidence, was by consent read as evidence in the equity suit; it being agreed by counsel for the respective parties that it was "correct in

set aside the execution, or stay of process. *Moulton v. Kuapp*, 85 Cal. 385, 88 Cal. 446.

And the promise by a sheriff to delay a sale under execution, but not for any definite time, while the sale was in progress, and an injunction bond is being prepared, will not authorize setting aside the sale where the sheriff had other executions in his hands, and delayed the sale of this piece until the last, and then sold the equity of redemption under execution, and the property was insufficient to satisfy the mortgage. *Pell v. Lander*, 8 B. Mon. 554.

The issue of an execution before the expiration of a certain agreed time during which it could be paid in town orders will not authorize an injunction against the same, where no tender of town orders was made within that time. *Anamosa v. Wurzbacher*, 37 Iowa, 25.

The fraudulent withdrawing of a deposit after judgment, on which deposit a judgment for specific performance was obtained, will entitle an injunction against the judgment. *Hutchins v. Lockett*, 30 Tex. 165.

But where a decree was vacated, and the order was not recorded because the minutes on the docket were erased by some one without authority, the decree may be enjoined as procured by fraud, where the complainant has not been guilty of negligence. *Gillett v. Booth*, 6 Ill. App. 423. See also *infra*, IV.

IV. For alteration of record.

The fraudulent alteration of the record of a judgment entitles an injunction against the same. *Smith v. Chandler*, 13 Ind. 513; *Byars v. Justin*, 2 Tex. Civ. App. Cas. (Wilson) 686.

And in *Cromelin v. McCauley*, 67 Ala. 542, it was said that in order to enjoin a judgment or decree on the ground of fraud, it must have been procured by fraud either in its original rendition, or by a subsequent fraudulent alteration, and this must be shown to be actual and positive.

A third party may enjoin the levy and sale of his personal and real property on a judgment, which has been altered by the clerk, and enlarged so as to render it void, and this on the ground of fraud. *Hardy v. Broadus*, 35 Tex. 668.

So, where levy was made sufficient to satisfy the debt, and the execution was returned, and then the record fraudulently altered, and the amount of the judgment increased, without consent of the debtor, and a second execution issued thereon,—an injunction will be granted on the ground of fraud. *Babcock v. McCamant*, 53 Ill. 214.

V. Judgments set aside, reversed, or superseded.

An injunction will be granted where the judgment has been set aside, reversed, or superseded, if there is no adequate remedy at law, and the complainant has not been guilty of negligence.

Where the sheriff is proceeding to enforce a levy and sale, in defiance of the judgment of the court of law dismissing the levy and case, an injunction will be granted against the sale. *Scogin v. Beall*, 50 Ga. 88.

And an injunction will be granted to restrain proceedings upon a judgment recovered upon a judgment in another state, where such judgment of the foreign court has been reversed and complainant has not been negligent. *McJilton v. Love*, 13 Ill. 486.

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So, negligence of the clerk of court in failing to set aside a judgment as directed will authorize an injunction against the same. *Mayo v. Bentley*, 4 Cal. (Va.) 523.

And vacating a joint judgment at the instance of one of the defendants will entitle the others to an injunction against enforcing the first judgment against them, where it was understood that the defense made by the party setting such judgment aside was for the benefit of all. *Miller v. Longacre*, 26 Ohio St. 291.

And an injunction will be granted against proceedings on a judgment that has been vacated. *Rickets v. Hitchens*, 34 Ind. 348; *Olson v. Nunnally*, 47 Kan. 391; *Marsh v. Prosser*, 64 Ind. 236.

Or superseded. *Burge v. Burns, Morris (Iowa)* 287. Or enjoined. *Patterson v. Gordon*, 3 Tenn. Ch. 18. But an injunction will not be granted where there is ample remedy at law. *Faba v. Roberts*, 54 Ill. 192; *Scanland v. Mixer*, 34 Ark. 354.

And a purchaser of a title in a judgment for possession, after another judgment had been reversed, which affected the title of the successful party in the judgment for possession, cannot have the latter enjoined, as the remedy at law by bill of review given by statute to his grantor does not enure to him, since he is a stranger to the same, but he takes the title subject to all the equities. *Ross v. Banta (Ind.)* 84 N. E. 865, 89 N. E. 732.

Sureties on an injunction bond cannot have the judgment thereon enjoined, although the judgment in the original action dissolving the injunction was reversed. The pendency of the appeal might, perhaps, in the discretion of the court, have been interposed for stay of proceedings in the second case, but even then, if the court rendered judgment in disregard of the application, that would not make the judgment void and subject to collateral attack. *Boos v. Morgan (Ind.)* 89 N. E. 919.

And an injunction will not be granted against a sheriff making a sale on an execution which was issued before petition in error, and before the execution of a supersedeas bond, where it is not alleged that the sheriff had any notice of the proceedings in error. *Jaedicke v. Patrie*, 15 Kan. 237.

VI. For payment or satisfaction.

Generally an injunction will be granted to prevent the enforcement of a judgment or an execution where the debt has been satisfied subsequent to the judgment, or a tender made of the same, and this relief may be obtained by a purchaser of land subject to the judgment. *Worden v. Jones (Kan.)* 40 Pac. 1071; *Greenfield v. Hutton*, 1 Baxt. 216; *Johnson v. Kitch*, 100 Ind. 80; *Meyer v. Tully*, 46 Cal. 70.

Or where a payment has been made on the judgment and not credited. *Newman v. Meek, Smedes & M. Ch.* 361; *Williams v. Bradbury*, 9 Tex. 437.

An injunction against the enforcement of a judgment which has been partly paid will be granted, but only against so much as has been satisfied. *Jewell v. Thorn*, 6 La. Ann. 95; *Perry v. Kearney*, 14 La. Ann. 401; *Cobb v. Hynes*, 4 La. Ann. 150; *Woodburn v. Friend*, 19 La. 496; *Gurley v. Hiteshue*, 5 Gill 217.

And a court of chancery may enjoin the enforcement of a decree of the supreme court on the ground of satisfaction since the decree. *McClellan v. Crook*, 4 Md. Ch. 398.

every particular." The complaint was dismissed for want of equity and an appeal was taken.

Messrs. Dodge & Johnson, for appellants: The death of Judge Thomason before signing the bill of exceptions was an accident.

1 Rapalje & Lawrence, Law Dict. p. 10, *Ac-*

cident; 1 Bouvier, Law Dict. p. 45; 1 Story, Eq. Jur. § 78; 1 Am. & Eng. Enc. Law, pp. 173-175.

Equity has jurisdiction to relieve against all cases of fraud, accident, or mistake.

8 Bl. Com. p. 43; 1 Story, Eq. Jur. § 76; Blapham, Eq. § 174; *Sims v. Lyle*, 4 Wash. C. C. 320; 1 Pom. Eq. Jur. 466; *Finnegan v. Fer-*

And an injunction may be granted, although perhaps relief might have been had in the courts at law. *Marsh v. Haywood*, 6 Humph. 210.

Under S. C. act March 16, 1783, providing for adjustment of contracts according to a depreciation table of value of currency at the time the contract was made, an injunction was granted against a judgment, on payment according to the act. *Hunter v. Boykin*, 1 Desauss. Eq. 108.

And a sale of land under a judgment that is paid will be enjoined at the instance of a vendor of the land under covenant of warranty, and which sale would create a cloud on the title of his grantee. *Huggins v. White* (Tex.) 27 S. W. 1068.

And an assignment by the mortgagee of the mortgage security and bond to a party who purchased the equity of redemption on a personal judgment, on one of the bonds, will be a satisfaction of the mortgage, and any further judgment on the bonds will be enjoined. *Tice v. Annin*, 2 Johns. Ch. 126.

So, a judgment enforcing a covenant to pay on the mortgage will be enjoined, where the defendants in the injunction suit prevented redemption on repayment by a power of sale which was not bona fide, while still enforcing payment of the debt. *Crotty v. Taylor*, 8 Manitoba Rep. 188.

And where plaintiff is attempting to enforce the collection of a judgment already satisfied, and the defendant cannot obtain relief by judge's order to stay proceedings, as the judgment is in the justice's court, and the county court had not obtained jurisdiction by the filing of the transcript, and the plaintiff was insolvent, and there is no remedy against the justice or constable because the execution is fair on its face and a judgment regularly obtained, an injunction would be granted to restrain proceedings thereon. *Mallory v. Norton*, 21 Barb. 424.

And an injunction to restrain execution sale was granted where the decree directing payment had been satisfied, some of the moneys being advanced before the decree in the surrogate's court and some afterwards, and the matters could not be tried in the surrogate's court to secure the moneys to be set off against the defendant's claim. *Laney v. Laney*, 33 N. Y. S. R. 678.

And where an appeal was abandoned on a judgment being released in consideration of a settlement and payment, the defendant was entitled to an injunction against an execution issued upon such judgment. *Wray v. Chandler*, 64 Ind. 146.

And a compromise made by a trustee with the owner of a judgment against the cestui que trust will authorize an injunction against proceedings on the judgment in fraud of the compromise. *Thomas v. Brashers*, 4 T. B. Mon. 66.

And a surety of a debt for which judgment is rendered may have the judgment enjoined where the same was paid by check, and the holder of the check, instead of cashing the same, presented a prior check which had been dishonored on another matter, and obtained the cash on the same. *Kallander v. Weidhold*, 98 Mich. 517.

Or where the principal defendant in a judgment had turned property over to the plaintiff to be sold and applied upon such judgment, and the plaintiff converted the same to his own use without crediting the judgment. *Harrison Mach. Works v. Templeton*, 62 Tex. 443.

Where the mortgaged land was sold under execution for the mortgage debt, and the sale was not made subject to the mortgage, the mortgagee was entitled to an injunction against an execution sale for the same debt of other land than that mortgaged, until the debt was credited with the amount realized by prior sale. *Lydecker v. Bogert*, 38 N. J. Eq. 140.

And where a judgment was obtained against a maker and an indorser, and levied on the property of the maker, and his attorney paid off the judgment, and the levy was released, the indorser is entitled to an injunction against the judgment nominally assigned to the maker's attorney, as the payment released the indorser, and the withdrawal of the levy on the maker's property by his authority also released the indorser. *Flagler v. Newcombe*, 36 N. Y. S. R. 739.

And an alias execution will be enjoined where a prior one has been satisfied. *Beardsley v. Hall*, 9 Tex. 112.

And proceedings on a judgment were enjoined where a prior judgment, on which this was obtained, had been paid and satisfied, and a release should have been entered, and the second judgment was obtained without right and without the knowledge of complainant, who settled the first judgment after the second action was begun. *Devoll v. Scales*, 49 Me. 320.

And an injunction was granted in a similar case against the prosecution of an action for the same claim in another state, which complainant was led to believe would be abandoned on the settlement of the judgment in the state where the injunction was sought. *Engel v. Scheuerman*, 40 Ga. 208.

And where a judgment on a collateral note was purchased after maturity, and after payment on the note was fraudulently obtained by the payee from the maker, where the equities of the maker against the purchaser are such as to extinguish the debt, its collection will be enjoined. *Barhorst v. Armstrong*, 43 Fed. Rep. 2.

And a purchaser for value may have a sale and execution enjoined as a cloud upon the title where the judgment was satisfied, and by collusion between the judgment creditor and debtor the entry of satisfaction was vacated. *Wheeler v. Alderman*, 34 S. C. 533.

And the same was held where the record showed that the execution had been returned satisfied in full at the time of the purchase, although it was subsequently claimed that there was a mistake in the description of the land in the advertisement of sale and execution. *Whitehill v. Fauber*, 97 Ind. 169.

And the payment of a judgment authorizes a court of equity to remove a cloud on the title, where the defendant had purchased the property on execution sale, although there is a statutory remedy by a motion to supersede an execution on a judgment. *Brewer v. Branch Bank*, 24 Ala. 439.

And a judgment for a vendor's lien that has been satisfied, but not released, will be enjoined, as it can only be impeached by proof of facts outside the record, and is a cloud on the title. *Texas Land & Mortg. Co. v. Worsham*, 5 Tex. Civ. App. 245.

An unauthorized assignment, by the attorney for plaintiff, of a judgment to some of the defendants paying the same, who were indorsers, will not authorize them to enforce the same by execution, and the same will be enjoined at the instance of

nandina, 15 Fla. 879, 31 Am. Rep. 203; *Roes v. Watertown*, 86 U. S. 19 Wall. 107, 22 L. ed. 72; 6 Am. & Eng. Enc. Law, p. 712, title *Equity*, and p. 718.

The court of chancery has the power to grant the relief prayed in this case, and in the manner and form as asked by these petitioners.

Dugan v. Cureton, 1 Ark. 48, 81 Am. Dec.

727; *Andrews v. Fenter*, 1 Ark. 195; *Watson v. Palmer*, 5 Ark. 501; *Bently v. Dillard*, 6 Ark. 84; *Hempstead v. Watkins*, Id. 380, 42 Am. Dec. 696; *Pelham v. Moreland*, 11 Ark. 448; *Ruddell v. Magruder*, Id. 588; *Jamison v. May*, 18 Ark. 604; *Burton v. Hynson*, 14 Ark. 86; *Simpson v. Montgomery*, 25 Ark. 872, 99 Am. Dec. 238; *McWillie v. Martin*, 25 Ark. 557; *Carnall v.*

the other defendants. *Maxwell v. Owen*, 7 Coldw. 680.

And proceedings on a judgment in favor of an assignee will be enjoined where the assignment was by the attorney without authority, although the assignee had paid the judgment at the instance and request of complainant, a defendant in that case who claimed to have prepaid him in full; but complainants will be required to pay their share. *Head v. Gervais, Walk.* (Miss.) 481, 12 Am. Dec. 577.

And an execution in favor of one who claims to be the assignee of a judgment will be enjoined where he paid the judgment on an agreement to take certain land of which he has possession. But in this case, as the equity of the bill was sworn off in the answer, the temporary injunction was dissolved. *Love v. Powell*, 67 Tex. 15.

A release to a third person of the right to the land in controversy in an ejectment suit after judgment is not an extinguishment of the right to maintain a bill for an injunction and relief, where the equity transferred is a mere possibility or constructive equitable trust. *Dunlap v. Stetson*, 4 Mason, 349.

The remission of liability against a collector of militia fines, made after the judgment, authorizes an injunction to that extent against the judgment for the same. *Hahn v. Hart*, 12 B. Mon. 423.

So, an execution for an attorney's commission on a judgment for a fine will be enjoined where such fine has been remitted by the governor, for a commission is not due if the money is not collected, and injunction is a proper remedy to prevent proceedings on a satisfied judgment. *Smith v. State*, 26 Tex. App. 49.

The holder of a junior lien is entitled to an injunction against the sale of the property under a senior lien, the judgment for which has been paid, although his lien has not been reduced to a judgment, where the debtor and the holder of the senior lien are fraudulently conspiring to defeat his lien. The remedy would be refused a general creditor. *Brigham v. White*, 44 Iowa, 877.

Where part of the judgment is paid after the injunction is obtained, it should be made perpetual as to so much as has been paid on the judgment. *Tapp v. Beverley*, 1 Leigh, 80.

An injunction will be granted more than a year and a day after the judgment, where the attorney had collected the same, and the creditors were absent from the country, and impliedly ratified the collection, and the circumstances exhibited in equity were not set up as a defense at law. *Branch v. Burnley*, 1 Call. (Va.) 147.

And the payment of a judgment authorizes an injunction against the execution, sued out and indorsed partly for the benefit of another party, as the indorsement for such third party gave him only an equity, and adequate relief could not be had at law. *Crawford v. Thurmond*, 3 Leigh, 86.

Although a motion to quash the execution might also have secured relief, as adequate relief could not be had at law, where the execution was issued for the benefit of plaintiff's agent. *Ibid.*

And under a statute allowing debtor stockholders of a bank to pay the debt due the bank with their stock, an injunction should be granted against so much of the judgment as is thus paid. *Hodges v. Planters' Bank*, 7 Gill & J. 303.
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And a surety on a forthcoming bond given for goods levied upon is entitled to an injunction against a judgment on the same where the sheriff accepted the same goods from the defendant in discharge of his body on another execution, under 1 Va. Rev. Code, 298, providing that on the execution of such a bond the goods shall be left with the owner until the day of sale. *Lusk v. Ramsay*, 8 Munf. 417.

Where the sheriff refused to pay over to a plaintiff in an execution money that he had collected, on the ground that he had an execution against the plaintiff in favor of another party, who obtained an order for the payment of such collection to him, an injunction should be granted against the enforcement of his judgment to that extent, although he afterwards refused to take the money from the sheriff on the ground that it was depreciated currency, but did not restrain the defendants in his rights. *Skinner v. Jayne*, 24 Miss. 567.

So, an injunction should be granted to restrain proceedings on a judgment or execution where the amount due has been tendered and refused. *Bowen v. Clark*, 43 Ind. 406; *Collier v. Sapp*, 49 Ga. 98; *Fisher v. Moore*, 19 Iowa, 84. See *Chicago & E. I. R. Co. v. Kamman*, 119 Ill. 382.

And where plaintiffs and defendants in a foreclosure have a joint interest an injunction will be granted against the sale where a tender of the money has been made with demand to assign the mortgage so as to protect the interest of other parties. *Fisher v. Hartman*, 165 Pa. 16.

And an execution should be enjoined where consent judgment was rendered for less than the amount of the execution, on the proviso that it be paid within a certain time, when plaintiff by the exercise of diligence was unable to make a tender until shortly after the day for payment of the judgment, because the party controlling the judgment was a nonresident. *Cooper v. Whaley*, 60 Ga. 285.

And on a tender of the property in replevin in a reasonable time after a judgment for the property, and in default thereof a money judgment, an injunction should be granted against an execution on the alternative judgment for the money. *McClellan v. Marshall*, 19 Iowa, 551, 87 Am. Dec. 454.

And where the plaintiff after dissolution of an injunction proceeds to take the body of the defendant in execution, and he dies in gaol, the remedy on the injunction bond is gone, as the plaintiff waives his right against the bail on the injunction bond. *Porteous v. Snipes*, 1 Bay, 219.

Some cases refuse an injunction against proceedings under a judgment on the ground of payments made thereon, where there is an adequate remedy at law, or the claim of satisfaction is not sustained, or the payment is made to the wrong party, or where it has been credited, or where complainant is guilty of fraud, or the bill is not specific or conditions precedent to obtaining an injunction are not followed.

So, an injunction will not be granted where there is an adequate remedy at law to have payments made after judgment, applied to the satisfaction of the same. *United States v. McLeamore*, 45 U. S. 4 How. 238, 11 L. ed. 977.

Or where an adequate remedy at law exists by a judge's order. *Lansing v. Eddy*, 1 Johns. Ch. 49.

Or where there is a remedy to tender or pay the

Looper, 35 Ark. 107; *Leigh v. Armor*, Id. 124; *Carroll v. Pryor*, 38 Ark. 283; *Valentine v. Holland*, 40 Ark. 338; *Harkey v. Tullman*, Id. 552.

The courts of chancery are competent to relieve against hardship arising from accident,

imposition, or fraud, if from any such cause the bill of exceptions could not be presented in the time allowed.

Carroll v. Pryor, 38 Ark. 283; *Johnson v. Branch*, 48 Ark. 536; *Whitehill v. Butler*, 51 Ark. 848.

balance due, and apply to the court by motion to compel cancelation, or to stay execution. *Roach v. Duckworth*, 95 N. Y. 391, affirming 65 How. Pr. 303, 61 How. Pr. 128.

And an injunction will not be granted where there is an adequate remedy at law under W. Va. Code, chap. 140, § 17, providing for quashing the same. *Howell v. Thomason*, 84 W. Va. 794.

And an injunction will not be granted at the instance of a replevin bail against an execution sale, where a prior execution had been levied upon property of the principal for the same debt and partially satisfied, as there is a remedy at law by motion to set aside the execution. *Cline v. Lowe*, 8 Ind. 527.

Or where the court at law can afford the same remedy on a rule to show cause. *Gorsuch v. Thomas*, 57 Md. 334.

And an injunction was refused where it was claimed that a credit for costs had not been allowed on a pluries execution issued after an injunction was obtained, where such prior injunction was improperly granted against the whole debt, and the question of costs could be adjusted after the sale. *Salter v. McHenry*, 17 La. 507.

And the remedy by affidavit of illegality prevents an injunction where the debtor has settled the same by conveying to the holder of the judgment the land. *Flournoy v. Silman*, 59 Ga. 185.

And a remedy by motion in the nature of *audita querela* prevents an injunction. *McRae v. Davis*, 5 Jones Eq. 140.

In *Parker v. Jones*, 75 Am. Dec. 411, it was said that if an execution has been satisfied by a levy on property of the defendant, the remedy by a writ of *audita querela* to order the writ called in and satisfaction entered of record, would prevent an injunction.

And where the plaintiff in execution purchased the equity of redemption in mortgaged property under his execution sale, he thereby satisfied his judgment, and after a reversal of the judgment, and another judgment was obtained, the defendant could plead satisfaction at law, and is not entitled to an injunction against further proceedings on the judgment or execution, as he did not defend at law. *Finley v. Thayer*, 42 Ill. 350.

And in *Hall v. Taylor*, 18 W. Va. 544, it was held that where the sheriff fails to return the execution promptly, and pays the same off to the plaintiff without the request of the complainant or the plaintiff at law, the judgment will not be enjoined, as the defendant on motion can have the execution issued thereafter quashed, but such motion would ratify the action of the sheriff, and the sheriff could then recover an action of assumpsit for money paid for complainant's use and benefit; but in this case there appears to have been an agreement that the sheriff should have the benefit of this judgment, and an injunction was refused.

And the remedy by an action of damages for failure to comply with contract prevents an injunction for the refusal of the plaintiff in judgment to accept a conveyance in satisfaction thereof, which he has agreed to take. *Gurley v. Hiteshue*, 5 Gill, 217.

And an injunction sought on these grounds will be refused where the judgment has not been satisfied. *Neal v. Henderson*, 72 Ga. 203; *Fuqua v. Robinson*, 10 Ill. 129.

So, the collection of an execution on a justice's

Judgment will not be enjoined on the ground that such justice had applied on the judgment a deposit left with him as a tender, where this was insufficient as a tender to cover costs and judgment, and it was not accepted in full satisfaction of the claim, and this appropriation will not prevent enforcing judgment for the balance. *Chicago & E. I. R. Co. v. Kamman*, 119 Ill. 332.

And the death of one of the slaves for which a forthcoming bond has been given will not authorize an injunction in favor of a surety where the other one has not been surrendered. *Laughlin v. Ferguson*, 6 Dana, 111.

Under Tenn. act 1831, chap. 25, providing that the sheriff having an execution and delivery bond, shall proceed to execute the same, and if unsatisfied pluries execution shall issue against the defendants in the judgment, the levy on personal property of one or several joint defendants and taking a delivery bond will not operate as a satisfaction of the judgment, and one of the defendants who has not joined in the delivery bond cannot enjoin the judgment. *Williams v. Wright*, 9 Humph. 493.

And an injunction will not be granted to restrain a levy of an execution on property which was re-delivered to the defendant on the execution on his giving a forthcoming bond, as such is not a satisfaction of the same. *Parker v. Jones*, 5 Jones Eq. 276, 75 Am. Dec. 411.

And under Iowa Code, § 3241, providing for a judgment in replevin for the property or its value at the election of plaintiff, an execution for the value cannot be enjoined by showing that the defendant had offered to deliver the goods to the sheriff. *Davis v. Bayliss*, 51 Iowa, 435.

When a debtor paid the plaintiff a part of his debt and proposed to pay the balance by a conveyance in which he had no interest, in consideration of a release, and then sought a specific execution of the contract, an injunction will not be granted to the debtor, as it would be compelling the creditor to exonerate him without consideration. *Gurley v. Hiteshue*, 5 Gill, 217.

So, where a trustee without authority compromised a judgment in consideration of land, but a deed had not been delivered, and the compromise had not been approved by the court, an injunction was refused against a sale of land under the execution to satisfy the judgment. *Morris v. Thomas*, 17 Ill. 112.

And on a bill to enjoin proceedings on an execution because the same was paid off by suffering a sale to another creditor under an agreement that the latter would sell the land and pay off this *f. fa.*, where the answer denied such satisfaction and collusion, the complainant must overcome the same by proof. *White v. Crew*, 18 Ga. 418.

And in order to enjoin a judgment that has been compromised or released it must be alleged and shown that the agreement to release is founded on a valuable consideration. *Plunkett v. Black*, 117 Ind. 14.

So, an injunction against the enforcement of an execution, and to have the judgment satisfied in pursuance of an alleged agreement, will be denied where the agreement is not shown to be certain and entitling the plaintiff to a decree for specific performance. *Spears v. Long*, 32 S. C. 523.

A vendi. exp. on a judgment in favor of a wife against her husband will not be enjoined where she had sluce the judgment united in a deed with the

Riddick, J., delivered the opinion of the court:

There are two questions in this case: First, Has a court of equity the power to grant the relief prayed for? And, second, if the power be conceded, is this such a case as calls for its exercise?

husband conveying the land sought to be sold, in the absence of a showing of fraud, or the covenants of the deed. *Trullinger v. Charles*, 120 Pa. 239.

An injunction should not be granted against a sheriff's sale on the ground that the defendant had tendered to the sheriff payment in notes and bonds of the plaintiff in the execution, where the sheriff was not authorized to receive such in payment. *Osburn v. Curtis*, 2 La. Ann. 764.

And an injunction against the collection of a judgment will not be granted on the ground that a draft had been given the plaintiff's attorney as collateral, but which was not to affect the lien of the judgment and which was not proved to be paid. *Compton v. Blair*, 46 Mich. 1.

And a receipt against an execution in the hands of a sheriff, given by a deputy sheriff, who never had the execution in his hands, and had no authority to receive the money, and the receipt was not procured by money, but by trading in notes, is not ground for injunction against the execution. *Turner v. Belew*, 3 J. J. Marsh. 50.

So, the purchaser under a fl. fa. cannot enjoin the execution on the same against him on the ground of payment to a person who had not the authority to receive it. *Brummel v. Hurt*, 3 J. J. Marsh. 709.

And an execution will not be enjoined where defendant paid plaintiff after notice of a bona fide assignment of the judgment. *Holland v. Dale*, Minor (Ala.) 285.

That a judgment debtor placed claims in the hands of the plaintiff's attorney for collection, to be applied on the claim, and that a sufficient amount has been collected to pay the judgment, will not entitle to an injunction, as this does not show payment. *Williams v. Bradbury*, 9 Tex. 487.

And an injunction will not be granted against an execution on the ground that a credit was not entered on the execution, when such credit was entered before process in the injunction suit was served. *Calderwood v. Trent*, 9 Rob. (La.) 237.

Where an unfair advantage is sought to be obtained through a receipt and a release of a judgment, and relief had been denied in a proceeding by *audita querela*, an injunction was denied against the judgment. *Williams v. Roberts*, 8 Hare, 315.

An injunction will not be granted for failing to enter credits paid on executions where there is a remedy at law. *Morrison v. Speer*, 10 Gratt. 238.

Under N. Y. Rev. Stat. 189, § 147, requiring a deposit and a bond for costs and damages, an injunction will not be granted on the ground that part of the judgment has been paid, where there is no deposit or bond, or specific statement of the amount paid. *Christie v. Bogardus*, 1 Barb. Ch. 167.

Where a second judgment was obtained on a bond by an executor without knowledge that a judgment had been obtained on the same bond twenty-three years prior thereto, the last judgment will not be enjoined on the presumption of payment from lapse of time, where at the date of the prior judgment the debtor conveyed his property in trust for his creditors, and the complainant does not show that the debt was satisfied, as the delay may be explained by settlement of the insolvent estate, and the assignment did not discharge the debt. *Payne v. Dudley*, 1 Wash. (Va.) 196.

In *Brown v. Wilson*, 56 Ga. 584, it was held that "it is no cause for enjoining a judgment that the 30 L. R. A.

The first question has been considered and answered in the affirmative by our ruling in the case of *Kansas & A. V. R. Co. v. Fitzhugh*, and we need only consider the second question.

It is said that the trial court committed error in impaneling, and also in charging, the jury. But errors alone are not sufficient to warrant

plaintiff's attorney has failed to enter a credit on the execution according to agreement."

So, in *Wray v. Chandler*, 64 Ind. 146, it was said that if complainant had practiced a fraud in procuring a release, it would have been a bar to the action for injunction.

Merely fact that a payment has not been credited on an execution will not authorize an injunction where there is no allegation of an attempt to collect the money again, or refusal to allow credit on an application for that purpose. *Abercrombie v. Knox*, 8 Ala. 728, 37 Am. Dec. 721.

VII. In behalf of surety.

As to the right of a surety to an injunction restraining proceedings on a judgment, where such surety is released or discharged by reason of extension, agreement, conduct of the parties, or satisfaction, he is generally entitled to an injunction, this being regarded as peculiarly within the province of equitable interference.

So, an injunction will be granted where the surety is released.

As where the plaintiff had stayed an execution levied on the property of the principal, which operated as a release of the surety. *Jones v. Bullock*, 3 Bibb, 467. See also *Cox v. Mobile & G. R. Co.* *infra*, IX.

Or released the levy on the principal's property. *Baird v. Rice*, 1 Call (Va.) 18, 1 Am. Dec. 467.

Or where the creditor takes out execution against the principal, and has it returned unsatisfied, where there was property of the principal. *Jenkins v. McNeese*, 34 Tex. 189.

Or where the creditor assists the principal debtor to defeat the collection of the debt from the principal's property. *Smith v. Hays*, 1 Jones, Eq. 221.

So, where a creditor causes a return of his execution where a replevin bail was taken which was void, thereby discharging a lien of the execution on personal property of the principal debtor, sufficient to satisfy the judgment, the surety is discharged, and will be entitled to an injunction. *Sterne v. McKinney*, 79 Ind. 578.

Or where the plaintiff, after a levy on the property of the principal, discharged the same without the knowledge or consent of the surety, as it operates as a fraud on the surety. *Dixon v. Ewing*, 3 Ohio, 281, 17 Am. Dec. 590. (But see next case.)

But in *Findlay v. Bank of United States*, 2 Mo-Lean, 44, it was held that *Dixon v. Ewing*, *supra*, holding that a surety was entitled to an injunction against proceedings on a judgment after levy on the property of the principal, and the discharge of such levy, is not recognized as authority as the rights of a surety are merged in a judgment, and the application of the Ohio statute in such a case for the benefit of a surety is not applicable, and such decision rests on general principles, and not on the construction of the statute.

Where the judgment creditor assigned a judgment against principal and surety to another creditor under an agreement to make the debt out of the principal defendant, but instead he had the execution returned "no property," and exhausted the property by attachments of his own, the surety was entitled to an injunction. *Biggerstaff v. Hoyt*, 62 Mo. 481.

Or where the sheriff returned on the original ex-

the interposition of a court of equity. "It must clearly appear that it would be contrary to equity and good conscience to allow the judgment to be enforced, else equity declines to impose terms upon the prevailing party." *Whitehill v. Butler*, 51 Ark. 343; *Kansas & A. V. R. Co. v. Fitzhugh*, *supra*. But a consid-

eration of the evidence introduced in the action at law leads us to the conclusion that the verdict and judgment against the appellant were without evidence to support them. To warrant a judgment for the penalty imposed against appellant in the action at law, it was essential that there should be some evidence

of execution "No money made," when it was partly satisfied by a levy and sale on principal's property, and the sheriff had absconded, there being no remedy at law. *Fryer v. Austill*, 2 Stew. (Ala.) 119.

And where a judgment was obtained against the makers of a note, and one of them appealed and gave security, and a judgment was obtained in an action against an indorser, and then the maker dismissed his appeal, the judgment against the indorser was enjoined, where the lien of the first judgment was lost by dismissing the appeal. *Lewis v. Armstrong*, 47 Ga. 298.

And a surety is entitled to have an execution sale of his property restrained until the property of the principal, seized under the execution, shall have been sold. *Irick v. Black*, 17 N. J. Eq. 189.

A surety compelled to pay a judgment of an insolvent principal is entitled to an injunction against a judgment against him in favor of his principal, which his principal had assigned after insolvency. *Williams v. Helme*, 1 Dev. Eq. 151, 18 Am. Dec. 580.

And a surety obtaining an equitable assignment of the judgment against his principal and co-surety will be enjoined from enforcing it against his co-surety, where he paid the debt out of collaterals placed in his hands by the principal. *Kerns v. Chambers*, 8 Ired. Eq. 576.

Under La. Rev. Stat. 1856, p. 67, providing that no sales should be made of the property of a surety until that of the principal shall have been discussed, a surety is entitled to an injunction against a levy of an execution on his property by showing a failure to levy on property of the principal sufficient to satisfy the execution. *Stinson v. Hill*, 21 La. Ann. 509.

And under Pasc. (Tex.) Dig. art. 4789, providing that indorsers are only sureties even after judgment, an indorser is entitled to an injunction against the judgment, where after levy on the principal's property the sale was postponed until he became insolvent. *Parker v. Nations*, 83 Tex. 210.

And where the county board released one of the sureties on a criminal bail bond on the payment of a certain sum, the other surety was entitled to an injunction to prevent the collection of the judgment for a greater amount than his co-surety was compelled to pay. *Trabing v. Albany County Commission*, 1 Wyo. Terr. 301.

For injunction by surety on account of payment by principal, see *McGehee v. Gold*, *infra*, IX.

But where he is not released or there is an adequate remedy at law, an injunction will not be granted.

So, a surety cannot obtain an injunction against a judgment or execution on the ground that there had been a levy on the principal's property and a forthcoming bond taken, where such bond is not a satisfaction or release of the surety, who did not unite on the bond. *Williams v. Wright*, 9 Humph. 433.

Where an execution on a judgment against a principal and surety is levied on property of the principal which cannot be sold for want of bidders it may still be levied on the property of the surety, and, although the constable is liable for failure to sell the property, the surety is not discharged, and is not entitled to an injunction. *Moss v. Craft*, 10 Mo. 720.

And under Ind. Rev. Stat. 1894, § 627, authorizing relief by bill of review, an injunction in favor of a

surety against a judgment, where the principal has been released after such judgment, will not be granted. *Michener v. Springfield Engine & T. Co.* (Ind.) 40 N. E. 679.

And a judgment will not be enjoined on the ground of release of surety by extension granted to the principal on the debt after a levy on his land, where it is not shown that the plaintiff in the judgment knew that one of the defendants complaining was a surety. *Patterson v. Brook*, 14 Mo. 473.

In *Woodburn v. Friend*, 19 La. 490, it is held that sureties taken in judicial proceedings are bound *in solido* for the whole sum, and it is the duty of the surety to pay, and if the creditor does not suspend his execution so as to put it out of the power of the surety to pay, the surety is not entitled to an injunction for a return of the execution without service, but for so much of the debt as has been paid, he is entitled to an injunction.

In *Williams v. Wright*, 9 Humph. 493, it was said that admitting the principle that a valid agreement between the creditor and the principal debtor for delay without the consent of the surety discharges him, it is questionable whether this applies after judgment. If it does it will be indispensable that the surety should allege in his bill some reasonable ground for failure to pursue a legal remedy afforded him by statute.

For injunctions for set-offs in favor of sureties, see *infra*, VIII.

For satisfaction of judgment in favor of surety, see also *Kallander v. Neidhold*, 98 Mich. 517, and *Harrison Mach. Works v. Templeton*, 82 Tex. 443, *supra*, VI.; as to payment or satisfaction, *supra*, VI.; also *McGehee v. Gold*, 68 Ill. 215, *infra*, IX. as to newly discovered evidence.

And on a judgment against a principal and surety, where money was paid by the principal, and the execution was returned without service, but it was not shown that the payment was for an extension, the surety was not entitled to an injunction against proceedings on the judgment. *Woodburn v. Friend*, 19 La. 490.

The mere fact that the judgment creditors abstained from seizing the interest of the principal in a partnership stock of goods will not release a surety, as a surety cannot claim that the creditor should forbear as to him, until the value of the partnership interest is ascertained. *Cunningham v. Buchanan*, 10 Grant, Ch. (U. C.) 523.

Where an indorser on a note has due notice of a default, and the holder of a note countermands an execution against the maker, such indorser is not released, and cannot enjoin the judgment, as *Md. Laws 1768*, chap. 23, § 8, provides that an indorser can pay the bill, and be subrogated to the rights of the holder, and the promise that the *fi. fa.* would be made out of the maker is not proved in this case. *Lenox v. Prout*, 16 U. S. 3 Wheat. 520, 4 L. ed. 449.

So, the refusal of a judgment creditor to issue executions to certain counties that would have secured the debt, before the principal defendant was adjudicated a bankrupt, will not entitle a surety in the judgment to an injunction against an execution against such surety, as the sureties could have paid the debt and taken an assignment of the judgment, and that the creditor procured the adjudication in bankruptcy will not entitle to an injunction. *Thornton v. Thornton*, 63 N. C. 211.

And an execution sale will not be enjoined at the

tending to show that the amount charged the appellee was greater than three cents per mile for the distance he was carried as a passenger. Sand. & H. Dig. §§ 6211, 6217.

Now, an examination of the evidence shows that there was no competent evidence introduced to show the distance between the sta-

tions of Van Buren and Dyer, and Alma and Dyer. The only witnesses that testified were the appellee and his attorney. Neither of them told or pretended to know what the distances between these stations were. They gave the number of the nearest milepost to each station, and stated that the milepost

instance of the replevin bail, on account of an agreement of the judgment creditor to make one half of the judgment out of the property of the judgment debtor, as the terms of the recognizance cannot be varied by a contemporaneous parol agreement. *Smith v. Tyler*, 51 Ind. 512.

And a surety consenting to an indulgence granted to his principal cannot obtain an injunction against the judgment for the debt. *Furber v. Bassett*, 2 Duv. 433.

And that a surety on a bail bond had no notice or copy of the judgment nisi, served on him, will not authorize an injunction, as he has a remedy by action of nullity or appeal. *Cook v. State*, 16 La. 288.

An execution will not be enjoined on the ground that an entry was not made upon the execution showing who was principal and surety, where the judgment was against several joint makers of a note, where such entry was not required by law, although one of the parties was a surety. *Work v. Harper*, 81 Miss. 107, 66 Am. Dec. 549.

In *Gatewood v. Burns*, 99 N. C. 837, it was held that an injunction will not be granted in favor of the party claiming to be a surety on the ground that the homestead assigned to the principal was excessive, and is still undetermined, as he cannot delay the sale when it is his duty to pay the debt. But in this case the complainant does not appear to have been adjudged a surety, and it was said that a surety might, under N. C. Code, § 2140, show on the trial that he was a surety, and then the judgment would have stated such fact, and the execution would have been indorsed to that effect, and the debt would then have to be made out of the principal's property first.

VIII. For set-off.

Insolvency of plaintiff at law has often been held to be sufficient ground for equitable interference by injunction in aid of set-off, and it may be said that this, in connection with other equities, is sufficient to entitle an injunction in order to enable the defendant to obtain the benefit of a set-off that could not have been used at law, or that was acquired after judgment, unless there is an adequate remedy at law. Some courts hold that the existence of mutual judgments is in itself ground for equitable interference, and this set-off is allowed by statute in some states.

So, a set-off of judgments and injunctions should be allowed, if the plaintiff in such action at law is insolvent, and the refusal of the court at law to permit such set-off on summary motion, where such insolvency was not alleged, is not *res judicata*, as decisions on summary motions are not regarded as final. *Simpson v. Hart*, 14 Johns. 63, reversing 1 Johns. Ch. 91.

And equity will grant an injunction in order to allow a set-off of a subsequent judgment obtained against the complainant on the ground of insolvency, although there is a remedy to appeal to the equity power of the court at law to set off one judgment against another. This concurrent remedy will not defeat the jurisdiction of equity, but the right of set-off will not affect the lien of the attorney for costs in the judgment. *Gridley v. Garrison*, 4 Paige. 647.

So, an injunction will be granted against proceedings on a judgment in order to maintain a set-off of a subsequent judgment against the plaintiff

at law where he is insolvent, although he has appealed from the judgment. *Guttendag v. Lehigh Valley Iron Co.* 14 Phila. 639.

So, an assignee of a dormant judgment may bring a suit to revive, and at the same time have the judgment set off against a later judgment held by the defendant against him, and for an injunction where such defendant is insolvent. *Simpson v. Huston*, 14 Tex. 476.

And an injunction will be granted against a judgment held by fraudulent assignment, in order to maintain a set-off of a judgment against the assignor after a return on *d. fa.* of "*nulla bona*." *Mitchell v. Stewart*, 4 J. J. Marsh. 551.

And an injunction will be granted against a judgment, in order to maintain a set-off of a subsequent judgment, on the ground of insolvency. Although the court of king's bench would not allow the plaintiff's judgment to be set off against the defendants, yet it was right that it should be done in chancery. *Williams v. Davies*, 2 Sim. 461.

In *Chicago, D. & V. R. Co. v. Field*, 86 Ill. 270, it is said that only insolvency occurring subsequent to the judgment will form ground for equitable jurisdiction for set-off. But in *Galena & S. W. R. Co. v. Ennor*, 118 Ill. 55, that case was referred to as a case of insolvency arising after judgment, and its language is misleading; and it is held that a set-off should be allowed irrespective of the time of the occurrence of the insolvency, whether before or after judgment, and an injunction was allowed.

Under Ill. Stat. chapter on "*Judgments and executions*," §§ 58, 59, providing for setting off executions in the sheriff's hands, but not providing the forum where the relief is denied, a court of equity may compel a set-off of judgments against each other in case of insolvency, as insolvency, with other grounds of equitable relief, justifies an injunction. *Matson v. Oberne*, 25 Ill. App. 213.

So, where a judgment debtor was not entitled to plead a set-off because a claim was not due, but matured before judgment was finally rendered on appeal in the supreme court, an injunction was allowed where the plaintiff at law had become insolvent, as the defense could not have been made at law, and insolvency is sufficient ground of equitable relief for set-off. *Ellis v. Kerr* (Tex.) 23 S. W. 1050.

And where a defendant had paid money for the plaintiff as an indorser, and sought to have the judgment enjoined in order to maintain a set-off against the plaintiff, who was insolvent, the burden is upon the plaintiff at law to show that the set-off existed at the commencement of the suit, in order to prevent an injunction. *Brazelton v. Brooks*, 2 Head, 194.

So, set-off of a claim for rent against defendant will authorize an injunction against enforcing his judgment for costs in an action by plaintiff, where the defendant had assigned such judgment for costs, and was largely indebted to plaintiff, and was insolvent. *Hayes v. Carr*, 44 Hun. 372.

And a set-off acquired by an assignment of fees which accrued in the same suit to the defendant after the judgment entitled him to an injunction against so much of the judgment, as equity will require judgments to be mutually set off against each other. *Keifer v. Summers*, 137 Ind. 106, 113.

So, an injunction will be granted to restrain proceedings on a judgment or execution in order to maintain a set-off of judgments that are unsatisfied; but where the bill does not allege that the

showed the distances between the stations to be a certain number of miles, but there is nothing to show that the appellant had any connection with these mileposts. We cannot tell from the evidence whether the mileposts referred to are located on the railway right of way or along the public road, nor whether they were erected by

the county or the appellant or some other railway company. The attention of the court and counsel was called to this defect in the proof on the trial of the case, and the court was asked to direct a verdict for appellant for want of evidence showing the distances between the stations named. The court refused to do so,

judgment attempted to be used as a set-off is unsatisfied, an injunction will not be allowed. *Walker v. Ayres*, 1 Iowa, 449.

As a general rule, that which could have been pleaded to an original suit cannot be a ground for an injunction, but where two suits are pending between the same parties, each against the other, and are contested, compensation does not take place until after judgment, and then the execution in either case may be enjoined. *Ellis v. Fisher*, 10 La. Ann. 479; *Muse v. Rogers*, 12 Mart. (La.) 370; *Dabbs v. Hemken*, 3 Rob. (La.) 123, and 129.

Where a creditor obtained a judgment which was replevied, and then in a court which had no jurisdiction collected money due the surety, which judgment was reversed, an injunction in the creditor's behalf was allowed in order to maintain in his favor the set-off of his judgment on the replevin bond, in the other court, against the order to refund the money. *Smith v. Bohon*, 12 Bush, 448.

And where the fraudulent grantee of a chattel recovers a judgment in trespass for a levy of an execution on the same, and assigns it to his fraudulent grantor, the plaintiff in the execution is entitled to an injunction and set-off of his execution to the extent of the same, on the ground of fraud where his execution had been returned unsatisfied. *Bishop v. Duncan*, 3 Dana, 15.

And an injunction will be granted in order to prevent multiplicity of actions, where an attorney recovered a judgment and the money from the constable, and paid the money to his clients, to whom the constable owed the same, and a judgment against the constable was reversed, and he obtained a judgment against the attorney. *Colt v. Cornwell*, 2 Root, 108.

A judgment of trespass in favor of executors for a levy upon property of a legatee in his possession, where the executors had not given their consent to the legacy, will be enjoined where there are no debts against the estate, and the executor had no beneficial interest, and it would be against conscience to permit the debtor to pay his debt and at the same time recover damages from his creditors on the ground that he held a beneficial interest only, and not the legal title. *Lewis v. Wyatt*, 2 Rand. (Va.) 114.

And an equitable set-off will authorize enjoining a judgment where there is no remedy at law. *French v. Garner*, 7 Port. (Ala.) 549.

If such set-off was obtained before notice of an assignment for creditors including the judgment, it may be used, but if acquired afterwards an injunction will not be allowed. *Brashear v. West*, 33 U. S. 7 Pet. 608, 8 L. ed. 801.

And while an equitable right to set off judgments may be proper, defendant cannot obtain an injunction unless he tenders all that is due thereon, but the set-off will be allowed so far as it reaches. *Keifer v. Summers*, 187 Ind. 106, 118.

Where the defendant in a *fi. fa.* purchases a note of the plaintiff, an injunction will be granted until his claim to set off the amount of his note is determined, as, under La. Civ. Code, § 298, the debts are reciprocal, and extinguished as soon as they are opposed simultaneously, to the amount of their respective sum. *Caldwell v. Davis*, 2 Mart. N. S. 135.

But a court of chancery has no right to review the verdict, and alter the judgment, where an injunction is granted against a judgment in order to

maintain a set-off or a counter judgment. *Sumner v. Whitley*, 1 Mo. 708.

And an injunction will not be granted unless the complainant is the equitable owner of the set-off, or where he has not reduced the claim to judgment, and he does not allege insolvency of the defendant in the equity suit.

So, a party cannot set off a judgment subsequently obtained unless he is the beneficial, as well as the nominal, owner of the same. *Satterlee v. Ten Eyck*, 7 Cow. 480.

In *Aiken v. Satterlee*, 1 Paige, 289, which was the same case on another application, it was held that where the defendants are willing to deduct the amount actually paid by complainant for the judgment endeavored to be set up, an injunction will not be granted.

So, where a judgment is obtained in an action by A for the benefit of B against C, an injunction will not be granted at the suit of C against A alone, of notes held by assignment in order to maintain a set-off against A, who is insolvent, as B is the interested party, as appears of record. *Turner v. Cox*, 5 Litt. (Ky.) 175.

And an injunction will not be allowed on the ground of set-off of claims against a judgment where complainant does not allege the insolvency of plaintiff, and that complainant had paid value for the claims, and that they were obtained before the judgment was assigned. *Townsend v. Quinan*, 36 Tex. 548.

An injunction will not be granted to restrain the collection of an execution where the evidence is conflicting as to the insolvency of defendant, in order to maintain a set-off subsequently acquired. *Eady v. Blanton* (Ga.) 22 S. E. 323.

And a judgment at law will not be enjoined, in order to enable the defendant to obtain a judgment which may be used as a set-off, unless the plaintiff is insolvent. *Smith v. Ross*, 3 Humph. 220; *Boone v. Small*, 3 Cranch, C. C. 623.

And in *Whyte v. O'Brien*, 1 Sim. & Stu. 551, an injunction was refused against a judgment in order to maintain a set-off where the demand was acquired by complainant after verdict, on the ground that the demand was purely legal and there was no equitable ground for set-off.

In order to maintain an injunction against a *fi. fa.* on the ground of pleading in compensation a note made by the plaintiff in execution, it must be shown that the note was acquired subsequently to the date of the judgment. *Kennard v. Henderson*, 9 Rob. (La.) 165; *Morgan v. Driggs*, 3 La. Ann. 124; *Hart v. Cannon*, 10 La. Ann. 721; *Todd v. Fisk*, 14 La. Ann. 18.

In *Palfrey v. Shuff*, 2 Mart. N. S. 51, an injunction was refused against setting off one judgment against another, on the ground that the petition did not state that the judgments were in the same court, and the parish court could not impede the execution of the defendant's judgment when it could not protect him against the judgment the plaintiff alleged he had in his favor, and an injunction should not be granted against the whole of a judgment while the set-off left a considerable part in force.

And an injunction against a judgment in order to establish a set-off will not be granted where the set-off is a judgment that was rendered without jurisdiction. *Hanna v. Morrow*, 43 Ark. 107.

A judgment against a public administrator of a

and assumed in his instructions that the mileposts had been put up by appellant. He commences the second paragraph of his instructions as follows: "In regard to those mileposts, the company has put up mileposts along the road, as the proof shows here, and put consecutive numbers on them. I suppose when

they began, they commenced one mile from the starting point, then two, and then three, the same as a proclamation as to the distance," etc. The circuit judge in giving this instruction, no doubt labored under the impression that there was no dispute concerning the question as to whether or not the appellant had put up the

trustee will not be enjoined on the ground that the beneficiary has died since the judgment, and the trustee paid to one of her brothers more than his share, and that the bondsman of the trustee seeking the injunction has obtained by assignment the interest of the other brother where the settlement is still pending in the county court, as a distributee cannot offset his share against a judgment against him. *Green v. Tittman*, 124 Mo. 572.

So, an execution in favor of a wife who had died will not be enjoined to maintain a set-off by defendant against her husband alleging that as distributee he owns the judgment, and that he is insolvent, as this is repugnant,—especially where defendant waited five years without attempt to revive, and has a remedy by supplementary proceedings. *Boley v. Griswold*, 2 Mont. 447.

And in *Hobenthal v. Watson*, 84 Mo. 183, it was held that an injunction will not be granted against an officer from collecting the full amount of the judgment in his favor on an execution against a claimant for the full value of the property in a replevin suit, although after judgment the defendant procures from the defendant in the execution an assignment of his right to the surplus after paying the execution, as the complainant acquired his claim from a stranger to the judgment and suit, and when a case has proceeded to final judgment the losing party should not be permitted to continue the litigation by voluntarily acquiring new claims against the gaining party and setting them up in bar of the judgment.

A surety is entitled to an injunction against proceedings on a judgment where his principal is insolvent and such surety has subsequently acquired a judgment against the creditor having a judgment against the principal and surety. *Scholz v. Steiner*, 100 Ala. 148; *Steiner v. Scholz* (Ala.) 18 So. 79.

And a surety may have an injunction against a judgment against him, where the principal in a replevin action recovered a judgment against the plaintiff, annulling the original contract. *Dickason v. Bell*, 13 La. Ann. 249.

And he may have a judgment on the forthcoming bond enjoined on the ground that he has an action pending against the plaintiff for a larger amount, and that he is insolvent. *McClennan v. Kinnaird*, 6 Gratt. 352.

But where the principal prevents the completion of an execution sale in favor of his surety, by an injunction for nearly two years, and obtains a judgment against the surety, he cannot enjoin the completion of the execution sale in order to maintain a set-off. *McDonald v. Cook*, 11 Mo. 632.

IX. For newly discovered evidence.

Newly discovered evidence will authorize an injunction against a judgment at law, where it is shown that the evidence is material and would change the result, and could not by the exercise of diligence have been discovered in time to have been used at law, and was discovered since the judgment at law, and too late to enable the complainant to use the same for a motion for a new trial, and that the judgment at law is unjust. The showing of new evidence should be specific as to the evidence establishing its materiality, and should be supported by affidavits.

So, an injunction will be granted against a judgment at law on the ground of newly discovered

evidence which is material, and which could not have been had on a trial at law by use of diligence. *Billups v. Sears*, 5 Gratt. 31, 50 Am. Dec. 105; *Rust v. Ware*, 6 Gratt. 50, 52 Am. Dec. 100; *Winthrop v. Lane*, 8 Desaus. Eq. 310; *Vennum v. Davis*, 35 Ill. 568.

So, an injunction will be granted, on the discovery after judgment that the note sued upon was not one for which the defendant was liable as it was not given by the firm during the time of partnership, and complainant had used due diligence in making his defense, and obtained evidence since the trial that he was in no way responsible for its payment. *Vennum v. Davis*, *supra*.

Or where a corporation was in ignorance of its equitable title to lands recovered from it in ejectment, and had used diligence to ascertain the fact, and failed to discover the same until after the expiration of the time for a new trial. *Chicago & E. I. R. Co. v. Hay*, 119 Ill. 493, 507.

And will be granted on discovery after judgment of defects of title where the judgment was obtained on purchase-money notes, and complainant had been deceived by false representations of the vendor. *Fitch v. Polke*, 7 Blackf. 564.

Or on a discovery that the plaintiff had obtained a decree for a greater sum than he was entitled to, of which he had knowledge, and of which complainant was ignorant. *Baye v. Beard*, 12 B. Mon. 581.

So, a judgment in covenant obtained on a tender of "M. and N.'s" notes was enjoined where the notes were signed by N. and indorsed by M., and therefore not the notes of "M. and N." and M. had become bankrupt, which was not known at the time of the judgment. *Armstrong v. Hickman*, 6 Munf. 287.

So, an injunction will be granted on the ground of fraud, where a note indorsed for accommodation to be used in a particular manner was given to another party subject to equities, and the note was used in a different manner, and the fraud was not known at the time of judgment, as the complainant believed the note to have been properly used. *Hickerson v. Raiguel*, 2 Heisk. 329.

And will be granted for new material evidence consisting of the confessions of a party deliberately and voluntarily made, repeated at different times and to different persons, and where the evidence at the trial on which the judgment was obtained was of the same character, consisting principally of declarations. *Colyer v. Langford*, 1 A. K. Marsh. 237.

And in *Bultzell v. Randolph*, 9 Fla. 366, where a judgment was taken against complainant, on a note made in the firm name, long after he had left the firm, and he was unable to make the defense for the reason that the party who had executed the note was sick, and no information could be had because the clerk of the firm had left for parts unknown, and a continuance was prevented for the same reason, because it was not known what could be proved, an injunction against an execution and proceedings on the judgment was allowed. There appears to be much of negligence of complainant in this case as he acted under a delusion, until a short time before court, that his former partner would attend to it, but having withdrawn his pleas and suffered judgment by default, he never having

mileposts. To make such mistakes in the hurry of a trial is easy, and it is less difficult to criticize than to avoid making them; but we are bound by the record, and it shows that the question as to the distances between the stations was the principal point in issue, and that no admissions were made, the attorney for appellant contending that the proof on this very point was insufficient.

In addition to this instruction, which was calculated to mislead the jury on a material point, two of the jurors admitted on their examination that each of them had brought suit against appellant to collect a penalty for

an overcharge for passenger carriage between the same stations of Alma and Dyer; that these suits had been tried the term before; and that each of them held an opinion as to the distance between these stations. For this cause they were challenged by defendant, but the court held that they were competent, and the defendant having exhausted its peremptory challenges, they sat in the trial of the case. These jurors having only a short time before been plaintiffs in an action against appellant in which the same issues were involved, the challenge of defendant should have been sustained. *Missouri P. R. Co. v. Smith*, 60 Ark. 222.

owed any part of the debt, an injunction was granted.

And new evidence discovered after judgment will entitle to relief against the same where it could not have been discovered by due diligence,—as that a surety was released by an extension. *Cox v. Mobile & G. R. Co.* 44 Ala. 611.

So, an affidavit of a witness that he had given testimony erroneously by mistake, will authorize an injunction on the ground of accident, against proceedings on a judgment, where a sudden and unlooked-for adjournment of the court prevented a motion for a new trial. *Tarver v. McKay*, 15 Ga. 550.

So, a judgment will be enjoined on the discovery of evidence showing payment, where such evidence could not have been discovered by the use of diligence. *Winchester v. Jackson*, 3 Hayw. (Tenn.) 806; *Hubbard v. Hobson*, 1 Ill. 147; *Harvey v. Seashol*, 4 W. Va. 115; *Wales v. Bank of Michigan*, Harr. Ch. 808; *Pearce v. Chastain*, 3 Ga. 223, 45 Am. Dec. 423; *McGehee v. Gold*, 68 Ill. 215.

Where complainant was only surety. *McGehee v. Gold*, *supra*.

Or an administrator. *Terrill v. Southall*, 3 Bibb, 458.

Or where the evidence of payment through an agent was destroyed by fire, and could not be discovered with reasonable diligence until after the judgment at law, an injunction against proceedings on the judgment should be enjoined. *Brown v. Luehrs*, 79 Ill. 575.

And in *Price v. Fuqua*, 4 Munf. 68, where an executor found evidence of a receipt against the debt after the judgment, and had failed to make a defense of the statute of limitations under the mistake of counsel, and there was misconduct of the jury, an injunction was granted.

In *Gainsborough v. Gifford*, 2 P. Wms. 424, it was said that if after a judgment a receipt was found under the plaintiff's own hand for the debt, equity will grant relief. This case is generally quoted as an authority on this question, but that was not the decision of the court.

So, where the judgment is fraudulent. *Davis v. Tilston*, 47 U. S. 6 How. 114, 12 L. ed. 366.

The discovery after judgment that the plaintiff knew that a blank note was filled in with too large an amount, and that the bank suing as ussee had only a nominal interest, but the suit was in pursuance of a conspiracy to cut off defenses, will authorize an injunction against proceedings on the judgment, where the same could not have been discovered by the use of diligence. *Goad v. Hart*, 8 Smedes & M. 737.

And a judgment in favor of bank B on a note payable to bank A will be enjoined where it is discovered after judgment that bank B did not own the note or authorize the suit, and that the same was a fraudulent transaction to prevent a set-off against bank A in favor of the defendant. *Stovall v. Northern Bank*, 5 Smedes & M. 17.

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at law by which the defendant can establish fraud in the consideration where defense was not made at law, entitles to an injunction against the judgment, where complainant has not been negligent, and alleges that the indorsee of a note in whose favor the judgment was rendered took it with notice of fraud. *Vathir v. Zane*, 6 Gratt. 246.

And newly discovered evidence of the existence of a contract in the possession of adverse parties which was concealed by them during the trial, and which would have changed the result, will authorize an injunction against the judgment where the complainant has not been guilty of negligence, although such facts might possibly have been elicited on cross-examination. *Cairo & F. R. Co. v. Titus*, 28 N. J. Eq. 260, Reversing 27 N. J. Eq. 102.

So, where defense was not made at law because it was believed that the bill upon which suit was brought was a genuine one, and after time for new trial had passed it was discovered that it was a forged one, relief was granted by injunction against the judgment. *Ferrell v. Allen*, 5 W. Va. 43.

Discovery of new material evidence after a sentence in admiralty court will authorize an injunction against the judgment, when, at the time of trial, such evidence could not have been received according to the practice in that court, and the judgment was unjust. *Jarvis v. Chandler*, 1 Turn. & R. 319.

But an injunction will not be granted for newly discovered evidence unless it is shown that the judgment is wrong, that the evidence has been discovered since the trial, that diligence had been used, and that such new evidence would make a different result. *Holmes v. Steteler*, 67 Ill. 209.

So, newly discovered evidence that would not have changed the result is not ground for enjoining the judgment. *Graham v. Roberts*, 1 Head, 56; *Turley v. Taylor*, 6 Baxt. 376.

Notes and policies against plaintiff found among the papers of a debtor after a judgment rendered against his administrator will not authorize an injunction against the judgment where such debts were paid by dependent out of money in his hands belonging to plaintiff, and not with his own money. *Segond v. Remy*, 8 La. Ann. 128.

And the discovery of proposals for marriage settlement after a decree will not authorize enjoining the decree on the ground of reformation of settlement on account of mistake, where complainant is not entitled to such relief on the evidence. *Marquis of Breadalbane v. Marquis of Chandos*, 2 Myl. & C. 711, 7 L. J. (Ch.) N. S. 23.

A bill of complaint for an injunction against a judgment on the ground of newly discovered evidence must set forth the evidence in the bill, so that its materiality may be seen. *Miller v. McGuire*, *Morris* (Iowa) 150.

And must be supported by the affidavits of the witnesses, and the complainant must have used diligence. *Fuller v. Little*, 69 Ill. 229.

And an injunction will not be granted if the newly discovered evidence is not material, or com-

When we consider these rulings of the court in connection with the fact that the verdict and judgment are not supported by the evidence, we must conclude that the appellant was entitled to a new trial, and that it would have obtained it but for the fact that its appeal was cut off by an inevitable accident, which left it without remedy at law. It seems unjust and inequitable that the appellee should be allowed to retain the advantage given him by the sudden death of the presiding judge. As the appellant is remediless at law, we believe that this is a proper case for a court of equity to exercise its restraining power, to the end that justice may be done. *Kansas & A. V.*

R. Co. v. Fitzhugh, supra; Carroll v. Pryor, 38 Ark. 288; Leigh v. Armor, 35 Ark. 123; Oliver v. Pray, 4 Ohio, 175, 19 Am. Dec. 595, and note; 1 Black, Judgm. 886; 2 Freem. Judgm. 484, 485.

It is therefore ordered that the decree of the chancellor be reversed, and that unless the appellee, Thomas H. Wells, shall elect to submit to a new trial at law on the issue involved in his action against appellant for a penalty, he be forever enjoined from enforcing, or attempting to enforce, the judgment recovered by him in said action.

Bunn, Ch. J., dissents.

plaintant has not exercised diligence. *Ludington v. Handley, 7 W. Va. 269; Titcomb v. Potter, 11 Me. 218; Holmes v. Stateler, 57 Ill. 209; Hill v. Harris, 42 Ga. 412; Peace v. Nailing, 1 Dev. Eq. 289; Cunningham v. Buchanan, 10 Grant, Ch. (U. C.) 523; Levan v. Patton, 2 Heisk. 106; Lebanon Mut. Ins. Co. v. Erb, 16 W. N. C. 118.*

And an injunction will not be granted where complainant is guilty of negligence and does not show that the evidence could have been discovered by the use of diligence. *Greenfield v. Frierson, 7 Heisk. 638; Fuller v. Little, 69 Ill. 229; Kirby v. Pascault, 53 Md. 531; Munn v. Worral, 16 Barb. 221; Glover v. Hedges, 1 N. J. Eq. 113; Faulkner v. Harwood, 6 Rand. (Va.) 125; Hiveness v. McClung, 22 W. Va. 81; De Lima v. Glassel, 4 Hen. & M. 369; Cantey v. Blair, 1 Rich. Eq. 41.*

And the same was held on the discovery of evidence showing payment of the debt. *Sample v. McGatagan, 10 Smedes & M. 98; Slack v. Wood, 9 Gratt. 40; Floyd v. Jayne, 6 Johns. Ch. 479.*

Or that the consideration was contrary to public policy. *Green v. Robinson, 5 How. (Miss.) 80.*

New evidence will not authorize an injunction against proceedings on a judgment where the defendant failed to use due diligence, where the note sued upon was executed by complainant's partner after a settlement and dissolution, and fraudulently antedated. *Leggett v. Morris, 6 Smedes & M. 723.*

An injunction will not be allowed against a judgment in trespass obtained by a fraudulent grantee, for levying upon his property, where the fraud in his obtaining title had been tried at law, and there is no showing but what the newly discovered evidence could have been obtained by due diligence. *Bishop v. Duncan, 3 Dana, 15.*

Where a party has reason to expect that evidence on behalf of the issue will be offered, he cannot obtain an injunction on the ground of surprise, and if he was not ready for a trial, or was surprised, he should have moved for a new trial; and the fact that he took an appeal, and was disappointed that evidence was not permitted on the appeal, will not justify an injunction, as ignorance or mistake of law will not excuse a party in a case like this, nor tend to show either fraud or surprise on the testimony which had already been heard. *Turley v. Taylor, 6 Baxt. 376.*

In order to enjoin a judgment on the ground of new evidence the evidence should be stated, must be material, must be such as would change the result, and complainant must have been diligent.

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Smith v. McLain, 11 W. Va. 654; Burnley v. Rice, 21 Tex. 171; Cadwaleder v. Atchison, 1 Mo. 669.

An injunction will not be granted against a judgment on the ground of newly discovered evidence, or of a defense of which he was ignorant until the judgment was rendered, unless complainant shows that by the exercise of ordinary diligence he could not discover such evidence or defense or that he was prevented from obtaining the same by fraud, accident, or the act of the opposite party, unmixed with laches or negligence on his part. *Bloss v. Hull, 27 W. Va. 508.*

In order to obtain an injunction against a judgment on the ground of newly discovered evidence the complainant must show that he has not been guilty of laches in making the discovery that the evidence was material to the issue, that it is not merely cumulative, or in addition to other evidence of like import heard at the trial. *Harnsberger v. Kinney, 13 Gratt. 511; Akers v. Akers, 38 Va. 633; Forsythe v. McCreight, 10 Rich. Eq. 303.*

Newly discovered evidence is not of itself sufficient to enjoin a judgment and execution sale, where such matters were in issue and determined by the trial court, and have become *res judicata*. *Gusman v. DePoret, 33 La. Ann. 333.*

In *Bloss v. Hull, 27 W. Va. 508*, it was said that an injunction will not be granted for newly discovered evidence, when it goes merely to impeach the testimony of a witness to let in cumulative evidence as to matter which was principally controverted at the former trial; but if the newly discovered evidence is sufficient to utterly destroy the former testimony by showing it was false, or founded on perjury, then a new trial will be granted.

When additional evidence was discovered and could not be used in a court at law by obtaining a new trial, an injunction was refused, where it was not shown that such evidence was material, relevant, and not cumulative. *Hannon v. Maxwell, 31 N. J. Eq. 318.*

So, failure to show that relief could not have been obtained at law will prevent an injunction. *Hintrager v. Sumbargo, 64 Iowa, 604; Hamel v. Grimm, 10 Abb. Pr. 150.*

And an injunction will not be granted on newly discovered evidence where the facts on which the complaint is founded, although discovered since the trial, might have been established at the trial upon cross-examination. *Taylor v. Sheppard, 1 Younge & C. Exch. 271.*

L. T.

NEW YORK COURT OF APPEALS.

Frank E. PARSHLEY, *Appt.*,

v.

THIRD METHODIST EPISCOPAL
CHURCH in the City of Brooklyn, *Resp't.*

(147 N. Y. 583.)

1. A church corporation does not ratify the employment of an attorney by individual trustees to conduct the prosecution of a preacher before a church tribunal, by passing a resolution to pay a certain sum to another attorney for services in respect to the sale of property, although the trustees acting individually, and not in their corporate character, had an understanding with him that a part of the money should be applied by him to discharge the claim of the other attorney.
2. No liability is admitted by a resolution by church trustees appointing a committee to "confer with and act under the advice of" the attorney of the board in examining a certain claim and agreeing upon the sum, if any, to be paid, and another resolution authorizing the president and treasurer to pay the sum, if any, found due by such committee, where the board refused to accept the report of the committee, which found in favor of the claim in disregard of the condition as to acting under the advice of counsel.
3. The official board of a Methodist Episcopal Church, consisting of the trustees, the stewards, the class leaders, the Sunday-school teachers, and the local preachers, does not represent and cannot legally bind the church corporation in respect to the payment of a claim against it.
4. A church does not take the benefit of an attorney's services in prosecuting a preacher, so as to make it liable to pay for them, by a resolution for the removal of the preacher from the parsonage, which recites his suspension from the ministry upon the charges presented against him.

(November 26, 1886.)

APPEAL by plaintiff from an order of the General Term of the City Court of Brooklyn reversing a judgment entered upon the report of a referee in favor of plaintiff in an action brought to recover the value of services rendered by plaintiff to defendant as counsel in prosecuting the pastor of the church upon charges which had been preferred against him. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. Isaac H. Maynard*, with *Mr. Charles M. Stafford*, for appellant:

The services and expenditures of the plaintiff for which this action is brought were rendered and incurred for the benefit of the defendant, and it was competent for the board

of trustees of the defendant to bind the corporation to make compensation therefor.

20 Am. & Eng. Enc. Law, p. 778; *Tyler*, Am. Eccl. Law, p. 64, § 100; *Morawetz*, Priv. Corp. § 4; *Robertson v. Bullions*, 11 N. Y. 243; *Re St. George's M. E. Church*, 21 N. Y. Week. Dig. 81; *First M. E. Church v. Filkins*, 8 Thomp. & C. 279; *Re St. Ann's Church*, 14 Abb. Pr. 424; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. 208; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y. 521; *De Ruyter v. St. Peter's Church*, 8 N. Y. 242; *Petty v. Tooker*, 21 N. Y. 287; *People v. Fulton*, 11 N. Y. 94; *People v. Conley*, 43 Hun, 98; *Briator v. Burr*, 120 N. Y. 432, 8 L. R. A. 710; *Isham v. Fullager*, 14 Abb. N. C. 363; *Lauyer v. Cypriely*, 7 Paige, 286; *German Reformed Church v. Busche*, 5 Sandf. Ch. 666; *First Baptist Church v. Witherell*, 3 Paige, 296, 24 Am. Dec. 228.

If the services rendered and the expenditures made were for the benefit of the defendant, and the board of trustees knew that they were rendered and made in its behalf, and they afterwards ratified and adopted the action of a less number of their members than was necessary to constitute a quorum, it wrought the same effect upon the legal rights of the plaintiff as if he had been originally employed by a resolution duly adopted at a legally constituted meeting of the board.

Fister v. La Rue, 15 Barb. 323; *Ang. & A. Priv. Corp. chap. 8, § 58*, pp. 216-218; *Bank of Lyons v. Demmon*, Hill. & D. Supp. 398; *Danforth v. Schoharie Turnp. Co.* 12 Johns. 227; *Hoyt v. Thompson*, 19 N. Y. 207; *Beattie v. Delavore*, L. & W. R. Co. 12 N. Y. Week. Dig. 334; *Cunningham v. Massena Springs & Ft. C. R. Co.* 63 Hun, 439; *Prindle v. Washington L. Ins. Co.* 73 Hun, 448; *Waterman, Corp.* p. 352, § 109.

Where the directors of a corporation avail themselves of the benefits to the corporation of the unauthorized act of one of their number, it amounts to a ratification although they were ignorant of the terms of the contract.

Scott v. Middletown, U. & W. G. R. Co. 86 N. Y. 200; *Castle v. Lewis*, 78 N. Y. 131; 1 *Waterman, Corp.* pp. 358, 359; *Beach, Priv. Corp.* § 196; *Morawetz, Priv. Corp.* 2d ed. § 618.

By soliciting contributions to pay plaintiff for his services and expenses, the board of trustees recognized his employment and adopted his acts in the prosecution of Millen.

Dunn v. St. Andrew's Church, 14 Johns. 118.

Mr. George G. Reynolds, with *Mr. William J. Groo*, for respondent:

No caucus of any number of trustees, or any number of members of any kind, with or without their attorney, could bind the corporation in any degree.

Landers v. Frank Street M. E. Church, 114 N. Y. 626.

The claim made by the plaintiff is of such a nature that even the board of trustees of the defendant would have no right to pay or do any act that would bind the defendant or make it liable for such claim.

NOTE.—For an attempt to raise an obligation to pay by acceptance of benefits from acts done without any contract to pay therefor, see also *Cincinnati, S. & C. R. Co. v. Bensley* (C. C. App. 6th C.) 19 L. R. A. 796.

As to authority to bind local church organization, see also *West v. First Presby. Church* (Minn.) 4 L. R. A. 622.

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By the discipline neither the trustees nor any other officers have anything to do with the selection of a minister, or with determining whether any particular minister shall preach in that church.

The trustees can exclude the appointee from neither the parsonage nor the pulpit.

People, Peck, v. Conley, 42 Hun, 98; *Bristor v. Burr*, 120 N. Y. 432, 8 L. R. A. 710.

If the trustees had voted to pay plaintiff his claim out of the funds of the church they might have been restrained by injunction as for threatening to commit waste of trust property.

Bowden v. M'Leod, 1 Edw. Ch. 588.

Finch, J., delivered the opinion of the court:

It is not at all certain that the trustees of the church, having charge of its temporalities and representing it in its corporate character, have a legal right to contract a debt for the purpose of prosecuting before a church tribunal a preacher charged with immorality. But, waiving any consideration of that question, and assuming for the sake of the argument that such power exists, it still seems to me quite certain that the general term were right in holding that the corporate body never became bound or liable for the debt.

There is no room for dispute about the fact that the trustees acting officially never employed the plaintiff or authorized his expenditure. A minority of the board, acting only as individuals and promising merely individual and voluntary aid, alone set the plaintiff in motion. The trial court so found and planted its award of judgment wholly upon the ground of ratification, and it is upon that question that the courts below differed and to which our attention is required.

Two main and principal facts are relied on by the appellant, both of which have some peculiar features. There came a time when the plaintiff was pressing for his pay, and the church corporation was about to sell its property to the bridge company. Counsel was, of course, employed to conduct the negotiations and manage the proper transfer of title. That counsel was Judge Groo, who promised to act without compensation, or, at least, without charge for his time and services. Nevertheless, the trustees passed a resolution to pay him, first \$5,000 and later \$8,000, for his services and expenses as counsel. That was the corporate action on its face, and there was no other. But behind it stood the motive for it and the explanation of it. Between the trustees, acting individually, and not in their corporate character, and their counsel there was an understanding that the money voted to Groo should be by him applied to the discharge of plaintiff's claim, and \$3,500 of it was in fact so applied. Obviously, there was here an attempt to do indirectly what it was supposed could not be done directly, and the indirect action was not at all and not intended to be of a corporate character. That was carefully avoided and meant to be avoided, and as the result of what was done the plaintiff acquired, not a legal right against the corporation, but a moral right against Judge Groo, founded on the latter's good faith. The caucus action of the individual trustees was clearly personal and 80 L. R. A.

nonofficial. *Landers v. Frank Street Methodist Church*, 114 N. Y. 626. As such it did not, and was not intended to, bind the church. It recognized, not a legal obligation of the church corporation, but a moral duty of its members which they sought to perform through the agency and operation of an entirely different legal obligation. The very form and manner of the transaction assumed that the plaintiff had no legal claim against the corporation; that it had no right to pay him, and that it was only by an artifice, and through the liberality of Judge Groo, that the moral duty of reimbursing the plaintiff could be performed. The trustees had sought to obtain funds for him through voluntary subscriptions. They had recognized that no corporate moneys were available for that purpose, and failing to secure a voluntary contribution resorted to the questionable measure of paying the corporate funds to Judge Groo as a counsel fee, leaving him, out of what had become his own money, to do justice to the moral claim of the plaintiff. Whatever else may be said about the transaction it is very certain that it did not amount to a ratification of the acts of individuals and a corporate assumption of their obligations.

But a further step was taken. The plaintiff continued to press for reimbursement out of the corporate treasury, evidently insisting that he had a legal claim against the church, and in 1892 the board of trustees passed two resolutions. One of them appointed a committee to examine the claim and agree upon the sum, if any, to be paid, but providing that the committee should "confer with and act under the advice of" the attorney of the board. The second resolution authorized the president and treasurer of the board to pay plaintiff the sum, if any, found due by such committee. These resolutions admitted nothing, acknowledged nothing. They left the question of the corporate liability open to the decision of the committee, acting under the advice of counsel. There was a legal question to be determined arising upon and out of the facts, the answer to which would settle the doubt about liability and indicate what was the corporate duty. To meet that emergency the committee was authorized to act only after a conference with and under the advice of the counsel of the board. This was a vital and essential condition of the committee's authority, without obedience to which they had no power to act at all. They disregarded that condition, completely ignored the counsel, neither sought nor took his advice, and made a report in favor of allowing plaintiff's claim. The board, however, refused to accept the report, as not made in accordance with the condition imposed. Here, again, I am unable to see proof of a ratification. The act of the committee never became the act of the board. There was no original authority conferred upon them to act independently of the advice of counsel, and their unauthorized action was rejected and not confirmed by the board. It is suggested that the resolutions admit the liability, but question only the amount. I cannot so read them. They call for an investigation, guided by counsel, as to whether any sum is due at all, and do not admit an obligation for some amount.

There were some minor facts pressed upon

our attention as involving a ratification. One of them was the resolution of the official board in 1888. That board consisted of the trustees, the stewards, the class leaders, the Sunday-school teachers, and the local preachers. It had its place and its duties in the Methodist order and discipline, but did not represent and could not legally bind the corporation. What it did was to say that the plaintiff acted "in the interest of the church," and to recommend a voluntary contribution to defray the expenses. The word "church" was here used in its broad and moral sense, as covering the Methodist church generally in its religious character and aggregation, and not as meaning the particular corporation. It is "the" church, and "the M. E. church," and not the specific corporate defendant; and the recommendation

is to contribute to the expenses, and not to the defendant to enable it to pay.

Our attention is drawn also to the resolution for the removal of Millen from the parsonage, which recites his suspension from the ministry upon the charges presented against him, and the argument is that the defendant took the benefit of plaintiff's services, and so must pay for them. Very little need be said about that. The rule only applies where the party is free to take them or not. Here the defendant did not take them at all, and simply sought to remove a tenant holding over without right.

The order of the General Term should be affirmed, and judgment absolute be rendered for the defendant, with costs.

All concur, except Peckham and Gray, JJ., dissenting.

INDIANA SUPREME COURT.

Oliver O. FORSYTH *et al.*, *Appts.*,

v.

City of HAMMOND.

(.....Ind.....)

1. If the parties declining to join in an appeal go voluntarily before the supreme court and file their written declination, all is accomplished that was intended by Rev. Stat. 1894, § 647, providing for an appeal by some of several coparties upon service of notice upon all, and striking out the names of those refusing to join on motion, so that the appeal cannot be dismissed for failure to make them parties, after the time for them to appeal has passed.

2. Failure of the owner to consent need not be alleged in a proceeding for the annexation of unplatted land to a city, since the very existence of the controversy implies, not only a desire for annexation on the part of the city, but also want of consent thereto on the part of the property owner.

3. The jurisdiction of the county board to order annexation of territory to a city is not defeated under Rev. Stat. 1894, § 8659, by the fact that a part of the lands are platted, if the platted section is not contiguous to the city.

4. Lands subdivided into lots and blocks, if not contiguous to the limits of a city, are not "platted" within the meaning of the statutes relating to the annexation of territory to municipalities.

5. For the court to assume in its charge to the jury the existence of undisputed facts is not reversible error.

6. An instruction that land is contiguous to a certain city is not erroneous because of the fact that the land had been previously annexed to another municipality.

NOTE.—For a case denying that annexation by a municipal corporation can be attacked collaterally, see *Kuhn v. Port Townsend* (Wash.) 29 L. R. A. 445.

For legislative power to annex territory to municipal corporations, see note to *State v. Cincinnati* (O.). 27 L. R. A. 787.

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7. The annexation by a city council of territory to the city by proceedings in which it acquires no jurisdiction may, except in case of estoppel, be collaterally attacked.

On rehearing.

8. The legislative character of the function of annexation of territory to a city does not preclude judicial examination and decision on questions as to the preliminary steps and the truth and sufficiency of the petition for annexation.

9. A statute giving a city council jurisdiction to annex adjacent lands on the written consent of the owners gives the council no jurisdiction to annex lands on the petition of owners whose lands are not adjacent.

(April 11, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for Porter County reversing the decision of the board of county commissioners in defendant's favor in a proceeding to annex territory to the City of Hammond. *Affirmed.*

The facts are stated in the opinions.

Messrs. W. H. H. Miller, F. Winter, John B. Elam, A. L. Jones, and S. D. Miller, for appellants:

A part only of the remonstrants appeal to this court, but all their co-remonstrants have filed a refusal to appeal in this court. This meets the requirements of the law.

Truman v. Scott, 72 Ind. 258.

In order that the board of county commissioners might acquire jurisdiction of the subject matter involved, the petition should set out:

1. That the territory sought to be annexed was contiguous;

2. That said territory is not laid off in lots;

3. That the owner or owners of the property will not consent to the annexation;

4. The reasons for the annexation, and so on, complying throughout with the letter of the statute,—for, as the court below rightly charged the jury, this is a purely statutory proceeding, and the statute must be strictly

construed, and the annexation can be had only in strict conformity with such statute.

Perr v. Bearss, 55 Ind. 576.

The board of commissioners could not annex territory when the written consent of the owners had been had.

Strosser v. Fort Wayne, 100 Ind. 446; *Huff v. Lafayette*, 108 Ind. 14; *Swinney v. Fort Wayne*, *M. & C. R. Co.* 59 Ind. 205; *Terre Haute & I. R. Co. v. Scott*, 74 Ind. 29; *Lake Shore & M. S. R. Co. v. Cincinnati, W. & M. R. Co.* 116 Ind. 578.

The board has no more power to annex the platted lands than it had to annex lands in the next county.

Chandler v. Kokomo, 187 Ind. 295.

Where an inferior tribunal has jurisdiction of the subject-matter, and exercises that jurisdiction, such exercise cannot be questioned in a collateral attack.

Muncey v. Joest, 74 Ind. 409; *Argo v. Barthand*, 80 Ind. 63; *Mullikin v. Bloomington*, 73 Ind. 161; *Cicero v. Williamson*, 91 Ind. 541.

Proceedings to annex contiguous territory to incorporated towns or cities cannot be set aside upon the ground that the proceedings of the board of commissioners were erroneous, except in cases where there is a direct appeal from the judgment of the board.

Grusenmeyer v. Logansport, 76 Ind. 549; *Bryan v. Moore*, 81 Ind. 9; *Marion County Comrs. v. Pressley*, Id. 861; *Caskrey v. Greensburg*, 78 Ind. 333; *Ricketts v. Spraker*, 77 Ind. 371; *Houck v. Barthold*, 73 Ind. 21; *Huffman v. Canble*, 86 Ind. 595; *Scott v. State*, 64 Ind. 400.

The county board had no jurisdiction of the territory sought, for annexation by the city of East Chicago of the 80-rod strip robbed the territory sought by the city of Hammond of its contiguity.

Taylor v. Ft. Wayne, 47 Ind. 274.

Mr. Thomas J. Merrifield, also for appellants:

There is a fundamental principle of right and justice inherent in the nature and spirit of all constitutional governments at least, which the legislature cannot go beyond without exceeding its rightful authority. This principle the courts will recognize and enforce in order to protect the life, liberty, or property of the citizen from violation in the unjust exercise of legislative power.

Baltimore v. State, 15 Md. 469, 74 Am. Dec. 572; *Cooley*, Const. Lim. 162, 487; *Sedgw. Stat. & Const. L.* 414; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Re John & Cherry Streets*, 19 Wend. 659; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *People v. Smith*, 21 N. Y. 595; *Wynehamer v. People*, 18 N. Y. 890; *Taylor v. Porter*, 4 Hill. 140, 40 Am. Dec. 274; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174.

The legitimate deduction from the facts as they appear in the record is that the imposition of corporation taxes upon the owners of land embraced within the new limits would be an actual taking of private property for the use of a corporation,—not only for its future use, but to help to pay its indebtedness already created.

The limits of a city or town may be properly extended so as to take in contiguous lands: (1) 30 L. R. A.

when they are platted and held for sale as town or city lots; (2) whether platted or not, when they furnish the residence of a numerous population or represent the natural growth of the city or town beyond its legal boundaries; (3) when they are needed for any proper city or town purpose, such as for the extension of its streets or sewer, gas or water systems, or to supply places for business or residence for its population; (4) when they are valuable on account of their adaptability for prospective city or town uses.

City or town limits should not be so extended as to take in contiguous lands: (1) when they are used only for purposes of agriculture or horticulture and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city or town use.

Chandler v. Kokomo, 187 Ind. 295; *Vestal v. Little Rock*, 54 Ark. 331, 11 L. R. A. 778; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Oheaney v. Hooser*, 9 B. Mon. 330; *Covington v. Southgate*, 15 B. Mon. 491; *Morford v. Unger*, 8 Iowa, 82; *New Orleans v. Michoud*, 10 La. Ann. 763; *Bradshaw v. Omaha*, 1 Neb. 16; *Languorthy v. Dubuque*, 18 Iowa, 86; *Fulton v. Davenport*, 17 Iowa, 414; *Kelly v. Meeks*, 87 Mo. 396; *St. Louis v. Weber*, 44 Mo. 547; *Corrigan v. Gage*, 68 Mo. 544; *Prince George's County Comrs. v. Bladensburg*, 51 Md. 465; *Taylor Borough*, 160 Pa. 476; *Sewickley Borough*, 86 Pa. 80; *Yeadon Borough*, 3 Pa. Dist. R. 669; *Ewing v. State*, 81 Tex. 172; *State v. Eidson*, 76 Tex. 302, 7 L. R. A. 733; *McClesky v. State*, 4 Tex. Civ. App. 322; *State v. Baird*, 79 Tex. 68; *Mathews v. State*, 82 Tex. 571; *State v. McReynolds*, 61 Mo. 203; *State v. Campbell*, 120 Mo. 396.

As the statute does not prescribe the reasons which shall be sufficient, the question is necessarily left to the discretion of the authority passing upon the petition.

Catterlin v. Frankfort, 87 Ind. 45; *Elston v. Crawfordville Board of Trustees*, 20 Ind. 272; *Beach*, Pub. Corp. § 420.

The only feature in which the jurisdiction of the common council and that of the board of commissioners was distinguished was in the one fact as to whether the lands to be annexed were platted or unplatted.

Rev. Stat. 1881, §§ 3195, 3196; Rev. Stat. 1894, § 3658.

This fact was clearly a jurisdictional fact; and it was as such not only necessary to be alleged, but also to be proved.

Jolly v. Ghering, 40 Ind. 139; *Toledo, W. & W. R. Co. v. Milligan*, 52 Ind. 505; *Evansville & C. R. Co. v. Epperson*, 59 Ind. 488.

The general denial and special remonstrance were filed before the board and required proof of every issuable fact. Upon appeal to the circuit court every question in issue before the board was triable *de novo*, the decision thereof by the board having been suspended and vacated by such appeal.

Malone v. Hardesty, 1 Ind. 79; *Daggy v. Conte*, 19 Ind. 259; *Hays v. Parrish*, 53 Ind. 132; *Coyner v. Boyd*, 55 Ind. 166; *Scraper v. Pipes*, 59 Ind. 158; *Bowers v. Snyder*, 66 Ind. 340; *Schmied v. Keeney*, 73 Ind. 309; *Grimwood v. Macks*, 79 Ind. 100; *Osw v. Lindley*, 80 Ind. 327; *Fleming v. Hight*, 95 Ind. 78; *Neff v.*

Reed, 98 Ind. 341; *Washington Ice Co. v. Lay*, 103 Ind. 48; *Reynolds v. Shultz*, 106 Ind. 291. **Messrs. W. H. H. Miller and Thomas J. Merrifield**, for appellants in support of petition for rehearing:

The circuit court had no authority to pronounce that judgment and decree, and that all the proceedings in that court, as well as in the Lake circuit court, were *coram non iudice* and wholly void because the same were an attempted exercise of legislative power, which is expressly forbidden by the Constitution of the state of Indiana.

Dill. Mun. Corp. § 9, 4th ed. §§ 61, 63, 71; 1 Peach, Pub. Corp. § 80; *Stone v. Charlestown*, 114 Mass. 220; *People v. Bennett*, 29 Mich. 451, 18 Am. Rep. 107; *Galesburg v. Hawkinson*, 75 Ill. 152; *People v. Nevada*, 6 Cal. 143; *Shultz v. McPheters*, 79 Ind. 373; *Mertwoether v. Garrett*, 102 U. S. 472, 26 L. ed. 197; *Stils v. Indianapolis*, 55 Ind. 515; *Aurora v. West*, 9 Ind. 81; *State v. Kolsem*, 130 Ind. 442, 14 L. R. A. 566; *Greenough v. Greenough*, 11 Pa. 489, 51 Am. Dec. 507; *State v. Noble*, 118 Ind. 350, 4 L. R. A. 101; *Wright v. Defrees*, 8 Ind. 298; *State v. Denny*, 118 Ind. 882, 4 L. R. A. 79; *Hovey v. State*, 127 Ind. 538, 11 L. R. A. 763; *Legal Tender Cases*, 79 U. S. 12 Wall. 457, 20 L. ed. 287; *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576; *State v. Haworth*, 122 Ind. 462, 7 L. R. A. 240; *Swan v. State*, 8 Blackf. 861; *Coffin v. State*, 7 Ind. 157; *Wiley v. Bluffton*, 111 Ind. 152; *Langenberg v. Decker*, 131 Ind. 478, 16 L. R. A. 108; 2 Kent, Com. 375.

The general assembly cannot delegate its law making power to any officer or body other than political. An attempt to vest legislative power in the judiciary is simply an attempt to repeal the Constitution.

Hanna v. Putnam County Comrs. 29 Ind. 170; *Moffit v. State*, 40 Ind. 230; *Peru v. Bearss*, 55 Ind. 532; *Alexander v. McCordeville & C. Gravel Road Co.* 44 Ind. 439; *Motz v. Detroit*, 18 Mich. 495; *Owners of Ground v. Albany*, 15 Wend. 374; *Com. v. Woods*, 44 Pa. 118; *Fort Wayne v. Cody*, 43 Ind. 200; *Bunnell v. White County Comrs.* 124 Ind. 1; *Farley v. Hamilton County Comrs.* 126 Ind. 468; *State v. Tippecanoe County Comrs.* 131 Ind. 90; *Jones v. United States*, 137 U. S. 202, 34 L. ed. 691; *Foster v. Neilson*, 27 U. S. 2 Pet. 253, 7 L. ed. 415; *Stile v. Indianapolis*, 55 Ind. 515; *Catterlin v. Frankfort*, 87 Ind. 52; *Chandler v. Kokomo*, 137 Ind. 295; *People v. Bennett*, 29 Mich. 464, 18 Am. Rep. 107; *Parker v. State*, 133 Ind. 188, 18 L. R. A. 567.

The court erred in holding that the record of the common council of the city of East Chicago could be attacked collaterally, and that the deed to the Chicago & Calumet Terminal Railway Company was admissible in evidence for that purpose.

The records of inferior tribunals, such as justices of the peace, common councils of cities, and boards of county commissioners, showing jurisdiction on their face, are just as invulnerable to collateral attack as those of courts of general jurisdiction.

Spaulding v. Chamberlin, 12 Vt. 538; *Clay County Comrs. v. Markle*, 46 Ind. 96; *Van Fleet, Collateral Attack*, § 60, and cases there cited; *Reg. v. Bolton*, 1 Q. B. 66; *Cooks v. Bangs*, 31 Fed. Rep. 640; *Witt v. Russey*, 10 30 L. R. A.

Humph. 208, 51 Am. D. c. 701; *Mason v. Westmoreland*, 1 Hend. 555; 4 Bacon, Abr. 46, citing *Prince's Case*, 5 C. cke, 80; *Jones v. Jones*, Hob. 185; *Nedham's Case*, 8 Coke, 135; *Harris v. Lester*, 80 Ill. 807; *Stackhouse v. Zantz*, 36 La. Ann. 529; 1 Chitty, Pl. 512; *State v. Gary*, 33 Wis. 98; *Dwiggins v. Cook*, 71 Ind. 579; *Houk v. Barthold*, 78 Ind. 21; *Ohio & M. R. Co. v. Shultz*, 31 Ind. 150.

Where the jurisdiction of an inferior tribunal is once established over the subject-matter and the parties to the proceedings which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevail in the action of courts of general powers, and its actions are unassailable by collateral attack.

Stoddard v. Johnson, 75 Ind. 20; *Evansville, I. & C. S. L. R. Co. v. Evansville*, 15 Ind. 395; *Dequindre v. Williams*, 31 Ind. 444; *Hord v. Elliott*, 38 Ind. 220; *English v. Smock*, 34 Ind. 115, 7 Am. Rep. 215; *Ney v. Scinney*, 36 Ind. 454; *Pendleton & E. Turnp. Co. v. Barnard*, 40 Ind. 146; *Worthington v. Dunkin*, 41 Ind. 515; *Curry v. Miller*, 42 Ind. 320; *Clay County Comrs. v. Markel*, *supra*; *Evans v. Clermont & S. Gravel Road Co.* 51 Ind. 160; *Markle v. Clay County Comrs.* 55 Ind. 185; *Lawrence County Comrs. v. Hall*, 70 Ind. 469; *Miller v. Porter*, 71 Ind. 521; *Mullikin v. Bloomington*, 72 Ind. 161; *Porter v. Stout*, 73 Ind. 3; *Houk v. Barthold*, *supra*; *Hume v. Little Flat Rock Drain Assn.* 72 Ind. 499; *Heagy v. Black*, 90 Ind. 535; *Earle v. Earle*, 91 Ind. 37; *Bicketts v. Spraker*, 77 Ind. 371; *Garvin v. Dausman*, 114 Ind. 436; *Brocaw v. Gibson County Comrs.* 78 Ind. 548.

The ownership and right of property in the soil over which the right of way was granted remained in the grantor, and therefore the right of way could not cut off the contiguity of the lands on each side of the right of way.

Patterson v. Philadelphia & R. R. Co. 26 W. N. C. 327 (1890); *Morgan v. Moore*, 3 Gray, 319; *Hancock v. Wentworth*, 5 Met. 446; *Jerman v. Mathews*, 2 Ball. L. 271; *Atkins v. Bordman*, 2 Met. 457, 37 Am. Dec. 100; *Winslow v. King*, 14 Gray, 331; *Miller v. Miller*, 4 Pick. 244; *Portey v. Chandler*, 6 Mass. 454, 4 Am. Dec. 159; *Pomeroy v. Mills*, 3 Vt. 279, 23 Am. Dec. 207; *Re Seventeenth Street*, 1 Wend. 262; *Underwood v. Carney*, 1 Cush. 292; *Van O'Linda v. Lothrop*, 21 Pick. 292, 33 Am. Dec. 261; *Green v. Chelsea*, 24 Pick. 71; *Lade v. Shepherd*, 2 Strange, 1004; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Westbrook v. North*, 3 Me. 179; *Mazwell v. McAtee*, 9 B. Mon. 20, 48 Am. Dec. 409; *Robbins v. Borman*, 1 Pick. 122; *Adams v. Emerson*, 6 Pick. 57; *Harback v. Boston*, 10 Cush. 295; *Harris v. Elliott*, 35 U. S. 10 Pet. 55, 9 L. ed. 845; *Hollenbeck v. Rowley*, 8 Allen, 478; *Lyman v. Arnold*, 5 Mason, 198; *Blake v. Eick*, 34 N. H. 232; *Quimby v. Vermont C. R. Co.* 28 Vt. 337.

Messrs. E. D. Crumpacker, Peter Crumpacker, and Grant Crumpacker, for appellee:

Municipalities are agencies of government, and proper powers delegated to them should be reasonably construed, because they are designed for the public benefit.

Green's Brice, *Ultra Vires*, 335.

Authority to annex contiguous platted prop-

erty is vested in the city, and authority to annex contiguous unplatted property is primarily in the board of commissioners.

Strosser v. Fort Wayne, 100 Ind. 448; *Delphé v. Startzman*, 104 Ind. 848.

Little formality is required in pleadings before the county board. Much less is required in the pleadings than in the proof.

Orange County Comrs. v. Ritter, 90 Ind. 862; *Duncan v. Lawrence County Comrs.* 101 Ind. 408.

The only requirement of the statute on this subject is that the petition shall set forth the reasons for such annexation.

Chandler v. Kokomo, 187 Ind. 295.

The board of county commissioners has the exclusive power to annex unplatted territory, but none to annex territory wholly platted. It may, however, annex territory both platted and unplatted embraced in a single petition.

Thornton, Mun. Law, note 4, p. 272; *Logansport v. LaRose*, 99 Ind. 117.

The railway company owned considerable portions of the land attempted to be annexed to East Chicago. Its holdings entirely severed the land of the improvement company, and divided it into three separate and distinct parcels, none of which were contiguous to the others. The alleged annexation cannot be sustained in so far as it includes the lands of the improvement company, because the municipal intention was to annex the whole tract and there was no purpose to acquire only a part.

Peru v. Beares, 55 Ind. 576; *Evansville v. Page*, 28 Ind. 526; *Catterlin v. Frankfort*, 87 Ind. 45; *Razedale v. Neip*, 82 La. Ann. 485.

The railroad company owned the fee without qualification.

Frank v. Evansville & I. R. Co. 111 Ind. 182; *Ballard v. Louisville & N. R. Co. (Ky.)* 5 S. W. Rep. 484.

Any attempt upon the part of a city to annex territory by resolution which is not platted into lots, without the written consent of all the owners, is utterly void, and may be impeached collaterally.

Indianapolis v. McAvoy, 86 Ind. 586; *Logansport v. LaRose*, 99 Ind. 117; *Strosser v. Fort Wayne*, 100 Ind. 448; *Delphé v. Startzman*, 104 Ind. 848; *Indianapolis v. Patterson*, 112 Ind. 844.

It is necessary, in proceedings before the county board to annex territory to a city, for the petitioner to prove that the land is unplatted and contiguous to the city, where those questions are put in issue by the pleadings.

Chandler v. Kokomo, 187 Ind. 295.

Only such issues as are made before the commissioners can be tried in the circuit court on appeal.

Forsythe v. Kreuter, 100 Ind. 28; *Green v. Elliott*, 86 Ind. 58; *Stout v. Grant County Comrs.* 107 Ind. 848; *Mathews v. Drout*, 114 Ind. 268; *Wells v. Rhodes*, 114 Ind. 467; *Metty v. Marsh*, 124 Ind. 18; *Indianapolis, D. & W. R. Co. v. Hood*, 180 Ind. 594.

Inasmuch as the statute is silent upon what shall be sufficient reasons for the annexation of territory, the question must be left to the sound discretion of the authority to which they are addressed.

Elston v. Crawfordsville Board of Trustees, 20 Ind. 272; *Catterlin v. Frankfort*, 87 Ind. 45; *Chandler v. Kokomo*, *supra*.

80 L. R. A.

Howard, J., delivered the opinion of the court:

This was a proceeding before the board of commissioners of Lake county to annex certain unplatted territory to the city of Hammond. The board decided against the petition for annexation, and the city appealed to the circuit court of Lake county, from which a change of venue was taken to Porter county, where a special judge was appointed to try the cause. The case was heard by the Honorable W. B. Biddle, special judge, and a jury, and the trial resulted in a verdict and judgment in favor of the city and her petition for annexation.

The appellee contends that this appeal should be dismissed for the reason that all the persons against whom the judgment was rendered have not been made party appellants. To this contention appellants answer that all such defendants not made appellants, save one, did, within one year after the judgment was rendered, file in this court their written declination to join in the appeal; and that, by proof also filed, it is further shown that said defendant not made a party appellant, and not joining in the written refusal to appeal was also, within the year after judgment, notified of this appeal; asking also that said defendant be now made a party appellant. In this condition of the record, we are of opinion that, while the appeal has been brought with some irregularity of procedure, yet the spirit of the statute regarding the taking of appeals, and also the requirements of our rules and decisions in relation to the same matter, have been practically observed. The purpose of the statute (Rev. Stat. 1894, § 647; Rev. Stat. 1891, § 635) *was to provide that a part of those against whom a joint judgment was rendered might appeal without compelling the remaining judgment defendants to appeal, and yet give all an opportunity to join in the appeal, so that but one appeal might be taken in one case. Notice is consequently provided to be given to those not joining in the appeal. If, however, such parties come voluntarily before this court and decline to join in the appeal, it would seem that as to them all is accomplished that was intended by the statute. As to the party served with notice of the appeal, we think the conclusion must be the same, for it is shown that he might have joined in the appeal had he so chosen.

So far as the interests of the appellee are concerned, the year allowed for an appeal having passed, there can be no appeal but this one. Consequently the decision of this court, when made, will leave the appellee's rights fully and finally determined. The appellee therefore has no interest personal to herself in asking for the dismissal of the appeal. It thus appears that no one, on either side, who was a party to the judgment, has suffered the loss of any right or interest to which he was entitled, and hence no reason remains for the dismissal of the appeal. The case of *Gregory v. Smith*, 189 Ind. 48, and other cases cited by

*Several coparties may appeal, but must serve notice on all other coparties, and, if any coparties decline to join, their names shall be stricken out on motion, and they shall thereafter be barred from taking an appeal, and unless they decline to join, they shall be taken as having joined, and shall be liable for their share of the costs.

counsel, are not in conflict with this conclusion. There all the parties were not before the court; here they are before the court, or have refused to come. The reason for the rule there insisted upon does not exist in this case, and hence the rule itself does not apply.

The appellants' first contention is that the complaint or petition is insufficient, in that it does not show that the owners of the property sought to be annexed to the city had not given their consent to such annexation previous to the bringing of the proceedings before the commissioners. This objection is brought here for the first time. There was no demurrer or motion to make more specific urged to the complaint in the trial court. The statute providing for the annexation of unplatted lands to a city by proceedings before the county board (Rev. Stat. 1894, § 8659; Rev. Stat. 1881, § 8196) does not require that it shall be stated in the petition that the owners will not consent to annexation. The want of such consent is implied in the very nature of the proceeding. If there were consent, such a proceeding would be quite unnecessary, for the city might then annex the land by a simple resolution, as provided in the same section of the statute. In the case of *Huff v. Lafayette*, 108 Ind. 14, although the question was not directly before the court, the opinion was expressed that it is not essential that the petition should contain a statement that the land owners had not consented to annexation. Virtually a like conclusion as to what should be stated in the petition was reached in the recent case of *Chandler v. Kokomo*, 187 Ind. 295. Nor, as we think, are the cases cited by counsel for appellants in conflict with this conclusion. In truth, there are but two methods provided for the annexation of lands to cities; one being with the consent of the owners, and one without such consent. If the land is platted, and the plat is recorded by the owner, the law implies a consent and agreement on his part that the land may be taken into the city. If the land is not platted, or the plat not recorded, the owner may file his written consent with the city council, agreeing that the land may be annexed. But in either of these cases the city is also a party to the transaction, and may accept or refuse to accept the land as a part of the corporate territory. But in case the property owner does not consent to annexation,—that is does not make and put on record a plat of his land, or does not file with the city his written agreement that the land may be annexed, while at the same time the city desires such annexation,—then the law provides a method by which the controversy may be tried and settled; and the board of county commissioners is set up as the tribunal before which, subject to appeal, the dispute between the parties may be determined. If, however, the property owner had consented to annexation, there would be no dispute, no controversy, and hence no action before the county board. The law will not presume so vain a thing as that it might be supposed that, though there was consent on the part of the property owners, and though, consequently, the city might have annexed the land by a simple resolution, yet the corporation proceeded to ask the county board, by an adverse proceeding, to do for her

what, without delay and without opposition, she might do for herself. The very existence of the controversy, therefore, shows, not only desire for annexation on the part of the city, but also want of consent thereto on the part of the property owner.

It is next contended that, because certain parts of the territory to be annexed are platted, therefore the commissioners had no jurisdiction to act on the petition. In order that any land, platted or unplatted, should be annexed to a city, it is necessary that the land to be annexed should be contiguous to the city limits—that is, that it should actually touch the existing territory of the city. In an action before the board for annexation, this contiguous territory must be unplatted, or, at least, if platted, the plat must, as yet, be unrecorded. However, should there be, within the limits of the territory to be annexed, certain tracts, called "platted lots," not contiguous to the city limits, and hence not recorded, certainly neither the statute nor any good reason would render such circumstance a cause for defeating annexation by the county board. The mere fact of platting, taken by itself, is rather a circumstance looking to annexation. It is an attempt to impress upon the territory an urban character, and is, in so far, an expression of consent to annexation. It would need only in addition, as we have seen, that the lots should be contiguous to the city, and that the plat should be recorded, to enable the city to make the annexation without the action of the board. In other words, the reasons in favor of annexing such attempted plats of lots are greater than those in favor of annexing unplatted lands themselves. But are such subdivisions of land as are here referred to legal plats, or plats such as are contemplated in the statutes? We do not think so. A plat of a town or city, or a plat of land adjoining a town or city, may be acknowledged and recorded in the same manner as a deed. Rev. Stat. 1894, §§ 4411, 4418; Rev. Stat. 1881, §§ 3874, 3876. It is such "lots laid off and platted adjoining such city" that are contemplated in annexation proceedings and referred to in Rev. Stat. 1894, §§ 8658, 8659; Rev. Stat. 1881, §§ 8195, 8196. There is no provision for placing any other plats on record, and the recording of any other lots or plats of lots would be a nullity. *Taylor v. Fort Wayne*, 47 Ind. 374.

The fact, therefore, that certain parts of the territory proposed to be annexed to the appellee city in this proceeding are said to be platted lots, not contiguous to the city, can have no bearing on the result. Such lots are included in the unplatted lands, and can be annexed to the city only as a part of such unplatted lands. Indeed, we may go further. Even if the whole tract sought to be annexed were platted, but the plat not recorded, the common council would have no authority to annex the land without the consent of the owners, and the county board alone could take jurisdiction. It may be observed, in addition, that the petition for annexation in this case, and also the published notice, describe the territory to be annexed by metes and bounds only, and no mention is made of lots; but a description of lands by metes and bounds is a description of the lands as unplatted. The evidence also shows

that the lands were in fact unplatted. It is only on the map filed that we notice on a part of the territory, not contiguous to the city, the outlines of platted lands, but there is no evidence of any attempt at placing such plats on record. These tracts are entitled on the map as subdivisions of parts of certain named sections of land, according to the United States surveys. The principal of these divisions is styled: "Robey & Shedd's Addition to Chicago, in Indiana." It is hardly necessary to say that there cannot be a legal addition to Chicago in Indiana, and that none of these subdivisions are platted lots, as contemplated in our statutes. *Taylor v. Fort Wayne, supra.*

The whole territory to be annexed, then, is clearly to be regarded as unplatted land. The attempts at platting parts of the territory not contiguous to the city as shown on the map filed for inspection by the county commissioners, could be considered only for the purpose of enabling the board to discover the probable fitness or unfitness of the lands for city uses and purposes. The case of *Chandler v. Kokomo, supra*, cited by appellants in this connection had reference to lands contiguous to the city, and not to attempted plats not contiguous, and hence is not here in point. Contiguous recorded plats may be annexed directly by the city. All other lands are to be regarded as unplatted, and will be treated accordingly in annexation proceedings. In *Logansport v. La Rose*, 99 Ind. 117, in considering Rev. Stat. 1894, § 3660; Rev. Stat. 1881, § 3197, this court said: "Provision is made for the annexation to the city of contiguous territory, whether platted into lots or otherwise, without the consent of the owners thereof, upon petition of the common council to the board of commissioners of the county." In commenting on this decision, counsel says that the clause, "whether platted into lots or otherwise," is wholly misleading, and contend that it is not warranted by the statute; that the statute provides that only unplatted land may be annexed by action of the county board. We are of opinion, however, that the learned judge who spoke for the court in that case intended by the words "platted into lots," to speak of an unrecorded plat of lots. The common council, without the consent of the owners, has no authority to annex contiguous unrecorded platted lots, but only those the plats of which are placed on record; and if there should be plats made of lands contiguous to a city, but the plats were kept off the record, it would be only by petition to the commissioners that the city could procure the annexation of such lots. In other words, for the purposes of annexation, such lots must, as we have already said, be treated as unplatted lands. And if this is true of a contiguous unrecorded plat, as is the force of what Judge Howk said in *Logansport v. La Rose, supra*, still more it must be true of noncontiguous plats, which, as we have seen, not only are not recorded, but for whose record the statute makes no provision. They must be treated as a part of the unplatted contiguous territory, and hence fall solely within the jurisdiction of the county board.

It is next contended that the third instruction given by the court to the jury is erroneous. The material part of the instruction com-

plained of is as follows: "It is required that the proceedings should conform strictly to the statutory requirements, and the petition and other documentary evidence have been introduced to prove the regularity of the proceedings; but as no question is raised before you of any want of compliance with the statutory requirements, or that of the contiguity of the territory sought to be annexed, you may find that the proceedings were regular, and that the territory is contiguous to the corporate limits of the city of Hammond." As the record does show that all the proceedings taken by the city were in conformity with the statute, and that this fact was in no way questioned, and as both parties, and all the evidence, documentary and oral, including the plats filed, showed that the territory sought to be annexed was contiguous to the city of Hammond, there could be no error on the part of the court in assuming the existence of such undisputed facts. *Carter v. Carter*, 97 Ind. 497; *Howard County Commrs. v. Legg*, 110 Ind. 479. But it is not the contiguity of the territory to be annexed that is disputed by counsel, but whether a part of that territory lying next to the city of Hammond had not already been annexed to the city of East Chicago before the petition for annexation had been presented by the city of Hammond to the county board. This is not a question as to whether the territory sought to be annexed was contiguous to the city of Hammond, or whether the proceedings for that purpose were regular, but rather whether the annexation could take place for another reason, namely, that the part next to Hammond had been already annexed to East Chicago. However the latter question might be determined, it would not affect the correctness of the instruction, which related only to the regularity of the proceedings and to the contiguity of the lands sought to be annexed. These last questions being undisputed, the instruction was correct.

As to whether a part of the territory sought to be annexed to Hammond had already been annexed to East Chicago, and could not therefore be annexed to Hammond, which is the real question here made, the facts presented, and which were all shown by documentary evidence, were as follows: After the common council of the city of Hammond had resolved to present their petition for annexation to the board of county commissioners, and after they had given the statutory notice of their intention to present such petition, describing in the notice the lands sought to be annexed, but before the petition was presented to the board, the city of East Chicago, on the written consent of the owners, annexed by resolution to that city a strip of land 80 rods wide on that part of the lands next to Hammond, which the latter city sought to annex. The effect of this annexation to East Chicago, if valid, would be to defeat the Hammond petition, for if the strip was annexed to East Chicago it could not also be annexed to Hammond; and, as the strip covered all the land in the territory sought to be annexed, which was contiguous to the city limits of Hammond, there would be nothing left to annex to that city, for the contiguity of the remaining territory sought to be annexed would be cut off by the East Chicago

strip. The evidence as to the East Chicago annexation proceedings is all documentary, and it is without conflict. The legal sufficiency of this evidence was therefore a question of law for the court; and, if such evidence shows that the action before the East Chicago common council was ineffectual for the annexation of the strip in question, the court might so inform the jury and the instruction would not be erroneous for that reason. *American Ins. Co. v. Butler*, 70 Ind. 1. The strip of land proposed to be annexed by East Chicago was unplatted. It was therefore necessary, as we have already seen, that a written consent should be filed for its annexation by the owners of the land. Such a written consent was filed by the Calumet Canal & Improvement Company, one of the appellants and owner of the greater part of the land to be so annexed to East Chicago, including the whole of the 80-rod strip contiguous to Hammond. If this strip reached the limits of East Chicago, so that its east end should be contiguous to the limits of that city, there would be no doubt that the written consent of the improvement company and the resolution of the common council of East Chicago would have effected the desired annexation. But prior to this time the improvement company had, by deeds in fee simple, conveyed to the Chicago & Calumet Terminal Railway Company strips of land which taken together, entirely cut off the 80-rod strip from the corporate limits of East Chicago. The railway company did not file any written consent to the annexation of its strips of land to East Chicago. It follows, therefore, that, the owners of all the land sought to be annexed to East Chicago not having filed their written consent to its annexation, the common council never acquired jurisdiction, and such annexation has not taken place. The proceedings before the common council being a nullity, they may be attacked even collaterally, except, perhaps, in case of estoppel, of which there is no question here. *Indianapolis v. McAvoy*, 86 Ind. 587; *Stroesser v. Fort Wayne*, 100 Ind. 448; *Delphi v. Starteman*, 104 Ind. 848; *Indianapolis v. Patterson*, 112 Ind. 844. While all presumptions will be indulged in favor of the regularity of proceedings before an inferior tribunal when once jurisdiction is shown, yet if it appears that facts essential to jurisdiction are wholly wanting, the presumptions in favor of the action of the tribunal must cease. *Olay County Comrs. v. Markle*, 46 Ind. 96; *Willinson v. Moore*, 79 Ind. 897; *Smith v. Clausmeier*, 138 Ind. 105; *Clayborn v. Thompkins* (decided at this term) (Ind.) 40 N. E. Rep. 121. Some other questions are discussed by counsel, but we think that in what we have said we have passed upon all questions affecting the merits of the case.

Finding no available error, *the judgment is affirmed.*

A petition for rehearing having been filed, on November 7, 1895, Howard, Ch. J., delivered the following opinion in response thereto:

One of the positions taken by counsel in support of their petition for a rehearing of this case is that the circuit court had no jurisdiction of the appeal from the board of county

commissioners, for the reason that the annexation of territory to a city is a legislative, and not a judicial, function, and, as such, in case of unplatted lands, the board of county commissioners is given sole and final jurisdiction in the premises. The proposition so advanced was not urged in the original argument, nor on the trial of the cause, and is now brought to our attention for the first time; but, as it is a question that affects the jurisdiction of the trial court, and also of this court, it is one that will be entertained at any time.

It may be conceded that annexation of territory to a city is a legislative function. This function is exercised by the common council when it resolves to annex certain described lands to the city, and to present a petition therefor to the county board. It must be admitted, however, as we think, that the after proceedings had upon the petition are of a judicial nature. The petition must give the reasons why, in the opinion of the council, the annexation should take place. The sufficiency of such reasons, and whether they in fact exist, calls for the decision of the tribunal appointed to hear the petition. Notice of the presentation of the petition is also provided for, and adverse parties are thus brought in. Whether the proper preliminary steps have been taken, whether the reasons given in the petition are true and are sufficient, seem to be questions calling for a judicial examination and decision. In a similar case (*Grusnmeyer v. Logansport*, 76 Ind. 549) it was said by Woods, J., speaking for this court, that "the decision of the board in such a case is judicial, and not merely administrative or legislative." But if the board, in considering and deciding upon the petition, acts in a judicial capacity, certainly the legislature may, as it has done in this case, provide for an appeal to the courts to determine whether the city council and the county board have complied with the statutory requirements in the action taken. It is the law itself, as has been said, that fixes the conditions of annexation; and the office of the board and of the court is to determine whether the conditions so prescribed by the law have been complied with. The legislature has expressly provided for such judicial determination by the board and for an appeal therefrom to the courts, and this court has frequently recognized the right to such appeal. Rev. Stat. 1894, § 4224; Rev. Stat. 1881, § 8248; *Catterlin v. Frankfort*, 87 Ind. 45; *Chandler v. Kokomo*, 187 Ind. 295; *Wilcox v. Tipton* (at this term) 43 N. E. Rep. 614. See also *Windfall Mfg. Co. v. Emery* (at this term), (Ind.) 41 N. E. Rep. 814. See also *Wahoo v. Dickinson*, 23 Neb. 426.

In *Forrythe v. Hammond*, 68 Fed. Rep. 774, Baker, J., in passing upon an application made to the United States circuit court for the district of Indiana by one of the appellants in the case at bar, to enjoin the appellee from collecting taxes upon the lands annexed in this proceeding, speaking of the question now under consideration said: "The power to hear and determine whether the conditions prescribed by law for the creation, enlargement, or contraction of a municipal body, exist is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement, or contraction of a munic-

ipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body, or the enlargement or contraction of its limits; and, when these conditions are judicially ascertained, the law *ex proprio vigore* creates the municipal body or enlarges or contracts its boundaries."

Counsel next repeat the contention that the action of the common council of East Chicago, in attempting to annex to that city certain of the lands here in controversy, without first having secured the assent of the owners of that part thereof adjacent to the city, cannot be attacked collaterally in this case. We cited in the original opinion numerous authorities to the proposition that the jurisdiction of an inferior tribunal, as a common council, may be attacked collaterally, and evidence offered to show that the tribunal did not have jurisdiction of the subject-matter or of the parties. We have attentively read the acute analysis made of those authorities by counsel, and are still satisfied that the authorities so cited do establish the truth of the proposition stated. We are inclined to think that counsel have not carefully distinguished between facts as to the jurisdiction of a body and facts as to the proceedings and acts of that body after jurisdiction is shown. If there is jurisdiction, then the decision that follows is conclusive, except on direct attack. But jurisdiction itself may always be inquired into, and it is only after jurisdiction is established, both of the subject-matter and of the person, that the decision of the tribunal will be invulnerable to collateral attack. As said by this court in *Olay County Comrs. v. Markle*, 46 Ind. 96, cited in the original opinion: "The facts which it is said must be shown to exist before the matter can be within the jurisdiction of an inferior court, and which can be inquired into collaterally, are such as in the absence of which the court cannot rightfully hear and determine any question touching the matter in controversy. Hence a recital in the record of such facts may be shown to be false." See also *State v. Hudson*, 37 Ind. 193. As bearing upon the question, see, further, *Rape v. Heaton*, 9 Wis. 228, 76 Am. Dec. 269; *Thompson v. Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 648; *Scott v. McNeal*, 154 U. S. 84, 88 L. ed. 896; *Works, Courts*, §§ 20, 23, 25, 26.

In the case at bar it is not doubted that the owners of the lands adjacent to the city of East Chicago, and which it was attempted to annex to the city, had never assented to such annexation, but that the only petition for annexation presented to the common council was by owners of lands not adjacent to the city; yet the claim is made that the question of the right of the council to annex such adjacent lands, and also the nonadjacent lands, is foreclosed by the record. The city council assumed that the petitioners for annexation were the owners of the lands adjacent to the city, and it is said that this assumption is conclusive, although in fact the owners of the adjacent lands did not assent to such annexation. If that contention were good, why could not any person go before a city council, claim falsely to be the owner of adjacent lands, and petition for their

annexation to the city, and, if the record of the common council should show that upon such petition the lands were annexed, how could the decision be collaterally called in question? The law, however, gives the council jurisdiction to annex adjacent lands only on the written assent of the owners. It is clear that the common council had no jurisdiction of the subject-matter.

In cases cited in the original opinion we think it is shown that this court has more than once decided practically the same question here raised, namely, that attempts at annexation of lands to cities made by common councils not having jurisdiction are void, and may be attacked collaterally as well as directly. *Indianapolis v. McCahey*, 86 Ind. 587; *Delphi v. Starteman*, 104 Ind. 843; *Indianapolis v. Paterson*, 112 Ind. 344.

Counsel devote much argument and research to show that where the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and settle by its decision, such decision in general is conclusive. It needed but a statement of that proposition to establish its truth. But it does not follow that such tribunal, by claiming jurisdiction, can establish it. If the law fixes what is necessary to acquire jurisdiction, the tribunal cannot take jurisdiction not so authorized by law. The law requires notice to parties who are to be subjected to the decisions of the tribunal. Jurisdiction, therefore, cannot be taken without such notice. But as the tribunal must itself decide whether the notice is sufficient, its decision on such sufficiency is conclusive. So, when a petition is to be filed, such petition is necessary to give jurisdiction, and the tribunal, by finding that a petition was filed, when in fact it was not, could not take jurisdiction. But as the tribunal is the only body to pass upon the sufficiency of the petition, whether it is in proper form, has the requisite number of signers, and whether the persons signing have the proper qualifications, etc., its decision on such questions is final.

Stoddard v. Johnson, 75 Ind. 20, one of the leading cases on this subject, and relied upon by counsel, is in harmony with this holding. That case decides that the presentation of a petition for the improvement of a highway gave the county commissioners jurisdiction over the subject-matter of the petition, and that whether the petition were in all respects sufficient was a jurisdictional question which the board had a right to decide for itself. The court, however, is careful to say that it is not to be understood as holding that "any petition, however defective or irrelevant, will be deemed sufficient to invoke the jurisdiction of the commissioners to decide upon its sufficiency, and to impart validity to that decision as against collateral attack." The correct rule is stated in the same case, "that once the jurisdiction of an inferior tribunal is established over the subject-matter and the parties to a proceeding which may be had before it, the same presumptions are indulged in favor of the regularity of its action as prevail in favor of the action of the courts of general powers." Had the common council in the case before us acquired jurisdiction over the lands to be annexed and lying adjacent to the city, and had

it also acquired jurisdiction over the owners of such lands, then the subsequent proceedings, however defective, would not be void; but not having acquired jurisdiction over the lands or over its owners, the annexation proceedings were a nullity.

Whether the right of way of the Chicago & Calumet Terminal Railway Company was a fee simple or an easement is not material here. If the strips of land belonging to that company, by whatever name the title may be called, are not within the corporate limits of the city of East Chicago, it is very certain that the land of the petitioner company, and which is separated by those strips from the city limits, is not adjacent to the city. But it cannot rightfully be claimed that these strips are within the limits of the city of East Chicago. They were never annexed, either on petition of their owners or by act of the county board. The city could not levy taxes or street and sewer assessments upon these strips of land, could

not make streets or alleys across them, or in fact exercise any jurisdiction whatever over them. The strips are outside the limits of the city, and completely separate the lands of the improvement company from the city limits. How, then, could the city annex those nonadjacent lands of the improvement company? The statute expressly provides that the lands to be annexed to a city shall be adjacent. Had the city jurisdiction of the subject matter? Could the city, by declaring the lands of the improvement company to be adjacent, make them adjacent? If the common council could annex lands separated from the corporate limits by a right of way 100 feet across, why might it not annex lands a mile distant from the city? The conclusion is irresistible that the city had no jurisdiction of the subject-matter; the lands of the petitioner company were not adjacent to the city, and could not therefore be annexed.

The petition for a rehearing is overruled.

IOWA SUPREME COURT.

Charles ASHTON *et al.*

v.

H. W. STOY, *Appt.*

(.....Iowa.....)

1. A motion in a district court to require plaintiffs to state more particularly the manner in which they were aggrieved by the action of the board of supervisors in the selection of a county newspaper under Code, § 807, is properly overruled.
2. A person to whom a paper is sent without his knowledge or consent, either expressed or implied, although it is done under a valid contract with a third person, is not a "subscriber" within the meaning of Code, § 807, requiring supervisors to select as the official newspapers of the county those having the largest number of bona fide yearly subscribers within the county.
3. An amendment of the list of subscribers by adding the name of one omitted should be refused by the district court on review of the action of the board of supervisors in the selection of a county newspaper.

(October 24, 1895.)

APPEAL by defendant from a judgment of the District Court for Guthrie County in favor of plaintiff in a proceeding brought to obtain a designation of the official paper for the county. *Affirmed.*

Statement by Robinson, J.

The plaintiffs are publishers of the Guthrie, a weekly newspaper published in Guthrie county. In January, 1898, they applied to the board of supervisors of that county to have

NOTE.—What constitutes one a subscriber to a newspaper is a question on which we think the above case has no direct precedent. On the question, What constitutes a newspaper?—see *Lynch v. Durfee* (Mich.) 24 L. R. A. 708.

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their newspaper selected as one of the official newspapers of the county under the provision of section 807 of the Code. The board denied the application, and selected the Guthrie Times, a weekly newspaper published in the county by the defendant. From the decision the plaintiffs appealed to the district court. That tribunal found in favor of the plaintiffs and adjudged the Guthrie to be one of the official papers of the county for the year named. From that judgment the defendant appeals.

Mr. E. W. Weeks for appellant.

Mr. E. R. Sayles, for appellee:

Even though the court may have erred in overruling a motion for more specific statement, the error is waived by answering or going to trial.

Cookley v. McCarty, 34 Iowa, 105; *Kline v. Kansas City, St. J. & C. B. R. Co.* 50 Iowa, 656; *Randolph v. Bloomfield*, 77 Iowa, 50; *Mann v. Taylor*, 78 Iowa, 355.

The law provides that the board of supervisors shall select two newspapers published within the county, having the largest number of bona fide yearly subscribers within the county. One of the questions in this case is as to what constitutes one a "yearly subscriber." In the interpretation of statutes, language used should be given its plain and ordinary meaning, unless a different meaning was evidently intended by the legislature.

Equitable L. Ins. Co. v. Gleason, 56 Iowa, 47; *Blackman v. Wadsworth*, 65 Iowa, 80; *Williams v. Poor*, Id. 410.

Bona fide subscribers should not be limited to those only who have subscribed by signing the subscription list of the publisher, but should and does include all those who in good faith have directly or indirectly authorized the publisher of the paper to enter their names upon the subscription list of said paper and whose relations are not by the terms of the contract to be terminated in less than one year.

Robinson, J., delivered the opinion of the court:

The list of subscribers within the county filed by the plaintiffs contained 986 names, of which 91 were stricken out by the court, leaving 895 which were counted as those of bona fide yearly subscribers to the Guthrie Times. The list filed by the defendant contained 1,012 names, of which 119 were stricken out, leaving 893 to be counted for the Times, or 2 less than the number counted for the other paper.

1. In the district court the defendant filed a motion to require the plaintiffs to state more particularly the manner in which they were aggrieved by the action of the board of supervisors, which was overruled, and of that ruling the defendant complains. It is said that, if the ruling was erroneous, the defendant waived the error by proceeding to trial. There was nothing in what he did inconsistent with his right to insist upon his exception to the ruling. He did not file any subsequent pleading, and therefore does not come within the rule of *Mann v. Taylor*, 78 Iowa, 857, and other cases cited by the appellees. But we do not find that the ruling was erroneous. A contest of this kind is triable in the first instance by the board of supervisors of the county in which it is instituted, and formal pleadings are not in all cases required. *Runtion v. Haislet* (Iowa) 57 N. W. Rep. 902. The issue should be presented to the board for determination, and, when fraud is charged, it should be alleged before the hearing is had and the selection of papers is made. *Cory v. Hamilton*, 84 Iowa, 597. The jurisdiction of the district court is appellate; and it should try and decide the case made before the board of supervisors. Without deciding that pleadings may not be required by the district court in any case, we reach the conclusion that there was no error in not requiring them in this one.

2. The chief contention on this appeal is based upon the action of the district court in striking from the Times list 86 names which were furnished to the defendant under an agreement made with one W. H. Stiles, but which the court found were not names of bona fide yearly subscribers. The facts in regard to them are substantially as follows: In December, 1892, the defendant and Stiles entered into an agreement in writing, a copy of which is as follows: "This article of agreement, made and entered into by and between H. W. Stok of the first part and W. H. Stiles of the second part, all of Guthrie county, Iowa, witnesseth: That, for and in consideration of the sum of \$35 and other valuable consideration, the party of the first part hereby agrees to furnish party of the second part 50 copies of the Guthrie Times for one year, from and including Vol. 10, No. 20, to be sent to such persons in Guthrie county, Iowa, as party of the second part shall direct; also to furnish party of the second part one column of advertising in said paper for same time as above stated, party of the second part to have the privilege of changing the said column at such time and in such manner as he may direct. Said advertisement shall occupy the first column or the upper half of the first two columns of the first page of the said Guthrie Times. Dated this 27th day of December, 1892. H. W. Stok L. R. A.

W. Stok. W. H. Stiles." After that agreement was made, Stiles handed to the defendant a list which contained the names of 44 persons, who appear to have been residents of Guthrie county. The names were placed on the Times subscription list, and a copy of the paper was sent to each of the persons thus designated, before the meeting of the board in January. Stiles then sent to each of them a communication of which the following is a copy, omitting the name of the person addressed: "Guthrie Center, Iowa, Dec. 27, 1892. Dear Sir: Upon retiring from the office of county attorney, I have established a real-estate office in connection with my other business. Knowing the value of a kind word from personal friends when occasion offers, I have taken the liberty to address you as such friend, hoping you may be able to throw some business in my way. As I do not feel like asking something for nothing, I have made arrangements with the publisher of the Guthrie Times to furnish a paid-up subscription to the Times for one year as a partial consideration for any aid you may extend in my behalf among your neighbors. You will find inclosed a receipt in full for one year to the Times. You will find my column advertised in the paper. Respectfully, etc., Wm. H. Stiles." With each communication was sent a receipt which, omitting name of beneficiary, was in the following form: "Guthrie Center, Iowa, Dec. 27, 1892. Received from W. H. Stiles, for —, one and no-100 dollars for subscription to the Times from Vol. 10, No. 20, to Vol. 11, No. 20, year ending January 1, 1894. H. W. Stok." The names of the persons to whom these instruments were sent were duly inserted in them. We do not find that there was anything illegal or unwarranted in the transaction considered by itself. It appears to have been a legitimate effort on the part of Stiles to increase his business, and the defendant had the undoubted right to be a party to it. The question to determine, however, is whether the persons whose names were placed on the Times list by virtue of that transaction, without any ratification on their part of what was done, thereby became bona fide subscribers for the paper. Section 807 of the Code, as amended (McClain's Code, § 438), requires the board of supervisors of each county, at the January session of every year, to select two newspapers published within the county, having the largest number of bona fide yearly subscribers within the county, to be the official papers of the county for that year. The reason for selecting the papers having the largest number of subscribers is to secure as large a general circulation of the official publications of the county among its citizens as practicable in two newspapers. It is therefore provided that the persons to whom the papers are sent shall be subscribers in good faith for a year at least, and not persons to whom the papers are sent temporarily for the purpose of increasing their circulation. The primary meaning of the word "subscriber" is to write underneath, as one's name; but it also means to give consent to something written, to assent, to agree; and a subscriber is defined to be: "(1) One who subscribes; one who contributes to an undertaking by subscribing. (2) One who enters his name for a paper, book,

map or the like." Webster, Int. Dict. To become a subscriber to a newspaper includes some voluntary act on the part of the subscriber, or something which is in effect an assent by him to the use of his name as a subscriber. A person to whom a paper is sent without his knowledge or consent, either expressed or implied, is not a "subscriber" within the meaning of the statute. Of the 44 persons whose names were furnished to the defendant by Stiles, but few are shown to have approved the sending of the paper to them, and it is not certain that any had done so when the board of supervisors was required to make a selection of newspapers, while some refused to receive it. We are of the opinion that the district court was fully authorized by the evi-

dence to strike from the list of the Times the names in question.

8. Complaint is made of the action of the court in refusing to permit the defendant to amend his list by adding thereto the name of a subscriber which had been omitted. We think the ruling was correct. The district court was required to try the case on the lists as deposited with the county auditor, and the proposed amendment was not allowable. But, if this were not true, the error would have been without prejudice, as the addition of the name to the Times list would not have changed the result.

We do not find any error in proceedings of the district court, and the judgment is affirmed.

MINNESOTA SUPREME COURT.

FIDELITY & CASUALTY COMPANY,
of New York, *Appt.*,

v.
William EICKHOFF, *Respnt.*

(.....Minn.....)

- *1. A contract of plaintiff with defendant's employer, guaranteeing his fidelity as employee,—construed.
2. This contract of guaranty having been executed at defendant's request, his obligation to indemnify the plaintiff is coextensive with the obligation of the latter to indemnify the employer; and any provisions in the contract between the plaintiff and the employer as to proof of liability, which were binding on the plaintiff in favor of the employer, are equally binding on the defendant in favor of the plaintiff.
3. A stipulation between plaintiff and defendant, that the voucher or other evidence of payment by the plaintiff to the employer should be conclusive evidence against the defendant as to the fact and extent of his liability to the plaintiff,—*Held* void as against public policy in so far as it made such voucher or other evidence of payment conclusive evidence.
4. *Held, also, that the complaint stated a cause of action.*

(December 13, 1896.)

APPEAL by plaintiff from an order of the District Court for Polk County sustaining a demurrer to the complaint in an action brought to recover of defendant the amount which plaintiff as surety upon his bond had been compelled to pay because of a shortage in his accounts. *Reversed.*

The facts are stated in the opinion.
Messrs. Van Fossen, Frost, & Brown,
for appellant:

The only way to reconcile the seeming confusion arising from the use of the terms "surety" and "guarantor" is to consider suretyship as a generic word embracing all cases

in which one person is primarily liable and another person is secondarily liable, and where the person secondarily liable has a remedy over against the person primarily liable.

Guaranty, on the other hand, may be properly embraced within the definition of suretyship as just defined, and is in itself a much narrower expression, being applicable solely to express or special promises to answer for the debt, default, or miscarriage of another.

Wendlandt v. Sohre, 37 Minn. 162; *Gallagher v. Nichols*, 60 N. Y. 438.

Under the implied promise, as against his principal, the guarantor is limited absolutely to the amount paid under a legal obligation so to do,—the basis of such legal obligation being the contract between the guarantor and the party in whose favor the guaranty was executed.

On the other hand, under an express promise of indemnity, the amount which the guarantor may recover from his principal is governed exclusively by the written contract of indemnity, and may be either greater or less in amount than that which might be recovered in an action on an implied promise.

The legal consideration of the contract of suretyship is to be found in the service rendered to the principal, and if the contract be valid the law looks only to the presumed beneficence of the surety as the cause of his obligation.

Union Bank v. Beatty, 10 La. Ann. 378.

A surety must be under a legal obligation to pay, and have paid, some money, before he can maintain an action at law against his principal.

Brandt, Suretyship & Guaranty, § 176; *Pigou v. French*, 1 Wash. C. C. 278; *Forest v. Shores*, 11 La. 416; *Hollinsbee v. Ritchey*, 49 Ind. 263; 2 *Eatee*, Pl. § 1859; *Mauri v. Hefferman*, 18 Johns. 58; *Bachelor v. Planters' Nat. Bank*, 78 Ky. 438; *Chambers v. McDowell*, 4 Ga. 182.

Judgments against the sureties are conclusive in actions by the sureties against their principals.

Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54; *Chipman v. Fambro*, Id. 291; *Pitts v. Fugate*, 41 Mo. 405; *Thomas v. Hubbard*, 15 N. Y. 405, 69 Am. Dec. 619; *Hare v. Grant*, 77 N. C. 204.

*Headnotes by MITCHELL, J.

NOTE.—The above case is believed to decide some questions of guaranty insurance for the first time.
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Fay v. Ames, 44 Barb. 387, held that in an action by a sheriff upon a bond given by a deputy sheriff to indemnify the sheriff against his acts or commissions as such deputy, the surety in such bond was held by a judgment against his principal, although no notice of such suit was given to the surety.

If the principal expressly waives failure of consideration, the effect of this is to admit the validity of the contract and to preclude the sureties from availing themselves of any such defense.

Dillingham v. Jenkins, 7 Smedes & M. 479.

Plaintiff's act in becoming guarantor for defendant herein, having been done at the latter's request, gave rise, in the absence of any written agreement, to an implied agreement on the part of the defendant to reimburse plaintiff for all losses incurred by reason of such guaranty.

Brandt, Suretyship & Guaranty, § 176; *Toussaint v. Martinant*, 2 T. R. 100; *White v. Walker*, 81 Ill. 422.

An elementary principle of all contracts is *modus et conventio vincunt legem*.

Broom, Legal Maxims, p. 689; *Gott v. Gandy*, 28 L. J. Q. B. 8.

Any one may at his pleasure renounce the benefit of contractual rights when they are introduced entirely in his own favor.

Broom, Legal Maxims, p. 696.

Bonds given to individuals or private corporations are subjects of private contract, by which the parties may bind themselves to any extent or in any manner not violative of public policy or positive statute.

Hubert v. Mendheim, 64 Cal. 218; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 825; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 858.

The only ground on which the clause in the contract of indemnity can by any possibility be held invalid is that of public policy.

Public policy has been defined (19 Am. & Eng. Enc. Law, p. 565) to be that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public or the public good.

Where no principle of public policy is violated, parties are at liberty to forego the protection of the law.

Sedgw. Stat. & Const. L. pp. 86-88; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *People v. Murray*, 5 Hill, 488; *Baker v. Braman*, 6 Hill, 47, 40 Am. Dec. 887; *James v. Hendree*, 24 Ala. 488; *Richmond v. Dubuque & S. O. R. Co.* 26 Iowa, 191; *Kellogg v. Larkin*, 3 Pinney, 128, 3 Ohand. 188, 56 Am. Dec. 164; *Richardson v. Mellich*, 2 Bing. 229; *Parsons v. Trask*, 7 Gray, 478, 66 Am. Dec. 503.

As example of cases where the law has permitted parties to waive by contract their legal rights,—

See *Tanner v. Smart*, 6 Barn. & C. 608; *Manby v. Scott*, 3 Smith, Lead. Cas. 454; *Nepean v. Doe*, Id. 718, note; *Allen v. Webster*, 15 Wend. 239; *Dickson v. Green*, 24 Miss. 618; *Nixon v. Carco*, 26 Miss. 481; *Sugg v. Thrasher*, 30 Miss. 135; *Barrett v. Carden*, 65 Vt. 481; *Griffith v. Earl Dudley*, L. R. 9 Q. B. Div. 857; *Western & A. R. Co. v. Bishop*, 50 Ga. 485; *Western & A. R. Co. v. Strong*, 53 Ga. 461; *Galloway v. Western & A. R. Co.* 57 Ga. 512; *Phyfe v. Eimer*, 45 N. Y. 102; *Kimball v. Mun-*

ger, 2 Hill, 864; *Fiero v. Reynolds*, 20 Barb. 275; *Cole v. Western U. Teleg. Co.* 33 Minn. 237; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Anacosta Tribe No. 12, I. O. of R. M. v. Murbach*, 13 Md. 91, 71 Am. Dec. 625; *Oscola Tribe No. 11, I. O. of R. M. v. Schmidt*, 57 Md. 105; *Black & White-Smith's Soc. v. Vandyk*, 3 Whart. 812.

The provision of the contract of indemnity making vouchers showing payment of loss conclusive evidence of the fact and extent of defendant's liability to plaintiff is valid.

First, such a provision is valid as an enlargement of contractual rights under the contract of suretyship existing between plaintiff and defendant.

Second, it is valid as constituting a rule of evidence agreed upon between the parties to govern any and all controversies between themselves arising under the contract of suretyship.

Randel v. Chesapeake & D. Canal Co. 1 Harr. (Del.) 276; *St. Paul & N. P. R. Co. v. Bradbury*, 43 Minn. 222; *Leighton v. Grant*, 20 Minn. 345; *Tullis v. Jason* [1892] 8 Ch. 441; *Kihlberg v. United States*, 97 U. S. 398, 24 L. ed. 1106; *Sweeney v. United States*, 109 U. S. 618, 27 L. ed. 1058; *Chicago, S. F. & O. R. Co. v. Price*, 138 U. S. 191, 34 L. ed. 918; *Home Ins. Co. v. Morse*, 87 U. S. 20 Wall. 445, 23 L. ed. 865; *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70; *Sugg v. Thrasher*, 20 Miss. 185; *Denver & N. O. Constr. Co. v. Stout*, 8 Colo. 61; *Snell v. Brown*, 71 Ill. 183; *Orumlish v. Wilmington & W. R. Co.* 5 Del. 270; *Carter v. Carter*, 109 Mass. 809; *Tarbell v. Whiting*, 5 N. H. 65; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & S. 205; *Knox v. Symmonds*, 1 Ves. Jr. 369; *Sweet v. Morrison*, 116 N. Y. 19; *Seibert v. Minneapolis & St. L. R. Co.* 52 Minn. 143, 20 L. R. A. 585; *County Seat of Linn County*, 15 Kan. 500; *Hand v. Ballou*, 12 N. Y. 541; *Howard v. Moot*, 64 N. Y. 262; *Cooley, Const. Lim.* 367; *People v. Comannon*, 189 N. Y. 43; *Larson v. Dickey*, 89 Neb. 463; *State v. Cunningham*, 25 Conn. 195; *Lumsden v. Cross*, 10 Wis. 289; *Allen v. Armstrong*, 16 Iowa, 508; *Wright v. Dunham*, 13 Mich. 414; *Abbott v. Lindenbower*, 42 Mo. 162; *Forbes v. Halecy*, 26 N. Y. 53.

Third, the provision of the contract of indemnity respecting the effect of the voucher is valid by way of estoppel in favor of plaintiff against defendant.

White v. Walker, 81 Ill. 422; *Harris v. Brooks*, 21 Pick. 195, 32 Am. Dec. 254.

Plaintiff assumes a legal obligation of defendant to a third party by reason of certain representations of defendant to it. Consequently the defendant is estopped to deny the validity of such a clause in the contract of indemnity.

Bigelow, Estoppel, pp. 552, 684; *Jagua v. Shewalter*, 10 Ind. App. 284; *Ward v. Johnson*, 95 Ill. 215; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Whitney Arms Co. v. Barlow*, 68 N. Y. 62, 20 Am. Rep. 185; *Galloway v. Western & A. R. Co.* 57 Ga. 512; *Burgess v. Badger*, 124 Ill. 288; *Loveman v. Taylor*, 85 Tenn. 2; *Probstfeld v. Oiseek*, 37 Minn. 420; *Jacobs v. Miller*, 50 Mich. 119; *Bishop, Contr.* § 286, note 2.

One who has taken the benefits of a con-

tract cannot repudiate the conditions on which it was given.

Fowler v. Saks, 7 Mackey, 570, 7 L. R. A. 649; *Keller v. Ashford*, 188 U. S. 610, 38 L. ed. 667; *State v. Arrington*, 101 N. C. 109.

Admitting (as does the demurrer) that all of the allegations of this complaint are true, could a judgment thereon be sustained in favor of plaintiff?

It could, (1) because of the fiduciary relations of the parties; (2) because the subject-matter of the allegations of the complaint relating to a breach of the conditions of the bond are peculiarly within the knowledge of the defendant.

Ordinary principals and sureties stand in a fiduciary and confidential relation, and the same principles apply to them as to other parties sustaining fiduciary relations one to the other.

1 Story, Eq. § 828; *Hallsburton v. Carter*, 55 Mo. 485; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 68, 26 L. ed. 699; *Stoll v. King*, 8 How. Pr. 298; *Robins v. Hops*, 57 Cal. 496; *Rochester v. Levering*, 104 Ind. 568; *Coggins v. Flythe*, 118 N. C. 109; *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 854; *Smith v. Compton*, 8 Barn. & Ad. 407; *American Bank v. Adams*, 12 Pick. 808; *Bigelow*, Fr. p. 125; *Atkins v. Withers*, 94 N. C. 589; *Nugent v. Bandy*, 2 White & Tudor Lead. Cas. Eq. 406, and notes; 2 Pom. Eq. § 956.

The burden of proof lies with the sureties to show that no loss occurred.

Bank of Washington v. Barrington, 2 Peur. & W. 27.

The subject-matter of the allegations of the complaint relating to a breach of the conditions of the bond are peculiarly within the knowledge of the defendant, and therefore, if he wishes to prevent plaintiff's recovery, the burden of proof is on him to give evidence respecting it.

Abbott, Trial Brief, p. 86; *People v. Cannon*, 189 N. Y. 46; *Corwin v. Shoup*, 76 Ill. 246; *Burtin v. Blin*, 23 Vt. 152.

A failure on the part of the defendant to account for, or deliver to his employer, all of the wheat received by him in the course of his employment, throws upon plaintiff (and by virtue of the terms of the contract of indemnity likewise upon defendant in the present action) the burden of proof to show that the failure to account for or to deliver the wheat was due to one of the exceptions named in the bond. Not being able to do this, the employer had a legal right to recover of plaintiff on the bond, and consequently defendant is liable to plaintiff for the amount of the employer's recovery against plaintiff therefor.

Gutridge v. Vanatta, 27 Ohio St. 866; 2 Chitty, Pl. p. 92; 2 Boone, Code Pl. p. 514; *Fild v. Robins*, 8 Ad. & El. 90; *Stoher v. Goodfellow*, 1 Nev. & M. 202; *Connors v. People*, 46 Ill. App. 72; *Walker v. Patterson*, 36 Me. 275; *Spalding v. Mattingly*, 89 Ky. 88; *Carrey v. Bely*, 29 Me. 157; *Alzheimer v. Hunter*, 56 Ark. 159; *Ladd v. Smith* (Ala.) 10 So. Rep. 886; *Chester County v. Hemphill*, 29 S. C. 584; *People v. Foster*, 183 Ill. 496; *Benham v. United Guarantees & Life Assur. Co.* L. R. 7 Exch. 744; *Towle v. National Guardian Assur.* 80 L. R. A.

Soc. 80 L. J. Ch. 900; Carpenter v. Solicitor to the Treasury, 51 L. J. P. 91.

If the complaint alleges a state of facts which if proved to be true would establish fraud as a conclusion of law, it is a sufficient allegation of fraud; and the declaration in the pleadings that such acts were fraudulent is in no wise essential and necessary to put the question of fraud in issue.

Andrews v. King County, 1 Wash. 46; *Bromley v. Smith*, 26 Beav. 671; *Hess v. Young*, 59 Ind. 379; *Parham v. Randolph*, 4 How. (Miss.) 436, 85 Am. Dec. 408; *Kerr, Fraud & Mistake*, § 886.

If a declaration discloses a state of facts upon which an action may be maintained although there be no fraud, the plaintiff is not bound to prove it though it be alleged, and may recover upon the liability by the facts disclosed.

People v. Brush, 6 Wend. 454; *Swinfen v. Lord Chelmsford*, 5 Hurlst. & N. 890.

Mr. Halvor Steenerson for respondent.

Mitchell, J., delivered the opinion of the court:

The plaintiff, a foreign corporation, is what is termed a "guaranty insurance company," engaged in the business of guaranteeing to employers the fidelity of their employees. This action was brought to recover money alleged to have been paid to the Red River Elevator Company, defendant's employer, upon a bond by which the plaintiff obligated itself to make good and reimburse to the elevator company such pecuniary loss as it might sustain by reason of the infidelity of the defendant as its receiving agent in one of its grain elevators. The appeal is from an order sustaining a demurrer to the complaint on the ground that it did not state facts constituting a cause of action.

The material conditions of the bond, which is set out in the complaint, are as follows: "The aforesaid company [the plaintiff] shall, . . . subject to the conditions and provisions herein contained, . . . make good, and reimburse to the said employer such pecuniary loss as may be sustained by the employer by reason of fraud or dishonesty of any of the employees [of which defendant was one] named upon said schedule, as hereinafter provided, in connection with his duties as receiving agent or buyer: . . . Provided that the company shall be liable only for the acts of fraud or dishonesty on the part of the persons mentioned in the schedule, who act as receiving agents, for shortages in their grain accounts, as follows, viz.: There shall be deducted from the total amount of grain and dockage received by the receiving agent at said elevator or elevators screenings and dirt from such grain as has been cleaned at said elevator or elevators, together with the amounts of shipments, based upon weights of grain and dockage at terminals; and if the result shows a deficit, and the shortage is not caused by the various exceptions agreed to, this proof of loss will be accepted as binding on the part of the company. In case where screenings and dirt are burned at an elevator, they shall be weighed before being burned, and the weight reported

daily to the employer: Provided that the company shall not be liable for the grading of grain, loss by heating, drying, or leakage of cars, or other damage, shortages caused by defective weighing apparatus or appliances, or for shortages in any elevator or elevators caused by the failure of any of the parties mentioned in said schedule to take dockage enough to make good their weights for grain checks issued, as the employer hereby assumes the risks of its superintendents, traveling men, and officers in giving instructions to its receiving agents as to the amount necessary to take to make good the amount of dockage at terminal points, and the action of receiving agents in taking dockage, the loss by cleaning grain, and the ordinary shrinkage arising from dust in handling of said grain in elevators. And it is further agreed that the company shall not be liable for errors or carelessness in weighing of grain, nor for thefts of grain by persons other than those covered by this bond, nor for robbery or thefts of money from the persons so covered, where proofs of such errors, carelessness, thefts, or robbery are conclusive, as negligence is not covered by this bond."

The complaint alleges that defendant, in consideration of plaintiff's becoming a guarantor for him by executing this bond, agreed to indemnify it against any losses, damages, or expenses it might sustain or become liable for in consequence of executing the bond; also that this bond was in the form requested by the defendant; also that defendant further agreed "to admit the voucher or other proper evidence of such payment by plaintiff as conclusive evidence against himself as to the fact and extent of his liability to the plaintiff." It is further alleged that defendant, within the scope of his employment as receiving agent of plaintiff, issued tickets for, received, and took in, at one of the elevator company's elevators, a certain number of bushels of wheat and dockage, but, of the same, only delivered to the elevator company a certain less number of bushels at the termination of his employment; leaving nearly 1,000 bushels which he never delivered, although requested to do so. The complaint then states specifically the manner in which this shortage was ascertained and made to appear, which was the exact manner provided for in the bond. It then negatives specifically that this shortage was caused by any of the exceptions named in the bond. It is then alleged that the elevator company presented its claim for this shortage to the plaintiff; that the latter was compelled to pay the same, and now holds the elevator's voucher for the same, but that defendant refuses to indemnify the plaintiff for the money thus paid out in his behalf. Counsel for plaintiff asks us to pass upon numerous questions touching the construction of this bond; but as it is a novel contract and its provisions prolix, somewhat obscure, and sometimes apparently contradictory, we deem it unwise, upon a demurrer, to decide much except what is necessary to determine whether a cause of action is stated. Hence we shall confine ourselves mainly to the specific objections made by defendant's counsel to the sufficiency of the complaint.

1. The first objection urged against the complaint is that it does not allege that the plain-

tiff had a license to do an insurance business in this state, as required by Gen. Stat. 1894, § 8381. Notwithstanding that there would seem to be some decisions holding otherwise, we are of opinion that the case is one where the maxim, "*Omnia rite acta presumuntur*," is applicable. Noncompliance with the laws of this state will not be presumed, but, if it exists, must be set up in defense. *Williams v. Cheney*, 8 Gray, 215.

2. The second point urged is that a contract guaranteeing the honesty of employees is void as being against public policy; that it is the duty of all employers dealing with the general public to employ honest agents; that the effect of such a contract as set out in the complaint is to make it a matter of indifference to an elevator company whether it employs honest or dishonest agents to deal with the patrons of the elevator. There is nothing whatever in this objection. The same principle is involved in every bond exacted from a public officer or a private agent as security for the faithful performance of his duties. And it is wholly immaterial whether the guarantor is a private person or an incorporated guaranty insurance company. The advantages of the latter over the former mode of suretyship, if properly conducted, are very apparent. 2 May, Ins. § 541.

3. The third objection is that the stipulation between the plaintiff and defendant that the voucher, or other evidence of payment by plaintiff to the elevator company, should be conclusive evidence against the defendant as to the fact and extent of his liability to the plaintiff, is void as being against public policy. This question is not really involved in this appeal, but, as it is one which will necessarily arise at the very threshold of the trial of the action, it may properly be considered now. The right of a party to waive the protection of the law is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed. Thus, an agreement to waive the defense of usury is void. So, also, according to the weight of authority, is an agreement, made at the time of contracting a debt, to waive the prospective right of exemption. The agreement under consideration is more than a mere enlargement of contractual rights, or the establishment of a rule of evidence. It provides that the plaintiff may, by his own *ex parte* acts, conclusively establish and determine the existence of his own cause of action. In short, he is made the supreme judge of his own case. The case is not at all analogous to the common provisions in building and construction contracts, by which the determination of some third person, such as the architect or engineer, as to the amount or character of the work, is made conclusive between the parties, in the absence of fraud or mistake. Nor is it at all analogous to a provision in an executory contract for the sale or manufacture of an article to the satisfaction of the buyer, where, if the article is declined, the parties are, in contemplation of law, left *in statu quo*. In the present case the attempt is to provide that, after the alleged cause of action has accrued, the plaintiff shall be the sole and conclusive judge of both its existence

and extent. Such an agreement is clearly against public policy. If the provision had been that the voucher, or other evidence of payment, should be merely prima facie evidence of the fact and extent of defendant's liability,—thus merely shifting the burden of proof, but leaving the defendant at liberty to rebut this prima facie evidence,—although even then a somewhat drastic provision, we do not think that it could be held to contravene public policy. To that extent we think this provision is valid, but, in so far as it assumes to make the voucher of payment by plaintiff conclusive of defendant's liability, it is void.

4. The fourth objection urged against the complaint is that, while the bond only covers acts of fraud and dishonesty, it contains no allegation that this shortage was caused by the fraud or dishonesty of the defendant. Whoever drafted this bond used language very loosely, and employed a great many words to express, or else conceal, very few ideas. But after taking it by the four corners, and considering all its provisions, our construction is that the plaintiff was only bound to make good and reimburse the elevator company for loss sustained by reason of a shortage of grain caused by the actual fraud or dishonesty of the defendant. But the bond also provides how the existence and amount of a shortage shall be ascertained, and that, when thus ascertained, it shall be accepted as evidence that it was caused by the fraud and dishonesty of the defendant, and not by any of the various other causes, enumerated as exceptions, for which the plaintiff was not to be liable; in other words, that a shortage ascertained in the manner prescribed should be prima facie evidence of its existence and that it was caused by defendant's fraud or dishonesty, thus casting the burden upon the plaintiff to rebut this prima facie case by proof. It is not bound to do this by affirmative evidence showing the particular one of the causes enumerated as exceptions, which produced the shortage, but may do it by negative evidence showing that it was not caused by the fraud or dishonesty of the defendant, and hence must have been produced by one or more of the excepted causes. This it may do by a fair preponderance of evidence as to any of the excepted causes, except errors or carelessness in weighing, and thefts by persons other than those covered by the bond, in which cases the proofs must be conclusive. The word "conclusive," in that connection, we think, must be construed as meaning so strong as to require a finding or verdict that the shortage resulted from the cause alleged. This may also be done by negative or circumstantial evidence. So much for the construction of the bond.

The bond having been executed at the request of the defendant and in the form requested by him, it follows that his obligation to indemnify the plaintiff is coextensive with that of the plaintiff to reimburse the elevator company; also, that any provisions in the bond, as to proof of liability, binding on the plaintiff in favor of the elevator company, are equally binding on the defendant in an action brought by the plaintiff against him to recover indemnity for what it has paid in his behalf. Therefore it follows that the complaint alleges

facts which, under the provisions of the bond, constitute a cause of action against the defendant; that is, if all the facts alleged are proved on the trial, it would follow, as a matter of law, that the plaintiff would be entitled to recover. That the facts alleged are, in one sense, merely evidentiary and may be rebutted by other evidence, is not material, inasmuch as, by the agreement of the parties, they make out prima facie a cause of action, and if not rebutted they conclusively make it out. Otherwise expressed, under the contract of the parties, the facts alleged prove that the shortage was caused by defendant's fraud or dishonesty. Under these circumstances, an express and direct allegation that it was so caused was unnecessary. The complaint states a cause of action.

Order reversed.

John L. GOULD, *Resp't.*

GREAT NORTHERN RAILWAY COMPANY, *App't.*

(.....Minn.....)

*1. The words "on each side of such roads," as used in Gen. Stat. 1878, chap. 34, § 54 (Gen. Stat. 1894, § 2562), relating to fencing railroads, mean the margin or border of the entire grounds or right of way.

2. Where a railroad company has only an easement in its right of way extending through farm lands, and it refuses or neglects to build a fence on the line of its right of way, or inside such line, the adjoining land owner may maintain an action for damages sustained thereby; and it is competent for such land owner to show on the trial of such action, as an element of damages, that he would have the legal right to join his fences with the fence of the railroad company, whether built on or inside of such line, although it is the primary duty of such railroad company to build its fence on the line, margin, or edge of its right of way.

3. Evidence considered, and held sufficient to justify the verdict of the jury.

(November 24, 1896.)

APPPEAL by defendant from an order of the District Court for Stevens County denying a motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for defendant's refusal to comply with the statute requiring it to fence its track. *Affirmed.*

The facts are stated in the opinion.

Messrs. M. D. Grover and C. Wallington, for appellant:

In *Emmons v. Minneapolis & St. L. R. Co.* 85 Minn. 508, this court held that the diminution of the rental value of the farm, by reason of defendant's railroad not being fenced, was a proper measure of damages, not to be limited

*Headnotes by BUCK, J.

NOTE.—For duty of railroad company to fence tracks, see also notes to *State v. Chicago, M. & N. R. Co.* (Wis.) 12 L. R. A. 180; *Perkins v. St. Louis, I. M. & S. R. Co.* (Mo.) 11 L. R. A. 436; *Gallagher v. New York & N. E. R. Co.* (Conn.) 5 L. R. A. 797.

by the cost of constructing and maintaining a fence and new trial was granted.

In *Nelson v. Minneapolis & St. L. R. Co.* 41 Minn. 181, this court defines the term "rental value" to mean the value of the use of the land for any purpose for which it is adapted in the hands of a prudent and discreet occupant, upon a judicious system of husbandry.

In *Finch v. Milwaukee & St. P. R. Co.* 46 Minn. 251, this court confirmed the rule that the difference in rental value might be taken as a basis for estimating damages.

All that is required of defendant is that it should fence its railroad, and not that it should construct its fence as a line fence or on the boundary line between its right of way and the land of plaintiff.

8 Bl. Com. 209; *Locks v. First Dis. of St. Paul & P. R. Co.* 15 Minn. 850; Gen. Stat. 1874, chap. 84, § 54; *Gillam v. Sioux City & St. P. R. Co.* 26 Minn. 268; *Smith v. Minneapolis & St. L. R. Co.* 37 Minn. 108.

The land of the plaintiff was not fenced save about 100 acres in one corner of section 2.

The necessity for herding therefore arose, not from the absence of the fence along the line of defendant's road, but from the fact that plaintiff had upon his farm, and there were also upon the farms adjoining, hundreds of acres of unfenced grain, into which the cattle would have strayed had they not been herded.

Mr. William C. Bicknell, for respondent:

The term "road" in general does not mean simply the beaten path. "Road" is used to designate the land over which a way, public or private, is established.

See *O'hollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 98 Am. Dec. 408.

In *Winona & St. P. R. Co. v. Walden*, 11 Minn. 515, 88 Am. Dec. 100, it was decided, in ascertaining the compensation to be paid for taking land for railroad purposes, that the cost of constructing fences along the line of the road was not a proper element of damage, where the company is under a statutory obligation to construct such fence.

The language of this statute is broad and general enough to cover damages caused by rendering the abutting land less valuable for the purpose of raising or pasturing animals than it would be if the railroad were fenced as required by the statute.

Emmons v. Minneapolis & St. L. R. Co. 35 Minn. 508, 38 Minn. 215.

Buck, J., delivered the opinion of the court:

This action is brought to recover damages arising from the neglect of the defendant to fence its railroad as required by Gen. Stat. 1878, chap. 84 § 54 (Gen. Stat. 1894, § 2692). The plaintiff owns two large adjacent stock farms in Stevens county; one containing 640 acres and the other 820 acres. The defendant's road is constructed across each of these farms, for a distance of about 2 miles, without being fenced as required by law. Each farm is used separately, and has its own buildings. The railroad runs nearly through the center of one farm, and divides the other so as to leave a larger portion upon one side than upon the other. About one half of these farms is suit-

able for raising stock, and the balance is well adapted to the raising of grain. The neglect of the railroad company to erect its fences on each side of its road is a plain violation of a positive law. The omission to erect these fences renders these farms, to some extent, less suitable for stock raising, and deprives the plaintiff from using them with such advantage and profit as he otherwise would. And this result would tend to impair its rental value and make the farm less valuable. *Finch v. Milwaukee & St. P. R. Co.* 46 Minn. 250. If the verdict in this case rests upon sufficient legal evidence as to the damages arising from the impaired rental value and the depreciation in the value of the farm in consequence of the defendant's neglect to fence its road, we cannot properly disturb the verdict. There were only three witnesses, including the plaintiff, in his behalf, and none on behalf of the defendant. The witness Brittondall testified as to the amount of damages to the premises by reason of the railroad's not being fenced, but added that he also based his opinion as to such damages upon the fact that the whole tract was not fenced on all sides. Of course, such evidence could not constitute the proper basis for estimating the legal measure of damages, as against the defendant, by reason of its neglect to fence its road. Whether there were fences or not on all of the other sides of the farm except where the railroad was bound to fence was immaterial, and could not properly be considered in adding to or lessening the damages to which the defendant was liable by reason of its neglect to fence its road as required by law. None of the evidence of this kind, however, was objected to, and therefore no question of error arises upon its admission. If there was no other testimony upon the subject, it would only show that the verdict of the jury is not sustained by the evidence. It is claimed by the defendant that the testimony of the witness Sanders is of the same character. There is considerable doubt about this being a fair construction of his evidence. It can be asserted with much force that his testimony related to the fence which the railroad company was bound to build, and not to fences upon other sides of the premises. But, whichever view of the testimony is correct, it is not necessarily material in the determination of this case. The plaintiff did not so testify, but did testify as to the impaired rental value of the land by reason of there being no railroad fence there. His uncontradicted and unimpeached testimony was sufficient to sustain the verdict of the jury in this respect, unless his further explanation of the manner of estimating the rental value of the lands is of such a character as to nullify his previous testimony, and make it, as a whole, incompetent and insufficient as a basis for estimating proper damages. In estimating the difference in the rental value with and without the fences being there, he based it upon the ground that the fences would be on each side of the track, 75 feet from the center of the track, which would make the fence on the division line between the parties. He also testified as follows: "I base my estimate of the rental value upon the proposition that I have a right to join my fence to that of the railroad company, built directly upon the line between

my land and the railroad right of way, so I can have the use of the railroad fence on one side."

The statute to which we have above referred, in regard to railroad companies fencing their roads, reads as follows: "All railroad companies in this state shall within six months from and after the passage of this act build or cause to be built good and sufficient cattle-guards at all wagon crossings, and good and substantial fences on each side of such road." Evidently the witness based his opinion upon the assumption that it was the duty of the railroad company to build its fences on the margin or outer line of its right of way; that is, upon the division line between him and the railroad company. Is not this the true construction to be placed upon the language of the statute? In Webster's International Dictionary the word "side" is defined to be the "margin, edge, verge, or border of a surface, the bounding line of a geometrical figure; as, the side of a field, of a square or triangle, of a river, of a road." This word "side" is not here used in a technical sense, but as it is commonly and properly understood. The meaning of the words "on each side of such road" is that the fence must be built on the margin or border of the entire railroad right of way, and therefore on the division line between such right of way and that of the adjoining proprietor. This construction evidently gives full force to the spirit and intent of the language of the statute, as well as to the usual and popular meaning attached to the words. While the authorities are almost if not quite universal that the primary object of the statute requiring railroads to fence their roads is one of a police nature, yet possibly it might have been the legislative intent that such a fence would also serve as a partition or division fence. Probably the railroad company could not, especially when it has only an easement in the right of way, be compelled to build a partition fence as such, yet it may constitute one; and we think that the adjoining land owner should share the right to join fences with the fence of the railroad company, whether such a fence is denominated simply a "railroad fence," or a "partition fence," and which incloses upon one side the land of the adjoining owner, and as a matter of legal right such owner would have the benefit of it, as a partition fence. This was the view taken of the statute of Illinois which required the railroad company to erect and maintain fences on both sides of its road. *People v. Ohio & M. R. Co.* 21 Ill. App. 38. And it was there held that the words "on each side of the road" meant the margin or border of the entire grounds used as a roadway. To the same effect are *Wabash, St. L. & P. R. Co. v. Zeigler*, 108 Ill. 806, and *Ohio & M. R. Co. v. People*, 121 Ill. 488. In the latter case the court uses the following language: "The question now is, whether a railroad company, in complying with the statute in question, may build a fence required thereby anywhere on its right of way except on the line between its right of way and the adjoining owner's land, or, what is the same thing, is the fence now constructed, after notice given, 10 feet within and upon its right of way, and that distance from the adjoining owner's land, a compliance with the provisions of the statute in regard to

fencing railroads? It is thought it is not. The statute is so plain in this regard, it seems idle to attempt to construe it. It makes it the duty of the company to erect a fence on 'both sides of the road,'—that is, so as to embrace the right of way; and so this court has held in *Wabash, St. L. & P. R. Co. v. Zeigler*, 108 Ill. 804. In that case it was decided a fence built 2 feet inside of the right of way was not constructed in conformity with the statute. The suggestion that the 'sides of its road' may mean the mere 'track' upon which trains are moved is too absurd to be seriously considered." See also Thornton, *Railroad Fences*, § 185. Of course, where there are such natural or physical formations of the ground as to make it difficult or impossible to comply with the statute, the company would not be liable for not fencing on the margin of its right of way. But where no such obstacles intervene the railroad company is bound to build its fences on the margin of its right of way, and the adjoining land owner has a right to connect his fences with its fences whenever he builds up to them. Even if it is not the object of the law to furnish the land owner with a partition fence on one side of his land, yet its provisions and requirements do embrace the protection of the cattle of the owner of a stock farm as well as the safety of travelers upon its railroad, or the lives of its employees.

But there is another ground upon which the order of the trial court should be sustained. There are a long line of cases, commencing with that of *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 515 (Gil. 392), 88 Am. Dec. 100, holding, as the settled doctrine of this court, that when a railroad company, whether as a condition or limitation of its right to take land for its road, or as a police regulation, is required to fence its road, the damages for the taking of the land should be assessed upon the basis of the construction of such fences by the railroad company. In this case we must assume, in the absence of any proof to the contrary, that the railroad company has merely an easement in its right of way, and that the fee of the land, subject to the easement, remains in the plaintiff. If the railroad company had built a fence on the line of its right of way, the plaintiff would have been entitled to join his fences to it so as to inclose his land, without having to build another and parallel fence on the same side of his land. Even if we should concede that the railway company is not bound to build its fence on the line of its right of way, it is clear that it cannot, by building it inside of the line, upon its right of way, deprive the land owner of the benefit of it as a line fence. If the company builds its fence inside of the margin or edge of its right of way, the land owner may extend his fences so as to connect with it. Having had his damages assessed upon the basis that it, and not the land owner, will build the fence between him and it, the railroad company cannot be heard to say that he cannot join his fences to its fence for the purpose of inclosing his land; and this right to thus connect his fence is an element which may be taken into account in estimating the value of the use of the land. Hence the railroad company should do one of two things,—build its fence on the line of its right of way,

or if it build on such right of way, inside the line, allow the adjoining land owner to join his fences to the railroad company's fence. If the railroad company desires an unobstructed use of its entire right of way, it can easily accomplish this purpose by building its fence on the margin thereof, and thus do away with the obligation to permit the adjoining land owner to join fences with its fence. It cannot defeat the right of the adjoining land owner to have his fences connect with its fence, by refusing to build a fence either on its line or inside of it, although, as we have stated, its primary duty is to build its fence on the margin of its right of way. Therefore it seems to us that the plaintiff's testimony in regard to the grounds upon which he based his damages was substantially correct. It was the legal right of joining his fences with the defendant's, either on the exact line, or near to and inside of it, which he considered the primary element in estimating his damages, and the matter of expense in building a few feet of additional fence would be of too little consequence to seriously affect the amount of damages one way or the other, and certainly not to the disadvantage of the defendant's rights. It was therefore properly submitted to the jury, and, there being no evidence to the contrary, we should not disturb the verdict. It is a matter of great importance that railroad companies fence their right of way, because it involves the safety of the lives of the traveling public,

as well as the interests of the adjoining land owner; and, if they continually and obstinately persist in defying the plain provisions of a positive law, perhaps obedience to its requirements will be quickened and obtained by being mulcted in damages in favor of an injured land owner, the rental value of whose adjoining farm is thus impaired year after year. There being no prejudicial errors in the case, *the order denying the motion for a new trial is affirmed.*

Mitchell, J.

I concur in the result, but do not wish to commit myself to the proposition that under the statute a railroad company is required to build its fences on the line of its right of way. The determination of that question is not necessary to the decision of this case, and therefore I place my concurrence upon the second ground suggested in the opinion. A railroad company, at least where it has a mere easement in the land, cannot, by building its fence inside of the line of its right of way, deprive the owner of the fee from joining his fences to theirs. Leaving part of the right of way outside of their fence amounts to implied authority to the owner of the fee to inclose that part left outside with his adjoining land, by connecting his fence with the railroad fence.

Canty, J.:

I concur with Judge Mitchell.

GEORGIA SUPREME COURT.

HUBBARD, PRICE, & CO., *Pigs in Err.*,

v.
TURNER et al.

(38 Ga. 732.)

"The word 'heirs,' in a policy of life insurance payable to the 'heirs or assigns' of

***Headnote by LUMPKIN, J.**

the assured after his death, he never having had a wife or child, is to be construed as meaning his next of kin according to the statute of distributions, which in Georgia, when the decedent leaves no widow, is the same as the statute of descent or inheritance. Although the heirs, as beneficiaries of the policy, are to be ascertained by reference to the statute, they become beneficiaries, and take their interest by virtue alone of the contract in their behalf embraced in the policy, and

NOTE.—*Who are "heirs" within the meaning of life insurance policies.*

- I. In general.
- II. Other words combined with the word "heirs."
- III. Widow as an heir.
- IV. Insured as heir of beneficiary.

I. In general.

The above decision in the case of HUBBARD, P. & CO. v. TURNER is fully sustained by the prior decisions on the subject.

The person who would take intestate personal property under the statutes will be entitled to the proceeds of insurance payable to the "heirs at law" of the insured, and the proceeds will not go to his estate. *Mullen v. Reed*, 64 Conn. 240, 24 L. R. A. 664.

The word "heirs," designating those to whom insurance shall be paid in case there is no will, is held, in *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 90, to mean the legal heirs designated by the statute of distributions to the exclusion of the executor and creditors of the estate.

The word "heirs" in a certificate of life insurance, 30 L. R. A.

where there is no context to explain it, means those who would, under the statutes of distribution, be entitled to the personal estate of the insured. *Johnson v. Knights of Honor*, 38 Ark. 265, 8 L. R. A. 732.

The phrase "legal heirs," as used in the by-laws of a benefit society describing the person to whom payment shall be made if the member has not disposed thereof, means next of kin, or perhaps in a still broader sense includes dependents as well as next of kin. Therefore when a member left neither widow nor child, his mother, who was dependent on him at the time of his death, was held entitled to the fund. *Britton v. Supreme Council of R. A.* 46 N. J. Eq. 102.

The word "heirs," describing the beneficiaries of a policy of life insurance, is held to mean the persons entitled to the surplus of personal estate under the statute of distributions, who in this case were the widow and children, and that they were entitled to the insurance in the proportion indicated by that statute. *Leavitt v. Dunn*, 56 N. J. L. 309.

The word "heirs" in the constitution of a benefit

not in any respect by virtue of the statute. Wherefore, on the death of the assured intestate without having assigned the policy, they take its proceeds as purchasers, and not as heirs or distributees. This being so, these proceeds are no part of the estate of the assured, and are not subject to the claims of his creditors, unless by reason of some fraud, actual or constructive, committed by the assured upon their rights in taking out or keeping up the policy, the creditors are equitably entitled to follow and reclaim money invested in the policy which ought to have been used or reserved for use in satisfying their demands.

(June 18, 1894.)

ERROR to the Superior Court for Chatham County to review a judgment in favor of defendants in a proceeding by the creditors of Charles C. Hardwick, deceased, to subject the proceeds of a policy of insurance upon his life to the payment of their claims. *Affirmed.*

The facts are stated in the opinion.

Messrs. A. Minis, W. W. Osborne, and Pope Barrow for plaintiffs in error.

Messrs. Cabaniss & Willingham, Saussy & Saussy, and Harrison & Peeples for defendants in error.

Lumpkin, J., delivered the opinion of the court:

Charles C. Hardwick, in his lifetime, took out a policy of insurance, payable to his "heirs or assigns." The contest in the present case was between his creditors and his heirs at law, who were his sister, two nieces, and a nephew (he never having had a wife or child), over the fund derived from this policy, which had been paid over by the company to Hardwick's administrator. The policy was issued in 1869. The debts due the contesting creditors were made in 1890. Hardwick had never assigned the policy, and died insolvent. There was no evidence that he was insolvent when the policy was taken out, nor that any of the premiums

association naming "widows, orphans, and heirs or devisees" as persons to be benefited, is not used in its restricted sense, but includes anyone to whom the estate of the deceased might pass by operation of law. *Lamont v. Grand Lodge Iowa L. of H. 31 Fed. Rep. 177.*

In holding that a policy of life insurance payable to the heirs of the insured is not assignable by him, it is said in *Goeling v. Caldwell, 1 Lea, 454, 27 Am. Rep. 774*, that the word "heirs" in the case of personality means next of kin.

A policy payable "to heirs or assigns" does not belong to the estate of the insured, but if no assignment has been made it will inure to the benefit of his heirs. *Mullins v. Thompson, 51 Tex. 7.*

A description by a foreigner of "legal heirs" as beneficiaries in a certificate means his wife and children if he has any, especially where his will gives to his wife all his personal estate including this benefit. *Kaiser v. Kaiser, 13 Daly, 522.*

The meaning of the words "heirs at law" in a benefit certificate made in a state in which the parties reside will be construed according to the laws of that state when brought in question before the courts of another state. *Mullen v. Reed, 64 Conn. 240, 24 L. R. A. 664.*

A policy payable to the wife and children of the insured, or in the event of their prior death to his legal heirs, was held, where one of the children died during the life of the insured, to be all payable to the wife and surviving children. *Covenant Mut. Ben. Asso. v. Hoffman, 110 Ill. 608.*

A by-law declaring that the funds shall go to the heirs of the member of an insurance association if he has made no other directions was also held operative in *Keener v. Grand Lodge, A. O. U. W. 38 Mo. App. 648*, where the insured had designated as beneficiary a woman with whom he was living unlawfully, but whom he named as his wife, although he had a lawful wife. The fund was held in this case to belong to the heirs, according to the language of the by-laws, and not to his wife alone, to be distributed among them as their interests might be determined by the law.

The words "legal heirs" in the provisions of a benefit association designating those to whom the fund shall be payable in case the member has failed to designate beneficiaries should be construed with reference to the general purpose of the association, and where that is to provide a fund for the families, heirs, or representatives of deceased members should be taken to describe the person or persons who would take such property in cases of intestacy. *Walsh v. Walsh, 66 Hun, 297.* In this case 80 L. R. A.

the widow is held entitled to share with brothers and sisters.

An only son and heir at law was held entitled to the whole fund where life insurance was payable to persons designated, provided they were heirs or members of the family of the insured, and, in the absence of designated persons or of any widow, to the guardian or trustee of children, or, if there are no children or assignees, to his heirs. *Tyler v. Odd Fellows' Mut. Relief Asso. 145 Mass. 134.*

A designation of the mother of a member of an insurance organization to receive "the \$1,000 my heirs are to receive" is entirely inoperative on the mother's death during his life, and the reference made by him to his "heirs" does not amount to a designation of them as recipients, as it is made merely by way of recital, with the express intent to designate his mother only. *Hellenberg v. District No. 1 of I. O. of B. B. 94 N. Y. 580.*

It is said in *Silvers v. Michigan Mut. Ben. Asso. 94 Mich. 93*, that under a statute prohibiting policies in favor of beneficiaries who have no insurable interest, and providing that in such case the insurance shall be payable to the heirs of the deceased member, heirs who had no insurable interest are included; but this statute was not actually involved in the case.

II. Other words combined with the word "heirs."

The cases here are not altogether alike.

The word "heirs" as used in a policy of life insurance must be held to mean distributees or next of kin—especially when it is associated with the words "executors" and "assigns." *Tompkins v. Levy, 37 Ala. 263.* This was said in defining who were the "heirs" of a wife who died during the life of the insured, and in holding that her children did not succeed to her statutory privileges in respect to the policy.

HUBBARD, P. & CO. v. TURNER holds that life insurance payable to "heirs or assigns," where the insured is unmarried and childless, will go free from debts of the insured to those persons who are his next of kin according to the statute of distributions, which in Georgia is in such a case the same as the statute of descents, but will not be part of the assets of the estate.

This case distinguishes *Rawson v. Jones, 33 Ga. 453*, which held that a policy payable to the insured, "his heirs, executors, administrators, or assigns" will confer upon his legal representatives a right to the money as part of his estate for distribution if there is nothing to show any contrary intent.

But where no certificate was actually issued: a

upon it were paid when he was insolvent, nor that any of the present claims against his estate were in existence at any time when any premium was paid. The judge, upon the above state of facts, rightly decreed that the heirs were entitled to the proceeds of the policy in the administrator's hands. What is the meaning of the word "heirs" as used in this policy? Under our statute of distributions, which is the same as the statute of descent or inheritance, when the decedent leaves no widow this word certainly means "the next of kin." Code, §§ 2484, 2570. As the assured was unmarried and childless, he, doubtless, intended to provide for those who would, at the time of his death, be entitled to his estate as his legal distributees, unless during his life, he should choose to divert in another direction the proceeds of the policy by himself assigning it. As he never did assign it, and as he remained unmarried up to the time of his death, we are satisfied the intention remained with him

to the last, that his next of kin should take the proceeds of the policy by virtue of the contract he had made in their behalf with the insurance company. Reference is had to the statute simply for the purpose of ascertaining who are the beneficiaries of the policy; but when thus ascertained, their right to the money is not derived from the statute, but solely from the contract embraced in the policy. In other words, they take the proceeds, not as heirs or distributees of the deceased, but as purchasers. This being so, the proceeds of this policy were not, under the facts of this case, any part of the estate of the assured, and therefore not subject to the claims of his creditors. Had any fraud, actual or constructive, been committed by the assured upon their rights, either in taking out or keeping up the policy, they might be equitably entitled to follow and reclaim money which the assured had invested in the policy, and which ought to have been used, or reserved for use, in satisfying their de-

member who had paid his dues for several years, and the beneficiary fund was declared in the act of incorporation to be for the "families, heirs, or legal representatives" or persons whom the member might appoint, it was held that this expression included those who would take such property, as in case of intestacy. *Bishop v. Grand Lodge, R. O. of Mut. Aid*, 112 N. Y. 627, reversing 43 Hun. 472.

Where the word "heirs" was coupled with the words "legal representatives" in naming beneficiaries, they were regarded as equivalent to "next of kin," and did not make the insurance money part of the assets of the estate of the insured. *Hodge's Appeal*, 8 W. N. C. 200, 9 Ins. L. J. 709.

Where a policy was payable to "heirs or representatives," and appeared to be intended for the benefit of the family of the insured, it was held to be payable to the heirs or next of kin, in this case to an only child. *Loos v. John Hancock Mut. L. Ins. Co.* 41 Mo. 538.

But those words in an endowment policy payable to the insured himself or in case of his prior death to his "heirs or representatives" were held to make the proceeds a part of his assets under the control of his administrators and subject to the debts of the estate. The decision seemed to turn chiefly on the effect of the word "representatives," which was given its legal meaning of administrators. *Wason v. Colburn*, 99 Mass. 342.

As to meaning of words "legal representatives" in such policies, see also *Rose v. Wortham* (Tenn.) *post*, —, and *note*.

A benefit certificate payable to devisees, "or in the event of their prior death to the legal heirs or devisees of the holder," is held to make the legal heirs the beneficiaries if there are no devisees in existence. *Smith v. Covenant Mut. Ben. Assn.* 24 Fed. Rep. 685.

A certificate payable to "devisees, . . . or in the event of their prior death to the legal heir or devisees of the certificate holder," is construed to be a promise to pay to devisees, if there are devisees to take, and if not then to pay to heirs. Accordingly it was held payable to heirs when there was no will and the nonexistence of devisees, rather than the death of devisees, was held to be the essential thing. *Covenant Mut. Ben. Assn. v. Sears*, 114 Ill. 108.

III. Widow as an heir.

While there is some diversity of decisions, nearly all cases hold that the word "heirs" in describing the person to whom life insurance is payable will include a widow of the insured.

80 L. R. A.

A widow is included among the "heirs at law" within the meaning of an insurance certificate payable to the heirs at law of the member, where, under the laws of the state, she would be entitled to a distributive share. *Mullen v. Reed*, 64 Conn. 240, 24 L. R. A. 664.

A certificate payable to the "heirs" of the insured is held to include the widow as one of the heirs where the statutes make her an heir as to personal property. *Lyons v. Yerex*, 100 Mich. 214.

The widow is held to be one of the heirs who are entitled to the benefit of life insurance, in *Shultz v. Citizens' Mut. L. Ins. Co.* (Minn.) 61 N. W. 331.

To the same effect it is decided in *Hanson v. Minnesota Scandinavian Relief Assn.* (Minn.) 60 N. W. 1091, where it is said: "The word 'heir' as used in the policies is to be construed not in its technical common-law sense, but as including all those who succeed to personal property under the statute of distribution, including of course the widow."

That a policy payable to "heirs" goes to the widow of the insured when there are no children was decided in *Jameson v. Knights Templar & M. Mut. Aid Assn.* 13 Ctn. L. Bull. 272, cited in *Bates's Ohio Digest*, p. 212.

A policy payable to "legal heirs" was held to be payable to the widow of the insured where under the statute she would take the whole of his personal estate because he had no children. *Lawwill v. Lawwill*, 29 Ill. App. 643.

So, if the insured has no children, his widow is the sole beneficiary under a policy payable to "legal heirs" where he evidently intended it for the benefit of his family. *Kaiser v. Kaiser*, 18 Daly, 522.

So, a certificate payable to "heirs" of the insured "or as he may direct in his will," where the charter of the organization prescribes that the beneficiaries should be the widow and children, was held to be controlled by the charter, and in the absence of any children the widow was held entitled to the money. *Kentucky Masonic Mut. L. Ins. Co. v. Miller*, 13 Bush, 426.

And a designation of "heirs" in an application for insurance, while the beneficiaries are further described as "wife or daughters," while the by-laws make the benefit payable to the widow, or if there is no widow to the guardian or trustee of minor children, is held to give the widow the entire proceeds of the insurance to the exclusion of daughters. This is on the ground that the answers of the member are fairly construed to agree with the by-laws. *Addison v. New England Commercial Travelers' Assn.* 144 Mass. 591.

A policy payable to the "devisees or to the heirs

mands. No reference is here intended to the class of cases falling under section 2820 of the Code. Where the assured directs the money due upon a policy to be paid to any of the persons designated in that section, even though he may be insolvent, and use in paying premiums money to which his creditors are equitably entitled, no person can defeat the policy. This is so because the law so declares in express terms. But granting that in the present case the creditors of Hardwick might, for any equitable reason, have been entitled to follow and reclaim money invested in this policy, no such equitable reason appears in the facts. It was not shown that, by reason of insolvency, or by reason of his using his means in paying premiums upon the policy, they lost or were de-

prived of any money which they ought or otherwise would have received.

It was strenuously insisted for the creditors that the true construction of the words "heirs or assigns," as used in this policy, would make it mean that the policy was payable to the legal representatives, or to the estate, of the deceased; and that, therefore, its proceeds were assets for the payment of his debts in the due course of administration. We confess that the question is not altogether free from doubt, but we have given the instrument that construction which, in our judgment, best accords with the real intention and purpose of the assured. Men much more rarely take life insurance for the benefit of creditors than for the benefit of those to whom they are related

at law" of a member who makes no will, and who leaves a widow, father, mother, sisters, and brothers, but no descendants, is held to be payable to his widow, where the statutes make her the sole heir of his personal property. *Alexander v. Northwestern Masonic Aid Assn.* 126 Ill. 556, 3 L. R. A. 161.

This case refers to and quotes from a prior decision in *Gauch v. St. Louis Mut. L. Ins. Co.* 83 Ill. 251, 30 Am. Rep. 554, where it was held that a widow, who by the Illinois statutes is entitled to one third of all the personal estate of an intestate when there are children, is to be regarded as a doweress and not as an heir, and therefore a policy of life insurance payable to "legal heirs" is held to belong to the children exclusively. The cases are distinguishable, and the court in the later case does not express either approval or disapproval of the earlier decisions; but it is out of harmony with nearly all the other cases on the subject.

Yet another very similar decision is found in Iowa where a policy of life insurance payable to "legal heirs" is held not to give the widow any rights therein where the insured left one child and it did not appear whether he had the right to change the beneficiary or not, while the statutes give the widow a certain interest in excess of one third of the estate as an heir only in the contingency of a lack of issue surviving. *Phillips v. Carpenter*, 79 Iowa, 600. The court said: "No one having children speaks of his wife, in contemplation of her survivorship, as his heir," and held that whether the term "legal heirs" was used in the technical sense, or not, the wife was not intended to be included.

Likewise in Arkansas it is held that a widow is not one of the heirs of her deceased husband within the meaning of an insurance policy on the life of her husband which is payable to his heirs where the statutes give her half of his personal estate as dower absolutely and independently of creditors, and provide for distribution subject to debts and dower. *Johnson v. Knights of Honor*, 58 Ark. 255, 81 L. R. A. 732.

That a divorced wife is not one of the heirs of a member of a mutual benefit society who can share in the fund payable to heirs, was decided in *Schonfield v. Turner*, 76 Tex. 324, 7 L. R. A. 139.

A policy payable to "heirs," taken by a widower with one child, who marries again, is upon his death payable to both widow and child, where the statutes of distribution give the widow a certain share of his estate as next of kin. *Young Men's Mut. L. Assn. v. Pollard*, 3 Ohio C. C. 877.

On the other hand, an Ontario case decides otherwise, holding that a certificate payable to "legal heirs," taken by a widower who had two children and who afterwards married again and died leaving a childless widow, is payable to the children to the exclusion of the widow. *Mearns v. Ancient Order of United Workmen*, 22 Ont. Rep. 34, 30 L. R. A.

A designation by the member of a mutual life insurance association of his wife or lawful heir, naming her by his own name with the prefix "Mrs.," was held, where his wife subsequently died and he married again without making any new designation, to give the fund to his daughter and lawful heir to the exclusion of his second wife. *Day v. Case*, 43 Hun, 179.

For interpretation of designation by the member, see also *Addison v. New England Commercial Travelers' Assn.* 144 Mass. 591.

A widow was conceded to be one of the "legal heirs" of the insured, in the case of *Wilburn v. Wilburn*, 83 Ind. 55, but that point was not actually decided because it was not contested.

IV. Insured as heir of beneficiary.

The widow was also regarded as one of the heirs, in *Walsh v. Walsh*, 66 Hun, 297; *Keener v. Grand Lodge*, A. O. U. W. 38 Mo. App. 543; *Leavitt v. Dunn*, 56 N. J. L. 308; *Covenant Mut. Ben. Assn. v. Hoffman*, 110 Ill. 603.

On the death of the wife during the life of her husband, where his life insurance was payable to her, her heirs, or assigns, he is to be regarded as one of her heirs, under the Pennsylvania statutes, and his share will pass by a general assignment for the benefit of his creditors. *U. B. Mut. Aid Soc. v. Miller*, 107 Pa. 162.

Substantially the same decision was made in *Deginger's Appeal*, 83 Pa. 387, where insurance on the husband's life was payable to the wife, her executors, administrators, and assigns, and she died during his life. It was held that his estate upon his death was entitled to share with his children under the statute of distributions.

The right of the estate of the insured to share in the proceeds of a policy of life insurance which was payable to his wife when she died during his lifetime was also sustained in *Anderson's Estate*, 85 Pa. 202, where the policy was payable to the wife, her executors, administrators, or assigns.

Likewise in *Hutson v. Merrifield*, 51 Ind. 24, 19 Am. Rep. 722, where it was payable to her "or legal representatives."

A policy payable to the wife and two children named, "share and share alike, or their legal representatives," excludes the theory of survivorship among the beneficiaries, and on the death of one of the children during the father's life his interest in the policies goes to his heirs at law, and the father whose life is insured may as one of his heirs take a share of the interest. *Macanley v. Central Nat. Bank*, 27 B. C. 215.

Cases as to right to proceeds of insurance payable to wife of insured or to other person who dies during his life are not considered here, except so far as they interpret the meaning of the word "heirs."

(L. R. A.)

by ties of blood or affection. In support of the creditors' contention, the case of *Rauzon v. Jones*, 53 Ga. 458, was relied upon. There the policy taken out by Jones was payable to "his heirs, executors, administrators, or assigns." He had no wife or child, never having been married. This court held that this policy was payable to the legal representative of Jones, and therefore was legal assets in his hands for the payment of debts and for distribution. Judge Trippe stated that the introduction of the word "heirs" did not affect the construction, and added: "The terms 'heirs,' 'executors,' and 'administrators' are not words that are used where those who are next of kin are intended to have a right given them directly by the instrument,—for instance, as purchasers,—but are the terms usually employed to signify that, if they take at all, it is not directly, but through an administration." The use of the words "executors and administrators" manifested a clear intention on the part of the assured to vest the proceeds of the policy in his legal representatives, and the mere fact that the word "heirs" was used in connection with these other words would not authorize a court to give the policy a construction which would defeat the obvious intention of the assured, because, taking altogether the language employed, it was just such language as in other instruments disposing of personal property would vest it in an administrator. We think the present case is different from the one just cited. Here there were no words manifesting a positive intention that the proceeds of the policy should become a part of the estate of the assured. If the word "assigns" had not been used, but only the word "heirs," there could be no doubt the next of kin would be entitled to its proceeds. The effect of inserting the word "assigns" was not to make the assured the owner of the proceeds, but merely amounted to a reservation to him of the power to appoint who should take. With this word in the policy, the assured could have cut off those who were to become his heirs at law by appointing others in their place while he yet lived. As he did not do this, their right under the policy as purchasers remained intact and complete.

We are aware there are decisions contrary to the conclusion we have reached in this case, but we are nevertheless satisfied with the correctness of our judgment, and will mention a few authorities which, to some extent, sustain it. The case of *Mullins v. Thompson*, 51 Tex. 7, in which it was held that a policy payable

to the "heirs or assigns" of the assured was assignable by him, but, not having been assigned, the heirs were entitled to its proceeds on the death of the assured, is very much in point. In *Pace v. Pace*, 19 Fla. 488, the words "for the benefit of the estate of the insured" were, by the aid of extrinsic evidence, construed to mean that the policy was for the benefit of a minor child, and that its proceeds did not go to the administrator of the assured. The supreme court of Missouri, in *Loos v. John Hancock Mut. L. Ins. Co.* 41 Mo. 588, held that the words "heirs or representatives," in a policy of life insurance, entitled the heirs or next of kin to the money, as against the executor or administrator of the assured, it appearing from the context that the object of the assured was to make provision for his family. So, in *Hodges's Appeal* (Pa.) 9 Ins. L. J. 709, it was held that the phrase "heirs and legal representatives," in an insurance policy, meant the next of kin, and that the fund was no part of the decedent's estate which his administrator was entitled to receive. In *Griswold v. Sawyer*, 125 N. Y. 411, it was held that the words "legal representatives" may be shown to be the dependent family of the assured, and not his administrator, overruling *Griswold v. Sawyer*, 56 Hun, 12. In *Weiser v. Muehl*, 81 Ky. 888, it appeared that the assured took out a policy payable "to his heirs;" and it was held that the persons answering that description at the time of his death were entitled to the proceeds of the policy in preference to the widow, to whom the assured had specifically bequeathed the amount due on this policy by will. As to the meaning of the words "heirs" and "legal heirs," as used in policies of life insurance, see *Wilburn v. Wilburn*, 88 Ind. 55, and *Gauch v. St. Louis Mut. L. Ins. Co.* 88 Ill. 251, 80 Am. Rep. 554. Many of the above cited cases strongly support the interpretation we have given the word "heirs," as used in the policy before us; and the reasoning of these cases, and the authorities they cite, also, as stated above, sustain our conclusion that the creditors of Hardwick were not entitled to the proceeds of this policy as against the claim of his heirs at law.

The fact that the money was paid by the insurance company to the administrator, while it may tend to show that, in the opinion of the managers of the insurance company, he was the proper person to receive it, will not prevent the heirs from claiming the money, if they are really entitled to it, as we have held.

Judgment affirmed.

OHIO SUPREME COURT.

City of TOLEDO *et al.*, *Plfs. in Err.*,
v.

William SHEILL.

SAME, *Plfs. in Err.*,
v.

Ernst A. EVERSMAN.

SAME, *Plfs. in Err.*,
v.

Annie BECKLER.

(58 Ohio St. 52.)

- *1. Where the boundary lines of a corner lot extend along one of its two abutting streets a materially greater distance than along the other, a presumption arises that it fronts upon the latter street.
2. Where the shape and dimensions of a corner lot raise a presumption that it fronts on a particular street while vacant, such presumption continues after it has been improved, unless rebutted by the style and character of the improvements.
3. Where a single business house is erected on a corner lot, the front of which, according to its plan of construction or style of architecture, accords with the presumed front of the lot while the latter was vacant, such front is not changed, although the building is provided with doors and halls that permit an extensive use of the other, or lengthwise, street, and afterwards such use is freely made by the occupants of the building.
4. Where a dwelling house is erected on a corner lot, the front of which, according to its plan of construction or style of architecture, corresponds with that of the lot when the latter was vacant, the original front is not changed, although the building is provided with entrances opening on the lengthwise street, that are extensively used by its occupants, and appurtenant structures erected that are accessible only from the latter street. Such use of the side street is incidental only to the occupation of the dwelling house.
5. Where both a dwelling house and a business house are erected separately on a corner lot, the former fronting on the breadthwise street, and the latter on the lengthwise street, so much of the lot as the latter building occupies, or as is clearly used as appurtenant to it, should be held to front on the street which it faces.

(November 23, 1896.)

WRITS of error to the Circuit Court for Lucas County to review judgments affirming judgments of the Court of Common Pleas restraining the city from proceeding to collect certain assessments which had been levied against the property of complainants for street improvements. *Modified and affirmed.*

The facts are stated in the opinion.

*Headnotes by the COURT.

NOTE.—As to frontage assessments in general, see *Raleigh v. Peace* (N. C.) 17 L. R. A. 330, and *note*, 30 L. R. A.

Messrs. Charles F. Watts, Horace A. Merrill, and Julian H. Tyler, for plaintiffs in error:

If the property abutted upon the street, it was subject to the assessment.

Northern Indiana R. Co. v. Connelly, 10 Ohio St. 160; *Cincinnati v. Oliver*, 81 Ohio St. 371; *Meissner v. Toledo*, 81 Ohio St. 387; *Lima v. Cemetery Assn.* 43 Ohio St. 128, 51 Am. Rep. 809; *Cincinnati v. Seawood*, 46 Ohio St. 296; *Harrisburg v. McCormick*, 129 Pa. 218 (1889); *Springfield v. Green*, 120 Ill. 269; *Wilbur v. Springfield*, 123 Ill. 395 (1888).

Where, however, lots have a double frontage, as corner lots are generally held to have, both fronts may be assessed.

Elliott, Roads & Streets, p. 391; *Des Moines v. Dorr*, 31 Iowa, 89; *Lawrence v. Killam*, 11 Kan. 499; *Morrison v. Hershire*, 32 Iowa, 271.

While the foot front assessment may not be as equal in theory as that by a valuation, or as that of an apportionment according to the benefits, in practice it is found to be more equitable than either, because of the difficulty of applying the principle of the other methods so as to obtain equality.

Harland v. Columbus, 50 Ohio St. 474.

If a lot does not, as a matter of fact, front upon the street improved, and therefore cannot, as a matter of law, be assessed, how can the council give that lot a frontage it does not actually have? If the council can declare that to be a fact which is not a fact, it must by virtue of some statutory provision.

Mays v. Cincinnati, 1 Ohio St. 269; *Cooley, Taxn.* 2d ed. 324; *Elliott, Roads & Streets*, p. 370.

The levy of an assessment by the foot front of the property bounding and abutting upon the street improved, as provided by section 2264 of the Revised Statutes, or by the foot front of the property fronting or abutting thereon, as provided by section 3 of the Taylor law, is a valid exercise of the power of assessment, and has been so declared by the supreme court of this state.

Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; *Ernst v. Kunkle*, 5 Ohio St. 521; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 160; *Wilder v. Cincinnati*, 26 Ohio St. 284; *Douglass v. Cincinnati*, 29 Ohio St. 165; *Corry v. Fols*, Id. 320; *Meissner v. Toledo*, 81 Ohio St. 387; *Cincinnati v. Oliver*, Id. 371; *Richards v. Cincinnati*, Id. 506; *Spangler v. Cleveland*, 35 Ohio St. 469; *Jaeger v. Burr*, 36 Ohio St. 164; *Lima v. Cemetery Assn.* 43 Ohio St. 128; *Cincinnati v. Seawood*, 46 Ohio St. 296.

Defendant in error was personally served with the notice of the passage of said resolution and of the contents thereof.

He was therefore an interested party to the proceeding. He was bound to take notice of all subsequent legislation pertaining to the subject-matter set forth in said resolution, and to exercise diligence in protecting and enforcing his rights.

Chamberlain v. Cleveland, 34 Ohio St. 570; *Cincinnati v. Seawood*, *supra*.

The defendant in error must be presumed to have known that, whatever method of assess-

ment was adopted, the law required it to be uniform and to affect all the owners and all the property abutting upon the improvement alike.

Northern Indiana R. Co. v. Connelly, 10 Ohio St. 165.

Yet he refused to speak. He made no effort to notify the council of its mistake of fact. By his silence he allowed the council to believe that there was no mistake of fact and that his property was legally subject to the levy of an assessment by the mode adopted.

By remaining silent when he could and should have spoken, he acquiesced in that mistake and he cannot speak now that he would.

Kellogg v. Ely, 15 Ohio St. 64; *Corry v. Gaynor*, 23 Ohio St. 584; *Neff v. Bates*, 25 Ohio St. 169; *Quinlan v. Myers*, 29 Ohio St. 500; *State v. Mitchell*, 81 Ohio St. 592; *Tone v. Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438; *Columbus v. Sohl*, 44 Ohio St. 479; *Columbus v. Slyh*, Id. 484; *Wright v. Thomas*, 26 Ohio St. 246; *Teegarden v. Davis*, 36 Ohio St. 601; *Columbus v. Agler*, 44 Ohio St. 485; *Ritchie v. South Topeka*, 38 Kan. 368; *Ross v. Stackhouse*, 114 Ind. 200 (1888); *Elliott, Roads & Streets*, p. 420.

Each of said lots has two real fronts, one upon each street bordering thereon.

Schmidt v. Cincinnati, 1 Ohio Dec. 66; *Betz v. Canton*, Id. 590; *Barney v. Dayton*, Id. 540; *Findlay v. Frey*, 51 Ohio St. 390; *Seville v. Wagner*, 46 Ohio St. 52; *Cleveland v. Stofer*, 83 Ohio L. J. 227.

Messrs. George P. Kirby and Charles H. Lemmon, for defendants in error:

The assessment as laid upon our lot is not in proportion to the foot front, but we are assessed upon the entire number of feet our lot bounds and abuts on Maumee avenue, at the same rate that other lots are assessed which front on Maumee avenue, although no part of our lot fronts upon Maumee avenue and has but a front of 40 feet. The action of the common council in so assessing our property was illegal.

Sandrock v. Columbus, 51 Ohio St. 817; *Pike v. Cummings*, 36 Ohio St. 213; *Haviland v. Columbus*, 50 Ohio St. 471; *Findlay v. Frey*, 51 Ohio St. 390.

Our right to obtain the relief prayed for in the present action is fully sustained.

Rev. Stat. §§ 5848-5851, Act of April 10, 1856 (S. & C. 1151); *Sleese v. Oriatt*, 24 Ohio St. 253; *Stephan v. Daniels*, 27 Ohio St. 533; *Tone v. Columbus*, 39 Ohio St. 301, 48 Am. Rep. 438; *Ehni v. Columbus*, 8 Ohio C. C. 493; *Haviland v. Columbus*, *supra*.

We admit, our property was liable to be assessed for some amount; that that amount is the sum of the rate set forth in the petition, multiplied by the number of feet front our lot has. That amount the circuit court has found, and it has been paid to the city of Toledo by the defendant in error. This gave us the right to have the collection of the remainder of the amount assessed, restrained.

Ehni v. Columbus, 8 Ohio C. C. 493; Ohio Rev. Stat. § 5851.

Estoppel will not lie to enable the corporation to do or permit an unlawful or unjust act.

Columbus v. Agler, 44 Ohio St. 485; *Wright* 30 L. R. A.

v. Thomas, 26 Ohio St. 246; *Stephan v. Daniels*, 27 Ohio St. 544.

Bradbury, J., delivered the opinion of the court:

The city of Toledo, in the course of proceedings instituted for the improvements of certain of its streets, sought to assess the "cost and expense" incurred for such improvements upon the abutting property "by the foot front of the property bounding and abutting upon the improvement," pursuant to the provisions of § 2264, Rev. Stat. passed March 5, 1890 (87 Ohio Laws, 48). This court in the case of *Haviland v. Columbus*, 50 Ohio St. 471, was required to construe this language, and it there held that where a municipal corporation sought to assess the cost and expense of improving a street upon the abutting property by the front foot, regard must be had for the real front, which was a matter of fact depending on the manner in which it had been laid out, built upon, occupied, and used by the owner, and where a lot abuts lengthwise on an improvement, but fronts breadthwise on another street, it should be assessed by such improvement to the extent of such lengthwise frontage only. And in the case of *Sandrock v. Columbus*, 51 Ohio St. 817, this court held that in the case of an unimproved lot lying on a corner of two streets and extending along one of them 37½ feet and along the other 150 feet, it should be deemed to front on the former street.

The city of Toledo, in the cases under consideration, reargues these questions, especially those in the *Haviland Case*, and asks their reconsideration. The reasons advanced by counsel for the city are not without force, but do not convince us that either of those two causes was erroneously decided, and we reaffirm the doctrine they announce.

Each of the three cases under consideration, however, has special features that distinguish it from both those cases. While we do not hold that a corner lot upon which a single structure stands, or a single main structure with appropriate or incidental minor ones appurtenant to it, may not have two fronts,—one on each street,—yet that can only occur under special or peculiar circumstances, which we do not attempt to forecast. The question of frontage should be determined according to the ordinary acceptance of that term. There is nothing technical or abstruse connected with the subject. The common knowledge of mankind is usually amply sufficient to determine the fact whenever a controversy arises respecting the front of a lot. Where a lot is unimproved, a glance at the plat is generally enough; if the lot is rectangular, with two of its parallel lines distinctly longer than the other two, the usual form of town and city lots, the mind at once recognizes it as fronting on the street which runs along its shorter line, or end. And although the lot may not be rectangular, yet if its length along one street is clearly and considerably greater than along the other, the same recognition occurs. Doubtless a lot may have such shape that the question of its frontage might be of difficult solution, but such cases are exceptional, and should not affect the general question.

In the case of a corner lot in the usual form,

therefore, a natural inference arises that its narrow side, or end, is its front, because that accords with our common knowledge and experience of such matters. This constitutes a presumption of fact. Should the lot be improved, this presumption continues, unless there is something in the nature or character of the improvement to rebut it. Doubtless the plan or style of the structure, in connection with the uses for which it was designed, will in many instances overcome this presumption, and in every instance becomes a material factor in determining the question of frontage. The fact, however, that the structure, whether designed for a dwelling house or a place of business, is so arranged that the side street, so called, can be used for the convenience of the occupants of the building, and is, in fact, extensively used, are not enough to establish a change of front. In the case of dwelling houses, especially, it is within the common knowledge of every one that, in many instances, its occupants habitually use what they call and understand to be a side entrance, without any notion that such use, in contemplation of law, changed the front of the structure, and consequently, the front of the lot on which it stands. There can be no change of the front of a town or city lot in law, unless there is a change in fact made. The actual and the legal frontage must be identical.

Where a single building has been erected on a corner lot, the style of architecture alone, or that together with the purpose for which it was designed, and the arrangement of the grounds and out-houses, may indicate that its real front is towards the side street, so called. In such case if the character of the improvements satisfactorily indicates that the entire lot is to be used with reference to or in connection with such improvements, a fair inference would arise that the entire frontage was changed. But if the character of the building or other improvements, fronting on the side street discloses that only a portion of the entire lot was intended to be used as appurtenant thereto, then the frontage of that part only which was to be so used would be changed; unless where such structure being placed on the original front end, would in changing the front of that part of the lot necessarily change the frontage of all that part of the lot which might lie between the structure and the rear end thereof. And doubtless wherever a structure fronting on the side street appropriated a strip through to the other side of the lot, all the lot lying between the strip so appropriated and its rear end would have its frontage changed.

In applying these principles to the several cases under consideration, it is necessary to ascertain the form of the several lots and the character of the improvements made on each and existing at the time the city began proceedings to improve the respective streets upon which the lots were claimed to abut.

In the case of *Toledo v. William Shell* the city contended that the defendant's lot abutted on Erie street as well as on Stickney avenue, and attempted to assess the lot for its full length along the former street, to pay the cost and expense of improving that street. It is a rectangular corner lot extending along Erie street 120 feet, and along Stickney avenue 27½ 80 L. R. A.

feet; upon it stands a dwelling house so constructed that its front was consistent with that of the lot when vacant. Another building fronting 16 feet on Erie street and extending back 27 feet then stood on said lot, the front half of which its owner, the defendant, occupied for a shoe shop. This building stands upon the rear end of the lot, where the lot is considered with reference to its front on Stickney avenue. According to the principles which we hold should determine the fact of frontage, the lot in question, if vacant, would front on Stickney avenue, and as the style of the dwelling house is as consistent with the continuance of that frontage, its erection did not effect a change in that respect. The other building however, clearly and distinctly fronted on Erie street, and its front end was designed for and used as a work shop for the owner; a use nowise appurtenant to the dwelling house, but on the contrary, was independent thereof. The style of this building and the chief purpose for which it seems to have been designed indicate a fronting on Erie street. What in relation to this building is unmistakably a front door, opens immediately upon Erie street, and affords the only direct entrance to the shoe shop. This latter building stands on the rear end of the lot when viewed from Stickney avenue, and extends back nearly its entire breadth, so that the building substantially covers the rear 16 feet of the lot. To that extent the lot should be held to front on Erie street, and the assessment made accordingly.

In the case of *Toledo v. Eversman* the agreed statement of facts shows that the real estate in the petition described, being lot number 610, in Oliver's addition to the city of Toledo, Lucas county, Ohio, as laid out and platted, abuts 50 feet upon Broadway street, and 150 feet upon Logan street, and is situate on the south-westerly corner of said streets.

Broadway street runs northeasterly and southwesterly, and is intersected at right angles by Logan street.

The entire lot is covered by a brick building, 120 feet of which, extending northwesterly from Broadway street, is three stories in height, and the northwesterly 30 feet thereof is two stories in height. This building is used by the plaintiff for the purpose of carrying on the business of dealing in hardware and stoves, and of manufacturing heating furnaces.

The first story of the three-story part is divided into two store rooms, which extend the entire length of said part; the store rooms are connected by two archways in the brick partition extending between the same. In that part of each of the store rooms abutting upon Broadway street there are large double doors which are used for the purpose of ingress and egress from and two said Broadway street, and on each side of said doors are large windows, which are used for the purpose of displaying the goods and wares of the plaintiff, and for the purpose such windows are generally used.

In that part of the three story building abutting upon Logan street there is no door except at the northeasterly end thereof, which is used for the purposes of ingress and egress from and to said Logan street.

Adjacent to this door and in the two-story

part, is a doorway 12 feet in width leading into a hallway, and connected with stairs by means of which access is had to the second and third floors. To this hall there is access from the store rooms above mentioned.

The two-story portion of the building is used by the plaintiff as a barn in which are kept his horses and wagons, used by him in carrying on his business and for no other purpose, and from this opens onto Logan street a door wide enough to admit the passage of a horse and wagon. At the northwesterly end of said store rooms there is a large double door about 5 feet in width through which access is obtained to the two-story part. Westerly of this doorway, and at the northwesterly end of said store rooms, there is a window.

The entire two-story building is used by the plaintiff in carrying on his business, and for no other purpose. The third floor of the building is used as a public hall, and access to the hallway above mentioned is had both from the Logan street entrance and from the store rooms above mentioned.

At the corner of Broadway and Logan streets there is a window extending upon Logan street about 2½ feet and upon Broadway street about 2½ feet. On the second floor of both buildings, and upon the third floor of said building, there are windows upon both the Broadway and Logan street sides.

The record contains a photograph of the building, showing that, according to its style of architecture and plan of construction, it fronted on Broadway, but was provided with openings admitting of the free use of Logan street; and the evidence given by the owner himself shows that the Logan street entrances were freely used in connection with his business. One of those entrances was the chief means of ingress and egress to and from a public hall in the third story. Another of them seems to have been the only entrance to that part of the building used for a barn.

The circuit court found that the building and consequently the lot fronted on Broadway alone. This holding was correct. The building was an entirety,—a single structure designed for conducting a particular business—and of such form and style that, according to the common understanding and notion respecting the subject, it fronted on Broadway. One side extended along Logan street, and naturally the use of that street would be both convenient and advantageous to its occupants. In view of this situation the owner in the plan of construction provided facilities for such uses, and afterwards those facilities were used at their pleasure by the owner, his employees and customers; this use, however, neither changed the front of the building, nor gave it a double front; it was a use incidental merely to a structure thus favorably situated whose plan of construction gave it a recognized front in another direction. Where a building has been constructed after a plan that indicates unmistakably or even with reasonable certainty its front, the circumstances that facilities for side entrances have been provided and are afterwards used by its occupants and those who for social or business purposes visit the house can operate only slightly, if at all, to effect a change in this particular.

80 L. R. A.

In the case of *Toledo v. Annie Beckler*, an agreed statement of the facts discloses that "the real estate in the petition described being lot number 206, in Knowler's addition to the city of Toledo, Lucas county, Ohio, as platted and laid out, abuts 40 feet upon Knowler street, and 106.26 feet upon Maumee avenue. Knowler street extends east and west, intersecting Maumee avenue at right angles, and said lot number 206 is situate upon the northwest corner of said streets. The north end of said lot abuts 40 feet upon an alley.

"May 5, 1890, there was, and continuously ever since said time there has been, upon said lot a two-story frame dwelling, with a one-story addition which was at said time, and continuously ever since has been, used and occupied by said plaintiff as her residence.

"There was not at said time, nor is there now, any other building upon said lot, except a small shed which was and is located upon the line of said alley, and was and is used for storing fuel.

"The narrow part of the two-story, or main part of the house, faces Knowler street, and the long side thereof faces Maumee avenue. In the two-story part facing Knowler street there was and is a door from which extends a walk leading to the street; in the two-story part of the house facing Maumee avenue there is no opening except windows; on the northerly side of the two-story part there was and is a one-story addition, which is not as wide as the main part of the house; in the side of this addition, facing Maumee avenue, there is a door opening onto a porch, which extends along this side of the addition, and there was and is a walk leading from said Maumee avenue to said porch, and on a line with said door there was and is a door opening from the sitting room, in the main part, onto this porch; the first floor of the two-story part is divided into three rooms and a hallway; the door facing Knowler street opens into a hallway; the hallway has therein a stairway and two doors the one leading to the sitting room, and the other into what is used as a parlor; the room next to Knowler street is used as a parlor or front room, and has windows on the Knowler street and Maumee avenue sides; behind the parlor is an ordinary family sitting room, with a bedroom off it; the one-story addition constitutes the dining room and kitchen, from which is a door leading onto the porch above described, and a door in the north end, opening into a small woodshed.

"There was not, at the time aforesaid, and has not been, any fence around this lot. The gables of the two-story part are upon the north and south ends thereof; the gable of the one-story part is on the north end thereof, and the roofs on both parts of the building slope east and west.

"The part of the house facing Knowler street is what is known as the front elevation, and there is no other front elevation thereto.

"It was further admitted by the plaintiff that if she were called upon to testify, she would testify that the entrances to her house from Knowler street and from Maumee avenue were both used for the purposes of ingress and egress to and from said house, but that the family most frequently used the en-

trance on Maumee avenue for said purpose."

In addition to this agreed statement, a photograph of the premises was introduced in evidence, which plainly shows that the dwelling house, according to the plan of its construction, should be held to front towards Knower street. The circuit court held that the premises fronted on Knower street. We think this holding is correct. According to the principles we hold should be applied to determine the question of frontage, the lot, if vacant, would front on that street. A dwelling house stands on the lot, the front of which, while it is not indicated with entire clearness, may fairly be held to face in the same direction. It has an entrance from Maumee avenue which its occupants and many others having occasion to visit them find more convenient than the entrance from Knower street, and on that account use it more frequently than they use the latter entrance. This use, however, as we have seen, is entitled to very little weight upon the question of frontage in any case, and especially respecting the front of a dwelling house, where the use may vary with the caprice of its occupants, or change entirely with a change of tenants.

Judgment accordingly.

Spear, J., concurring:

I assent to the judgments rendered in these cases, and others of like kind decided at the same time involving the same question, on the principle of *stare decisis*. The judgment in the *Haviland Case*, 50 Ohio St. 471, pronounced June 20, 1893, was rendered by a divided court. It received, at the time of its rendition, neither the assent of my judgment nor my vote, although no formal dissent was entered of record. April 24, 1894, the question was again presented to this court in *Sandrock v. Columbus*, 51 Ohio St. 817, and the same principle announced, resulting in a reversal of the judgment below.

Time and space are not taken here to give a statement of the ground of dissent of the minority, for, as it seems to me, such statement would be regarded, using common parlance, as a "back number," even though it might be possible to demonstrate that some other construction of the statute would have been sounder, more scientific, or more philosophical, or more scholarly. The law was settled long ago; the rule given, admittedly an equitable one, was acquiesced in by the people at large, and by most of the courts of the state, and numerous controversies, in Columbus and other cities, were adjusted and improvements made in consonance with the rule given, on the understanding that the question was settled and ended; and it would seem that it should be so regarded. *Stare decisis, et non quiescit movens*.

Shauck, J., dissenting:

Attention is due to the terms of the statute conferring upon municipalities the power of assessment which has been exercised in these cases. It provides that "where an improvement is made of an existing street, alley, or other public highway . . . the costs and expenses shall be assessed by the council on 30 L. R. A.

the abutting . . . lots and lands in the corporation . . . by the foot front of the property bounding and abutting on the improvement." Rev. Stat. § 2264. The assessment contemplated is not upon buildings, but upon lots and lands. It extends to all abutting lots and lands. It extends to all abutting lots whether they be used and occupied or vacant. In the case of lots that are built upon, the power is not limited by architectural elevations nor by modes of ingress and egress. To make lots and lands subject to the assessment it is necessary only that they bound and abut on the improvement.

The relation of these words of the statute shows plainly enough that the general assembly used them in their popular sense, regarding "bounding" and "abutting" as synonyms, and "front" as indicating the extent to which a lot is bounded by the highway for whose improvement the assessment is made. And it is equally clear that the general assembly shared in the popular understanding that a corner lot fronts on both the streets by which it is bounded. That this is the sense in which these words are used is indicated, not only by the provision quoted, but by many others relating to the control and improvements of municipal highways, such as the requirements as to the frontage owned by those who sign petitions for the improvements, consents to the granting of franchises in streets, and the provisions relating to the cleaning of streets, and the construction and maintenance of sidewalks and sewers. It is provided (Rev. Stat. § 2333) that no tax shall be imposed for the construction of a sidewalk upon property whose owners "have contracted and maintained sidewalks in front of such property." Will it be said that the owner of a corner lot is exempt from the construction of a walk upon one front of his lot because he has constructed and maintained a walk upon the other? If it be answered that the use of the plural, "sidewalks," prevents the application to that section of the views here expressed by the majority, the reply is that in view of the legislature it requires a plurality of walks to occupy the fronts of corner lots.

The provisions of sections 2379 and 2383, inclusive, are more than suggestive. They authorize municipalities to assess the expense of constructing sewers "upon the feet front of the lots and lands, by or through which" they pass. Certainly a lot cannot front upon a sewer, as the word "front" is defined by the majority in these cases. It is provided in section 2383 that "the council may exempt from assessment such portion of the frontage of any lot having a greater frontage than its average depth, and so much of any frontage of corner lots as to it may seem equitable, and charge the deficiency caused by such exemption on the whole frontage tax *pro rata*." In view of this provision, the meaning of these words is not a matter of inference, but the subject of express declaration. Section 2269 prescribes rules for making assessments. As amended March 27, 1894, it contained the following provision: "And if, in making a special assessment by the foot front, there is land bounding or abutting upon the improvement not subdivided into lots, or if there be lots numbered

and recorded, bounding or abutting on said improvement and lying lengthwise on said improvement, the council shall fix in like manner the front of such land to the usual depth of lot, so that it will be a fair average of the depth of lots in the neighborhood, which shall be subject to such assessment." Before the assessments whose validity is now considered (March 11, 1887) the section was amended by omitting the italicised portion thereof. That provision was inserted in the act of 1884 so that corner lots might not be assessed upon the whole of their long frontage. It was omitted from the act of 1887, so that they should thereafter be assessed upon such entire frontage. That this is the true legislative meaning of the terms under consideration is scarcely less manifest in other provisions of the statute.

The use of the terms in this sense is not only in conformity with popular usage, but it is technically accurate. To front, is to be in a confronting or opposed position; to face toward; to meet.

A somewhat extended examination seems to warrant the observation that there is but one exception to the numerous cases in which, either by express holding or by clear implication "to front" and "to abut" have been adjudged to be equivalent phrases within the meaning of the assessment acts. The act under which extensive street improvements were undertaken in the city of Columbus (73 Ohio Laws, p. 153) was held to be unconstitutional; but it was also held that those who promoted the improvement were estopped to assert its invalidity, and that as to them the act should be enforced according to its terms. Section 24 of the act provided that the city council should "not have the right to authorize any improvement unless the owners of two thirds of the feet front of the property abutting on any street or avenue to be improved shall petition the city council for the privileges of this act."

In *Columbus v. Sohl*, 44 Ohio St. 479, this court held that the petition presented to the council in that case was sufficient, although the record showed that to reach that result it was necessary to count the lengthwise frontage of all the petitioners, even of those whose lots were vacant. The 14th section of the act provided that the cost of the improvement should be "assessed equally per front foot upon the property fronting or abutting on the improvement," and this court adjudged that assessments upon the entire long frontage of corner lots were valid even though they exceeded the value of the lots after the improvement was made. The provisions now under consideration (§ 2264), were before this court in *Lima v. Cemetery Assn.* 42 Ohio St. 128. It was held that a cemetery fronts upon an alley. The conclusion is based upon the obvious consideration that all lands front all the highways by which they are bounded. How that case could have afforded any other reason for the conclusion reached, does not appear.

In *Cincinnati v. Senanogood*, 46 Ohio St. 296, this court determined a question arising out of the amendment of section 2269 above shown. The question was whether the assessment for the improvement of a street upon which a corner lot fronts lengthwise is valid for the entire length of that frontage as provided in the act 80 L. R. A.

of March 11, 1887, or whether it should be restricted as required by the act of March 27, 1884. The court reached the conclusion that the extent to which the property could be assessed was determined by the statute in force at the time of the passage of the improvement ordinance. The contention of counsel and the decision of the court are vanity unless, under the act of 1887, the assessments now before us are valid.

The report by Sayler, J., in *Shehan v. Cincinnati*, 25 Ohio L. J. 212, shows that in that case the superior court, taking the same view of the statute and of *Cincinnati v. Senanogood*, as it has taken in rendering the judgments now under review (considered with these cases and reversed) adjudged that the assessment was valid upon the entire long frontage of a corner lot. At about the same time that court, under the same statute, rendered a similar judgment in *Elder v. Cincinnati*. The judgment which it then rendered was affirmed by this court May 28, 1892, 27 Ohio L. J. 875.

In *Des Moines v. Dorr*, 81 Iowa, 89, the validity of an assessment upon the entire long frontage of a corner lot was upheld. The court disposed of the point now considered as follows: "These premises were situated at the intersection of Sixth and Walnut streets, being a corner lot with 22 feet front on the latter street, and 180 feet fronting on the former. It will thus be seen that the lot had two fronts, as every corner lot necessarily has, because its face is opposite to and fronts on two different streets."

The same conclusion was reached in *Morrison v. Hershire*, 82 Iowa, 271, the court saying: "Some of them are corner lots, and are so situated that the streets bounding each one of them upon its end and side are improved. These lots, in fact, front on two streets—have a double frontage, and are therefore properly so assessed."

The same conclusion was reached in *Lawrence v. Killam*, 11 Kan. 499, under a statute providing that "the assessment shall be made on all lots and pieces of ground abutting on the improvement according to the foot front thereof."

In *People v. Adams*, 45 N. Y. S. R. 270, the frontage of a corner lot was thus determined: "A corner lot faces or fronts on two streets; it has a frontage on both streets, though the house built upon it may have its principal door for egress and ingress facing only one street."

It would exhaust patience to cite all the cases in which this view of the words and phrases now under consideration has been taken. A few more of them are *Bonsell v. Lebanon*, 19 Ohio, 418; *Springfield v. Green*, 120 Ill. 274; *Wilbur v. Springfield*, 123 Ill. 490; *Scott County v. Hinds*, 50 Minn. 204; *Michener v. Philadelphia*, 118 Pa. 535; *Joyes v. Shadburn*, 11 Ky. L. Rep. 892; *Weeks v. Milwaukee*, 10 Wis. 258; *Tracy v. Chicago*, 24 Ill. 500; *Bacon v. Savannah*, 91 Ga. 500.

It is apparent that the legal meaning of these terms had been judicially settled before they were used in the statute before us. Here is no occasion for the application or discussion of rules of interpretation supposed to be of an equitable nature. The constitutional validity of the statute is confessed and the meaning of

its provisions is entirely clear. Its enforcement according to its obvious intent is required by that subordination to the law which is due from all courts and especially from those that are not otherwise subordinate. Nor do the conclusions reached by the majority in these cases leave much occasion for pointing out the confusion that is to ensue. These observations, perhaps, sufficiently intimate the opinion that the judgments of the superior court of Cincinnati should be affirmed, those of the circuit court of Lucas County reversed; and that *Haviland v. Columbus* should be overruled.

Burket, J., dissenting:

I base my dissent in all of these cases upon the following considerations:

These cases, with others, were brought here for the purpose of having this court again consider the principles of the *Haviland Case*, and if possible overrule that case, and therefore I feel at liberty to here consider the question anew.

In that case I contended, and I now contend, that the matter of assessments upon corner lots for street improvements is governed alone by the Constitution and statutes on that subject. That there is no statute warranting the rule of the *Haviland Case*, and that corner lots are liable to be assessed by the foot front on their entire length and breadth, subject to the restriction that the assessment cannot exceed the amount of the special benefit, as was held in the *Chamberlain Case*, 34 Ohio St. 551, and also subject to the restriction of § 2288, Rev. Stat. as to double assessments within a period of five years, and subject further to the 25 per centum limitation, when that limitation is applicable, subject still further to such other limitations in special cases as are provided by statute.

The majority having again affirmed the principles of the *Haviland Case*, the question must be regarded as settled, and to be followed by this, as well as the lower courts, unless changed by the general assembly as to future assessments.

NEW JERSEY COURT OF ERRORS AND APPEALS.

William P. STANDISH

v.

Caroline M. BABCOCK *et al.*

(.....N. J.)

***Money paid by one partner to his individual creditor in satisfaction of a just debt, and received by the creditor without knowledge or notice that it is partnership money, may be retained by such creditor against the claims of the partnership or the other partners, although it was in fact money derived from the sale of partnership property; *aliter* as to partnership property transferred in payment of an individual debt.**

(December 5, 1895.)

CCROSS APPEALS from the Chancery Court in a proceeding to charge plaintiff's claims against Frederick A. Babcock upon lands standing in the name of his wife; the complainant appealing from so much of the decree as refused to charge the land with his entire claim, and defendant Caroline appealing from so much as made any part of the claim a charge on the land. *Modified on defendant's appeal.*

The facts are stated in the opinion.

Mr. Frank Bergen, for complainant:

Each member of a partnership has a lien upon all the funds and property of the partner-

ship to secure distribution and payment of the surplus.

Arnold v. Hagerman, 45 N. J. Eq. 186; *Hill v. Beach*, 13 N. J. Eq. 81; *Story*, Partn. § 97; *Dyer v. Clark*, 5 Met. 562, 39 Am. Dec. 697.

As long as the funds of a partnership can be identified they can be reclaimed, no matter in whose hands they may be found.

Shaler v. Trowbridge, 28 N. J. Eq. 595; *Lindley*, Partn. ed. 1893, p. 352; *Partridge v. Wells*, 80 N. J. Eq. 176; *Clements v. Jessup*, 36 N. J. Eq. 569; *Morse v. Gleason*, 64 N. Y. 204.

To allow one partner by his own secret and fraudulent act to divest the lien of the other partners on a large part of the partnership property is simply to destroy the security which the law has always given to partners in trade.

West v. Skip, 1 Ves. Sr. 269; *Fox v. Hanbury*, Cowp. 445.

Where a fraud has been committed not only is the person who commits the fraud precluded from deriving any benefit from it, but even an innocent person is so likewise, unless he has in good faith acquired a subsequent interest for value, for the third person, by seeking to derive any benefit under such a transaction, or to retain any benefit resulting therefrom, becomes *particeps criminis*, however innocent of the fraud in the beginning.

Shaler v. Trowbridge, 28 N. J. Eq. 603; *Perry*, Tr. § 172.

The trustee, wherever the trust property may be placed, must always be careful not to

*Headnote by **MAGIE, J.**

NOTE.—The above decision denying that money of a partnership actually received from one partner in good faith on payment of his individual debt, can be brought within the rule that permits partnership property to be followed so long as it can be identified if transferred to a creditor of

one partner is of great practical importance, and makes an interesting distinction between money and other property.

As to the right of a firm to assume a partner's debt, see note to *Re Edwards & W.'s Estate* (Mo.) 29 L. R. A. 661.

amalgamate it with his own, for if he does the *cestui que trust* will be entitled to every portion of the blended property which the trustee cannot prove to be his own.

Lewin, Tr. pp. 293, 294, 297, 298; *Knatchbull v. Hallett*, L. R. 13 Ch. Div. 696; *Importers & T. Nat. Bank v. Peters*, 128 N. Y. 272; *Morrison v. Kinstra*, 55 Miss. 71; *Snograss v. Moore*, 80 Mo. App. 232; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693.

Mr. Cortlandt Parker for respondents.

Magie, J., delivered the opinion of the court:

The decree appealed from charged upon lands of Caroline M. Babcock the sum of \$921.50, with interest from January 10, 1889, in favor of William P. Standish, and directed that unless that sum, with costs, should be paid within a stated time, said lands should be sold to raise what was thus charged thereon. Caroline M. Babcock, who was one of the defendants below, appeals from the decree, on the ground that it was erroneous to charge her lands with any part of that sum. William P. Standish, who was complainant below, appeals from the decree, and contends that it was erroneous in not charging on said lands a larger sum. These appeals have been argued together.

To make intelligible the conclusions I have reached upon the case presented, a brief statement of the pleadings, showing the issues between the parties, is necessary. The bill was filed by Standish against Caroline M. Babcock and Frederick A., her husband. It charged that Frederick A. Babcock, Joseph W. Moyer, and Standish, in 1884, entered into a written agreement of partnership in the business of purchasing and selling coal lands in Schuylkill county, Pa.; that, under that agreement, lands were purchased and sold at a profit, and the proceeds of the sale were received by Frederick A. Babcock; that, in 1890, Standish filed a bill in our court of chancery, against Babcock and Moyer, for an accounting and settlement of the partnership affairs, and it was thereon decreed, on October 10, 1892, that Babcock was indebted to Standish in \$4,941.73, said sum being Standish's share of said profits; that said profits arose from the purchase and sale of lands in said county which were bought in 1884, and sold to one Frisbie on January 8, 1889, for \$15,000, which sum was then paid to said Babcock; that on January 10, 1889, said Babcock, out of said sum so received, paid off a mortgage which then encumbered lands of his wife, amounting to \$3,500, of principal and the interest then due thereon. The bill also charged that the decree remained unsatisfied, and that Frederick A. Babcock had property which could not be reached by execution, and there was a prayer for discovery against him. As to Caroline M. Babcock, the prayer was that the sum paid by her husband in satisfaction of the mortgage on her lands should be made a charge and lien on said lands in favor of Standish, and that they might be sold to raise and pay him that amount. The bill did not call for answers without oath. Caroline M. Babcock, by her answer, denied knowledge or information justifying belief whether the agree-

ment of partnership set out in the bill was ever entered into, or whether, under it, lands were purchased and sold at a profit, or whether the proceeds of any such sale were collected and received by her husband. She admitted that Standish had filed a bill in the court of chancery against Moyer and her husband for an account and settlement of the affairs of the alleged partnership, but averred that it was also filed against her and one Edward M. Babcock, and, after having been duly tried, had been dismissed upon the merits as to her. She admitted on information and belief that such a decree as was set out in the bill had been made in that cause. She denied knowledge or information in respect to the purchase of land and the subsequent sale to Frisbie, or the receipt by her husband of \$15,000 as the proceeds of that sale, and she left complainant to make proof thereof. She admitted that the mortgage on her lands had been paid off, but denied that it was paid by her husband, averring that, being under foreclosure, it was paid by her son Edward M. Babcock. By the answer, she further averred that the previous bill of Standish had charged that her husband had applied part of the money received by him from the sale to Frisbie to the satisfaction of the mortgage on her lands, and had prayed relief by charging as a lien upon her said lands the amount so paid, and by selling said lands to discharge such lien. She averred that, by her answer to that bill, an issue was presented upon those charges, which was duly tried, and a decree made thereon that the bill should be dismissed as against her, with costs. She thereupon claimed that the matter thus established by that decree was conclusively established as against Standish, and prayed to have the same benefit of this defense as if she had pleaded the decree in bar. To this answer was appended an affidavit containing the customary averments of affidavits to answers, and the further averments that the proceedings and decree in the former suit were correctly set forth in the answer, and that a copy of the decree annexed to the answer was true and correct. There was no affidavit or certificate of counsel such as is required to be annexed to a plea or demurrer (Rev. p. 109, § 27); but the complainant below filed a general replication, and the cause went to hearing upon those pleadings.

The evident purpose was to interpose the defense of *res judicata*. If the answer in that respect stood for a plea, the burden of proving its truth devolved upon the party pleading, for it is plainly an affirmative plea. 1 Dan. Ch. Prac. 718; *Swayze v. Swayze*, 37 N. J. Eq. 180. If it is to be deemed a defense set up by answer, it must be sustained by proof; for, if this answer was called for and put in under oath, it will not be evidence of new matter set up in defense. In either aspect, proof of the former suit, including the pleadings, which would show what issues were there tried or triable, and the decree thereon, was necessary to support the defense. The case before us discloses no proof whatever of this sort. The learned vice chancellor, who tried this case, indicates by his opinion that he conceived that he had before him the proceedings in the former cause, and that they showed that the dismissal therefrom of Caroline M. Babcock was ordered by

the court *ex mero motu*, and without considering the issue presented by her answer, because she was not a proper party. If the record disclosed such a dismissal, it would probably fail to establish the truth of the plea or answer. If the record did not disclose the ground of dismissal, extrinsic evidence could make it clear. *Russell v. Place*, 94 U. S. 606, 24 L. ed. 214. But here we have not the record of the former cause, and, in its absence, there is nothing to support the defense of *res judicata*.

Although this defense was not made out by proof, it is also true that the proof which appears to have been made in this cause was insufficient to justify a decree in favor of Standish. By his bill, he asserted that, in equity, the lands of Caroline M. Babcock should be recharged with the burden from which they had been gratuitously relieved by her husband's use of partnership funds for that purpose, and made to satisfy Standish for his share as one of the partners. Under the answer, he was required to prove the partnership, the resulting profit, and particularly that the \$15,000 received by Frederick A. Babcock was the result of the sale of partnership property. Without such proof, the equity here asserted was not established. But the case before us is barren of proof upon these points. While the decree in the former cause was not put in evidence, yet, as Caroline M. Babcock had set it out in her answer, and appended a copy thereto, Standish had a right to rely upon it as evidence against her, if it possessed evidential force in that regard. But it was not competent proof against her of the facts essential to his case; for, although she was originally made party to that suit, she was dismissed therefrom. She was not bound by the decree, and its adjudications on the essential facts do not estop her from contesting them, and requiring other proof. If she was a proper party in that cause, Standish could have appealed from the order dismissing her therefrom, and by its reversal would have bound her by the decree. But, after dismissal, the decree was as ineffective against her as if she had not been originally a party to the suit. As the decree is thus unavailable as proof, the case is left without proof on these essential points. Indeed, the only evidence upon the subject is that of Frederick A. Babcock, who, when called as a witness by Standish, repeatedly declared that the \$15,000 which he received from Frisbie was the proceeds of the sale of railroad bonds and stock, and not of the coal lands. While it is true that he is estopped from this defense by the decree in the former cause, yet he is admissible to testify in defense of his wife, who is not estopped thereby.

The result is that there is no evidence to support the decree appealed from. But this result is by no means satisfactory. The learned vice chancellor, who advised the decree, evidently deemed that he had before him evidence that raised the legal questions which he decided. Indeed, his opinion indicates that he believed that he had before him, not only the pleadings and decree, but also the evidence taken in the former cause; for he states facts that nowhere appear in proof of this cause. If we assume, as he did, that it appeared that the \$15,000 paid by Frisbie to Frederick A. Babcock was the

price of lands belonging to the partnership, a question is presented decisive of the case. Although the charge of the bill was that Frederick A. Babcock had paid off the mortgage on his wife's lands out of the \$15,000 received by him, the facts proved in this cause do not support this charge. The truth was that, shortly after the receipt of that sum, Frederick A. Babcock paid \$6,000 of it to his son Edward B. Babcock; and the latter, almost immediately, applied enough of that sum to discharge the mortgage on his mother's lands. It is suggested by Standish's counsel that these circumstances point to fraud, and justify the inference of collusion to invest the discharge of the mortgage with an appearance of filial generosity, while in reality it was a scheme to divert partnership funds to an unlawful purpose. But the vice chancellor failed to draw any such deduction from any evidence before him, and our review of the evidence before us convinces us that in so doing he was not in error. The evidence that the payment of \$6,000 to Edward was a payment upon a just debt, honestly due, is uncontradicted. The circumstances supposed to be suspicious are explainable by the near relationship of the parties, and will not justify an inference of fraud. There is ample corroboration of the ability of the son to make the advances to his father out of which arose the indebtedness upon which the \$6,000 was paid. It must be considered as established that the payment was made upon a debt honestly due. We also think that the evidence before us plainly shows that the son received that payment without any knowledge that the money paid was or was claimed to be partnership funds; nor is there anything discoverable in the evidence which shows that he was put upon inquiry on that subject. His evidence is uncontradicted that he supposed the money thus paid him was from the proceeds of the sale of some railroad bonds and stock made by his father.

The question, then, is whether Edward B. Babcock can retain money paid to him by his father upon an honest debt, and received by him without knowledge or notice that the money belonged to a partnership of which his father was one. The solution of this question is not affected by the subsequent application of part of this money by way of a gift to his mother; for, if Edward had acquired a right thereto, he could dispose of it at his pleasure. The question was solved by the court below by the application of the well-settled doctrine of the law of partnership that each partner has a lien on partnership property for the payment of partnership debts, and upon the surplus after such payment for his share. 1 Lindley, Partn. § 852. It was considered that it followed from this doctrine that one partner might follow money belonging to the partnership into the hands of a creditor of an individual partner who had received it in payment of his debt, without knowing that it was partnership money, and might require such creditor to restore the money so received to the partnership, or at least to account for his share thereof; and this decree, if made upon the facts deemed to have been before the vice chancellor, can only be supported upon that proposition. There can be no doubt that one

partner cannot give away partnership property or things procured by partnership money, and that the donee will be deemed to be a trustee for the partnership, and required to account for such gifts. *Shaler v. Troubridge*, 28 N. J. Eq. 595; *Partridge v. Wells*, 80 N. J. Eq. 176, 81 N. J. Eq. 862. Nor can one partner give a partnership obligation in payment of his individual debt without the consent of the other partners, and it has been held in this state that the creditor who thus accepts partnership obligations from one partner has the burden cast on him to prove the consent of the other partners. *Mecutchen v. Kennady*, 27 N. J. L. 290; *Dob v. Halsey*, 16 Johns. 84, 8 Am. Dec. 293. Nor can a partner transfer or create a lien upon partnership property for the payment of his individual debt to a creditor who has knowledge that the property so transferred or pledged is partnership property. *Maitlack v. James*, 18 N. J. Eq. 126; *Clements v. Jessup*, 36 N. J. Eq. 569. And this doctrine will apply to partnership money paid by one partner to his individual creditor, if the latter knows that the money belongs to the partnership. *Piercy v. Fynney*, L. R. 12 Eq. 69; *Kendal v. Wood*, L. R. 6 Exch. 243; 17 Am. & Eng. Enc. Law, 1250; *Davis v. Smith*, 27 Minn. 890; *Dob v. Halsey*, *ubi supra*. In the opinion delivered in the supreme court in *Mecutchen v. Kennady*, *ubi supra*, Chief Justice Green indicated his approval of the doctrine declared by the Supreme Court of the United States in *Rogers v. Batchelor*, 37 U. S. 12 Pet. 221, 9 L. ed. 1063. That doctrine was that a partner could not apply partnership property to the payment of his individual debt, so that the title of the partnership thereto would be divested, even if the individual creditor was ignorant that the property received by him belonged to the partnership. Mr. Justice Story, who delivered the opinion in that case, put the doctrine upon the ground that the true question was whether the title to the property had passed from the partnership to the individual creditor. The reasoning is that the implied agency of one partner to dispose of partnership property extends only to its disposition for partnership purposes, and not to its application to the purposes of one of the partners. An individual

creditor, receiving property upon his debt, may, by inquiry, discover the title of his debtor, who thus applies such property, and may in this mode be chargeable with the knowledge which would be acquired upon such inquiry. But if this doctrine, supported by such authority, be admitted to be correct (as to which no opinion need be expressed), the question remains whether it applies when a partner uses, not property, but money of the partnership, in the discharge of his individual debt. In my judgment, there is a marked distinction between the two cases. This results, not from the old notion that money has no "earmark," but because money has the quality of currency, passing from hand to hand in all bona fide transactions, without the necessity of inquiry on the part of him who receives as to the title of the party who pays it. When property thus passes, the recipient may be put upon inquiry as to its title; when money thus passes, no inquiry is required. In the former case the knowledge which inquiry would produce would charge the recipient; in the latter case nothing but actual knowledge will charge him. It was forcibly said by Lord Justice Fry in *Northern Counties of England F. Ins. Co. v. Whipp*, 26 Ch. Div. 482, that "the proposition that money obtained by fraud can be followed into the hands of persons who take it in satisfaction of a bona fide debt without notice is, in our judgment, devoid of support from principle or authority." *Perry*, Tr. § 837; *Lewin*, Tr. § 892.

The result is that, if this case appeared before us as it seems to have appeared to the vice chancellor, in my judgment his conclusion was erroneous, and the decree made thereon cannot be supported. It has been deemed best to state this conclusion, as the contrary view, expressed in the court below, will tend to greatly limit dealings with persons who are copartners. If a creditor of any individual partner cannot retain money paid upon his debt if the money so paid was in fact partnership money, although not known to be so by the creditor receiving it, dealings with individual partners will be seriously affected.

For the reasons above set forth, *the decrees must be reversed*, with costs.

ARKANSAS SUPREME COURT.

Dee BRISCOE, *Appt.*,
v.

J. R. ALFREY.

(.....Ark.....)

The owner of an unaltered jack is not liable for a filly killed by it, where it, without his knowledge or intentional or negligent permission, broke from the place in which it was kept, under Sand. & H. Dig. § 7301, making the

owner of such an animal liable for all damages sustained "by its running at large."

(October 12, 1895.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Woodruff County in favor of defendant in an action brought to recover damages for the killing of a filly by a jack belonging to defendant, which was alleged to have been unlawfully allowed to run at large. *Affirmed*.

¹ NOTE.—As to liability for owners on account of trespass by animals in general, see note to *Bulphit v. Matthews* (Ill.) 23 L. R. A. 55.
80 L. R. A.

For doctrine of *scienter* as to injuries by vicious animals while trespassing, see *Morgan v. Hudnell*, (Ohio) 27 L. R. A. 862.

Statement by Wood, J.:

The action was brought under section 7801, Sand. & H. Dig., which is as follows: "If any seed horse or any unaltered mule or jack over the age of two years be found running at large, the owner shall be fined for the first offense \$8, and for every subsequent offense not exceeding \$10, to be recovered by civil action in the name of any person who shall sue therefor, one half to his own use and the other to the use of the county; and the owner shall also be liable for all damages that may be sustained by the running at large of any such seed horse, jack, or mule." The proof tended to show that a mule, the property of the defendant, was an unaltered mule over two years old, which, while at large, killed a filly, the property of the plaintiff. Also that defendant kept the mule in a strong stable surrounded by a strong high fence, and that the mule had broken out during the night without defendant's knowledge. The judgment below was for the defendant.

Mr. N. W. Norton, for appellant:

At common law *scienter* must be alleged and proved, before there can be a recovery for an injury by domestic animals.

This statute was intended to take the place of the common-law rule as to injuries done by the animals named, while at large. It is analogous to statutes existing in many states, making the owner or keeper of a dog liable for damages done by the dog.

Under these statutes no proof of *scienter* is necessary.

Smith v. Montgomery, 52 Mo. 178; *Orne v. Roberts*, 51 N. H. 110; *Pressey v. Wirth*, 8 Allen, 191; *Woolf v. Chalker*, 81 Conn. 131, 81 Am. Dec. 176; *Kerr v. O'Connor*, 68 Pa. 341; *Swift v. Applebome*, 28 Mich. 253; *Job v. Harlan*, 18 Ohio St. 486; *Gries v. Zeck*, 24 Ohio St. 329; *Meracle v. Down*, 64 Wis. 323.

Mr. M. T. Sanders, for appellee:

The mule, having escaped without appellee's fault or negligence from the enclosure in which it was kept by him, was not running at large within the meaning of the statute.

Wolf v. Nicholson, 1 Ind. App. 223; *Rutter v. Henry*, 46 Ohio St. 272; *McBride v. Hicklin*, 124 Ind. 499; *Leavenworth, T. & S. F. R. Co. v. Forbes*, 37 Kan. 448; *Fremont v. Raley* (Tex.) 27 S. W. Rep. 200; *Fallon v. O'Brien*, 12 R. I. 518, 84 Am. Rep. 718.

The owner is not liable for an injury inflicted by a domestic animal allowed unlawfully to roam at large, in the absence of notice that it possessed a vicious disposition.

Klenberg v. Russell, 125 Ind. 581; *McLeaine v. Lantz*, 100 Pa. 586, 45 Am. Rep. 400.

The care must be what a prudent and reasonable man taking into view the common course of things would deem to be required in the particular case.

Bishop, Non-Cont. L. § 439; Bissell v. Booker, 16 Ark. 314.

Wood, J., delivered the opinion of the court:

The statute does not place owners of the ani-

mals named beyond the protection of that universal rule which exempts men from liability for inevitable accidents. This is plain when all the provisions of the section quoted are considered together. It is not to be supposed that the legislature demanded an impossibility, and imposed a penalty for inability to avoid the inevitable. No human prescience could forestall the various contingencies of escape to which such animals are liable. Yet, if the unfortunate owner is to be held responsible civilly at all hazards, the anomalous result would be to inflict upon him a penalty for something which might be impossible for him to avoid. The ownership of the animals named is not forbidden, but expressly recognized, and the imposition of such burdens as would tend directly or indirectly to prevent or discourage the ownership and use of such animals was never contemplated. By the somewhat rigorous results to follow to the owner in case of his failure to use proper care in restraining the animals designated, the legislature evidently only designed to enforce upon him the strict observance of that ancient maxim, *Ne utere tuo ut alienum non laedas*. What degree of care is required? Only that which a prudent man under similar circumstances would exercise to prevent animals of the kind mentioned from running at large, taking into consideration their natural habits and propensities. It is the intentional or negligent permission of the owner for his animal to run at large which subjects him to the civil and penal consequences prescribed by the statute. Whether the owner has exercised such care as the law requires if the facts are disputed is a question for the jury. The following authorities are cited to support the views we have expressed. *Bishop, Non-Cont. L. §§ 1220 et seq.; Wolf v. Nicholson*, 1 Ind. App. 223; *McBride v. Hicklin*, 124 Ind. 499; *Rutter v. Henry*, 46 Ohio St. 272; *Leavenworth, T. & S. F. R. Co. v. Forbes*, 37 Kan. 448; *Fallon v. O'Brien*, 12 R. I. 518, 84 Am. Rep. 718; *Fremont v. Raley* (Tex.) 27 S. W. Rep. 200; *Klenberg v. Russell*, 125 Ind. 581; *McLeaine v. Lantz*, 100 Pa. 586, 45 Am. Rep. 400,—all cited by appellee's counsel.

Counsel for appellant has called our attention to statutes and decisions of other states in which the owners of dogs are made liable absolutely for damages done by them. The status of the dog before the law is *sui generis*. *Bishop, Non-Cont. L. § 1323*. The vicious dog, in general, and the sneaking sheep killer, in particular (to which several of the cases cited refer), are under the law's especial condemnation. Without entering upon a discussion of the reasons therefor, it suffices to say that no legislation or decision with reference to injuries by dogs do we regard as analogous to that of the other purely domestic animals of the kind enumerated in our statute.

The instructions of the trial court were in accordance with this opinion, and there was no error in its ruling admitting certain testimony to which objection was made.

Its judgment is therefore affirmed.

TENNESSEE SUPREME COURT.

J. I. ROSE, Admr., etc., of Sidney
Wortham, Deceased, et al.,

v.

Sallie WORTHAM et al.

(.....Tenn.....)

1. Life insurance taken by a man before marriage is to be deemed "effected by a husband" within the provisions of M. & V. Code, §§ 3185, 3335, giving the benefit of such insurance to the widow, children, and next of kin free from claims of creditors.

2. The term "legal representatives" in a policy of life insurance, as a description of the beneficiaries, does not give the executor or administrator any beneficial interest in the recovery so as to defeat the right of widow, children, and next of kin under M. & V. Code, §§ 3185, 3335, to take the proceeds free from claims of creditors.

(November 2, 1895.)

APPPEAL by defendants from a decree of the Chancery Court of Campbell County in favor of the widow and child of deceased in a bill of interpleader to determine the right to money arising from a life insurance policy.

Affirmed.

The facts are stated in the opinion.

Messrs. Williams, Henderson, & Davis for appellants.

Messrs. Henderson & Jourdman for appellees.

Messrs. Reid & Powers for the administrator.

NOTE.—Who are "legal representatives" within meaning of life insurance policies.

I. In general.

II. Other words combined with the words "legal representatives."

I. In general.

The above case of *ROSE v. WORTHAM* is supported by the majority of the decisions upon the subject, but there are several decisions upon the other side. Yet the different facts in the cases decided to a large extent explain the divergence of the decisions, since the intent of the insured is regarded as important if not controlling.

The words "legal representatives," in a life insurance policy taken by an old man who had a wife and children dependent upon him, while he had recently become insolvent, must be presumed to be intended by him to designate his wife and children, rather than his administrators for the benefit of his creditors. *Griswold v. Sawyer*, 125 N. Y. 411, reversing 55 Hun, 12.

The next of kin to the exclusion of the husband of a woman take the proceeds of a policy of insurance on her father's life made payable to her or her legal representatives when she was only four years old. *Geoffroy v. Gilbert*, 15 Misc. 60.

The words "legal representatives," in a policy of insurance, as a designation of those to whom it shall be paid, is held to mean heirs or next of kin rather than executors or administrators, where the words "legal representatives" appear in the answers in the application for insurance to show those for whose "benefit" or "use" the policy was taken. *Schultz v. Citizens' Mut. L. Ins. Co. (Minn.)* 61 N. W. 331.

30 L. R. A.

Wilkes, J., delivered the opinion of the court:

The question involved in this case is to whom the proceeds of a policy on the life of Sidney Wortham for \$5,000 shall be paid,—whether to his widow and child or to his creditors. The chancellor held that the widow and child were entitled to the proceeds, after deducting certain expenses of collection, and the administrator and creditors appealed to this court, and assigned as error this holding of the chancellor. The cause has been heard by the court of chancery appeals, and they have affirmed the decree of the chancellor, and the administrator and creditors have appealed from that decision to this court.

The facts as found by the court of chancery appeals are that Sidney Wortham, on the 1st of January, 1889, being an unmarried man, became engaged to and contracted to marry the defendant Sallie, now his widow. The marriage was not consummated, however, till October 29, 1890. In the meantime, and on the 8th day of January, 1889, he took out a policy of insurance upon his life in the Mutual Benefit Life Insurance Company of Newark, N. J., for \$5,000, directing it, in answer to a question propounded, to be made payable to "himself or his estate." On the 18th of January, 1889, the policy was issued payable to the "legal representatives of the assured." The premium was to be \$75.55, payable semiannually. Sidney Wortham, the insured, died November 25, 1892, leaving his widow and one child, and his estate is

A certificate payable to "legal representatives," while the constitution of the association contemplates aid to widows, orphans, and heirs, is held to be for the benefit of the wife and child of a member instead of his estate; especially where there was evidence that he said he intended to take a policy for their benefit. *Murray v. Strang*, 28 Ill. App. 608.

The word "representatives" in the articles of association of the Odd Fellows Mutual Benefit Society, is held to be used, not in any technical or limited sense, but as including any person whom the member may designate, or whom the by-laws designate if he fails to make a designation, as the person to whom money shall be paid. It is therefore held that he may designate as beneficiary a person who is not a member of his family. *Walter v. Hensel*, 42 Minn. 304. The court says in this case: "There is nothing in the statute or articles and by-laws of the society requiring that the word should be construed, or indicating that it is used, in any such limited or technical sense, or anything indicating that the society is anything more or less than a mutual life insurance company on the assessment plan."

So, a provision that if a member of a relief association has no legal representatives such sum as they would have been entitled to shall become the property of the association, is held to refer to those persons who were enumerated in the charter and by-laws as the beneficiaries; namely, the widow, orphan, heir, assign, or legatee of the member. *Masonic Mut. Relief Asso. v. McAuley*, 2 Mackey, 70.

But it is held in *People v. Phelps*, 78 Ill. 147, that a policy payable to "legal representatives" makes the proceeds a part of the assets of the estate of the

totally insolvent. Both before and after his marriage he paid the premiums on his policy as they fell due. He frequently stated to his wife that he intended she and their child should have the proceeds of the policy, and be the beneficiaries thereunder. This evidence was not objected to. The proceeds of the policy were paid after his death to his administrator, who holds the same subject to the decision of this controversy as to ownership of such proceeds. The decision of this question involves the construction of the statutes brought forward in the compilation of Milliken & Vertrees as sections 8185 and 8385, and which are as follows:

"Sec. 8185. A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property free from the claims of his creditors."

"Sec. 8385. Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children and the money thence arising shall be divided between them according to the law of distribution, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise."

It is insisted for the creditors that it is only such life insurance as is effected by the husband as husband, during the existence of the marital relation, that is thus referred to and regulated, and that an insurance effected before the marriage relation begins is not contemplated by these statutes, and does not fall within their provisions. In *Sutherland on Statutes and Statutory Construction* it is said, in substance, that the presumption is that the lawmakers have a definite purpose in every enactment, and that purpose is an

implied limitation on general terms, and a touchstone for the expansion of narrower terms used in the statute. The cardinal purpose of the act must control, and words and phrases must be read in such sense as will harmonize with the subject-matter and general purpose of the statute. Mr. Kent, on the same subject, says in substance: In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms, and its reasons and intention will prevail over the strict letter. Not only may the meaning of words be restricted by the subject-matter of an act, but, for like reason, they may be expanded. The intention of the act will prevail over the literal sense of its terms. The particular inquiry is not, What is the abstract force of the words used? but, In what sense were they intended to be used as found in the act? This sense is to be collected from the context, and a narrower or more extended meaning is to be given, according to the intention thus indicated. *Sutherland, Stat. Constr.* §§ 219, 240, 241, 248. Accordingly, in *Silver v. Ladd*, 74 U. S. 7 Wall. 219, 19 L. ed. 138, the term "single man" was held to include an "unmarried woman" in the construction of the Oregon donation act of Congress. In *Ragland v. Justices of Inferior Ct.* 10 Ga. 65, 71, a minor with his parents living was held to be an orphan, in order to make the statute in question fully answer its obvious purpose and intention. In *Richardson v. Duncan*, 2 Helsk. 220, it was held by this court that an "ass" was within the meaning of the law exempting from execution a horse, mule, or yoke of oxen in the hands of a person engaged in agricultural pursuits. So, in *Webb v. Brandon*, 4 Helsk. 288, it was held that an "ox wagon" was embraced under the words

insured, if there is nothing to show that those words were used with a different meaning.

Life insurance payable to "legal representatives" of the insured, and which his application asks to be paid to his "estate," cannot be recovered in an action by his widow in her own right, although he left no children and the object of the insurance association was declared to be to aid the "families or assigns" of the members. The court says the words "legal representatives" must be given their ordinary meaning. *Sulz v. Mutual Reserve Fund L. Assn.* 145 N. Y. 568, 28 L. R. A. 379.

Policies payable to the "legal representatives" of the insured, one of them specifying "for the sole use and benefit of his estate," are held in *Fox v. Senter*, 33 Me. 295, to pass by will as part of his "remaining property" given to his wife if living.

The term "legal representatives" in a life insurance policy was held to mean administrators, in *Armstrong v. Mutual L. Ins. Co.* 11 Fed. Rep. 573. But the Supreme Court of the United States, reversing this case on other grounds, says: "The term 'legal representatives' is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law. It may, in this case, include assigns as well as executors and administrators." *Mutual L. Ins. Co. v. Armstrong*, 117 U. S. 591, 20 L. ed. 997.

A clause in a policy making it payable to "legal representatives" is held to apply only in case the

policy is not assigned by the insured, and not to limit his power to assign it where such power is contemplated by the policy. *New York L. Ins. Co. v. Flack*, 8 Md. 341.

So, the words "legal representatives," describing the persons to whom life insurance is payable, are held not to exclude an assignee of the policy to whom it was assigned as security for a debt. *Robinson v. Hurst*, 75 Md. 59, 20 L. R. A. 761.

Somewhat analogous to the present subject is the decision that a statutory provision that life insurance "shall inure to the separate use of the husband or wife and children" is held to give all to the widow in case there are no children, although there is another provision that the insurance shall not be subject to debts but "in other respects be disposed of like other property left by the deceased." This provision is held not to mean necessarily that the insurance shall go to the same class or classes of persons as will take under the statute. *Rhode v. Bank*, 53 Iowa, 375.

A policy for wife and children "or their representatives" was held to be for the benefit of the last survivor of them to the exclusion of a niece of the insured. *Robinson v. Dewall*, 79 Ky. 82, 42 Am. Rep. 208.

II. Other words combined with the words "legal representatives."

Where life insurance was payable to "heirs or assigns," and the insured was unmarried and childless, it was held that those persons who were the next of kin according to the statute of distributions

of the statute exempting an "ox cart" or a "two-horse wagon."

The evident object and purpose of the acts in controversy was to provide for the widow and children, and, in default of them, for the next of kin, of the assured upon his death, in the event he did not direct in the policy, or by assignment, or by his will, or in some other mode, that other persons should be the beneficiaries thereunder. *Harvey v. Harrison*, 89 Tenn. 476. That he might so direct cannot, under our decisions, be questioned. But, in order to do so in the policy, he must use apt words for that purpose, indicating his intention that the proceeds should be paid to parties other than the wife and children or next of kin, or else the proceeds will pass under the statute. Without now attempting to decide upon the use of particular words and phrases as indicating this intention, we are content to hold that the language used in this policy, designating the payees as "the legal representatives of the assured," does not indicate an intention to direct the proceeds to any other persons than those entitled under the law, to wit, the widow and children or next of kin, but under this language the proceeds will pass, as the statute directs, to the widow and children, or, if there be no widow or children, then to the next of kin under the law, who are, in the sense in which the terms are here used, "the legal representatives of the assured." It cannot be held that the term "legal representatives" was intended to mean the executor or administrator of the deceased, so as to give them a beneficial interest in the recovery, but was intended to designate those who, under the law, succeed to the personal estate of the deceased. It was intended by the statutes to provide a fund for the widow

and children and next of kin, which, upon the assured's death, should go to them free from the claims of creditors; and, like other exemption laws, they have been liberally construed to carry out the general purpose. *Collier v. Latimer*, 8 Baxt. 420, 35 Am. Rep. 711; *Jackson v. Shelton*, 89 Tenn. 82; *Harvey v. Harrison*, Id. 470. It is difficult to see why the widow and children of a party who took out his life insurance before he married should not stand upon the same footing and have the same rights as the widow and children of a party who obtained such insurance after he was married, when there is no indication in the policy that the assured intended it to go otherwise. It will be noticed that the act does not say when the insurance should be "effected," whether during the marital relation or previous thereto, and an easy and natural interpretation will embrace that "effected" before as well as that after the marriage occurred. Again, life insurance is made "effectual" by the payment of premiums at fixed intervals, and the insurance for any particular time is "effected" when the premium for that time is paid. In case of this policy it was "effected" every six months for the ensuing six months. The fact that the proceeds of life policies are paid to and collected by the executor or administrator of the assured does not in any way make the proceeds assets of the estate for the payment of debts, but they go to the widow and children or next of kin, free from the debts, whether the estate is solvent or insolvent. *Harvey v. Harrison*, 89 Tenn. 470; *State v. Anderson*, 16 Lea, 338.

It is urged that the North American Guaranty Company has a special equity as against the proceeds of this policy from the fact that it became surety upon the decedent's bond as

would take the proceeds free from the debts of the insured. *Hubbard, P. & Co. v. Turner* (Ga.) ante, 568.

This distinguishes *Rawson v. Jones*, 52 Ga. 458, which had held that if there is nothing to show any contrary intent, a policy payable to "heirs, executors, administrators, or assigns" will be payable to the estate for distribution by legal representatives.

But the words "families, heirs, or legal representatives," in the act of incorporation of an insurance organization, were held to include those who would take property as in case of intestacy, and were given effect where no certificate had been actually issued to a member in good standing. *Bishop v. Grand Lodge E. O. of Mut. Aid*, 112 N. Y. 627, reversing 43 Hun, 472.

Insurance payable to "heirs or representatives" will go to the heirs or next of kin, as, for instance, to an only child, where it appears that the benefit was intended for his family. *Loos v. John Hancock Mut. L. Ins. Co.* 41 Mo. 538.

The words "heirs and legal representatives" as used in the by-laws of a life insurance company describing the beneficiaries, are regarded as equivalent to "next of kin," and the fund is held not to be a part of the assets of the estate of the insured. *Hodge's Appeal*, 8 W. N. C. 209, 9 Ins. L. J. 709. In this case it was paid to his father and mother, as there was no wife or child.

But it has been held that a ten-year endowment policy payable to the insured himself, or in case of his prior death to his "heirs or representatives,"

is, in case of his death, payable to his administrator as assets, and is not within a statutory provision exempting from debts of a decedent life insurance expressed to be for the benefit of another person. *Wason v. Colburn*, 99 Mass. 842. The court said: "The term 'representatives' legally indicates administrators, and we cannot construe it as excluding them."

It was said in *Tompkins v. Levy*, 87 Ala. 268, that when a policy of life insurance is made payable to "executors and assigns," coupled with the word "heirs," it inures to the benefit of distributees or next of kin.

But the case does not decide in reality whether the words used would give the proceeds to the administrator as assets subject to the debts of the insured or not. The question decided was that upon the death of a wife during the life of her husband, which was insured by a policy payable to her, "her heirs, executors, or assigns," and the premiums therefor paid by him, the policy becomes payable to his estate.

The examination of the cases shows that the intention of the insured is regarded as the important element in determining the meaning of the words "legal representatives" when those words are used to describe the beneficiaries of his life insurance. Since the words are clearly shown to be somewhat ambiguous his intention ought to be controlling, and it would seem to require little to raise the presumption that he intended the proceeds to go to his family if he has any.

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a railroad station agent, and was compelled to pay something over \$600 on account of his default as such agent; and because, when he made application to the company to become his surety on such bond, he stated that he had a policy upon his life, payable to his estate, and this was one of the considerations moving the company to go upon said bond. This is not material to the question now before us. If the company desired the security of this policy, they should have secured it by an as-

signment, or such other proper proceeding as was necessary to fix a lien upon it which the law could recognize.

We think there is no error in the decrees of the chancellor, nor in the able opinion of the court of chancery appeals, delivered by Judge M. M. Neil, and which we have used liberally in this opinion; and the decrees of that court and the chancellor is affirmed, with costs.

SOUTH DAKOTA SUPREME COURT.

Joe KIRBY, *Recept.*,
v.

WESTERN UNION TELEGRAPH COM-
PANY, *Appt.*

(4 S. D. 105, 430.)

- *1. The statute law of this state (Comp Laws, §§ 3881-3910), makes a telegraph company which offers to the public to carry telegraphic messages a common carrier of such messages.
2. Such statutory provisions were not superseded or repealed by section 11, article 17 of the Constitution of the state, imposing upon the legislature the duty of providing reasonable regulations, by general law, for giving effect to the right of a corporation organized for such purpose to construct and maintain lines of telegraph within the state.
3. While a common carrier may, in general, determine for himself the character and condition of what he will offer to and will carry, he cannot, by offering to carry under a qualified liability, constitute himself a common carrier with such liability only as he advertises to assume.
4. A common carrier is under a legal duty to accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless such liability is restricted by a valid agreement between such carrier and his employer.
5. Such agreement, restricting the carrier's liability except as "to the rate of hire, the time, place, and manner of delivery," can only be manifested by the signature of the passenger, consignee, or consignee, or person employing such carrier. Comp. Laws, § 3888.
6. Such modification of the common carrier's liability depends upon, and results from, the agreement of the parties, and the carrier cannot legally exact such agreement as a condition precedent to receiving or carrying the offered freight or message.
7. As a common carrier, a telegraph company cannot legally refuse to ac-

cept and transmit an offered message because the person offering will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

8. While such an agreement, when freely made, is binding, the carrier cannot exact it as a condition precedent to the discharge of his duty as such common carrier.
9. In the afternoon of January 4, respondent offered appellant, for transmission, a message confessedly unobjectionable, except that it was not written on or attached to one of appellant's message forms. Respondent declined to sign or agree to the stipulations printed on such blank, and for that reason appellant refused to receive or send his message. Respondent then wrote a letter to the party to whom he desired to send the message, but still later, about 7 o'clock in the evening, went to the office of appellant, and sent a message upon one of its blanks, substantially like the one previously refused. *Held*, that appellant's refusal to send the first message constituted a refusal, within the meaning of section 3910, Comp. Laws, and that the sending of the second message was neither a cure of the wrong upon the part of appellant, nor a waiver of it on the part of respondent.
10. Where, upon undisputed facts, no other verdict than the one returned could have been properly rendered, this court will not examine an alleged error in allowing the jury to separate temporarily without being admonished by the trial court not to converse among themselves, or with others, upon the subject of the trial, as it is evident that no prejudice resulted therefrom.
11. When a petition for a rehearing states new matter which may materially affect the merits of the main controversy, and which was not considered by the appellate court at the time of the rendition of the opinion, a rehearing will be granted for the purpose of considering such new matter.
12. In this state a telegraph company is a common carrier. Comp. Laws, §§ 3881-3910.
13. A common carrier has a right to make, and as a condition precedent to insist

*Headnotes 1-10 by KELLAM, J. Headnote 11 by BENNETT, P. J. Headnotes 12-14 by FULLER, J.

NOTE.—For compulsory service by party whose business it is to serve the public, see note to *Rushville v. Rushville Natural Gas Co. (Ind.)* 15 L. R. A. 381.

The subject of the reasonableness and effect of a 80 L. R. A.

condition as to presenting claims for damages within sixty days is discussed so fully in the report of the above case that no attempt to annotate it will be made.

upon a compliance with, reasonable rules and regulations, designed to protect its interests, and promote the safe and convenient transaction of business, when the same contravene no consideration of public policy, and in no manner affect its liability under the statutory or common law.

14. The statutory obligation and common-law liability of a telegraph company to accept, safely transmit, and promptly deliver a message is in no manner modified, limited, or intrinsically affected, by a regulation in all respects reasonable, which requires the sender to present in writing a claim for damages within sixty days after the message is filed with the company for transmission; nor does such regulation shorten the time within which an action for damages may be commenced.

(June 28, 1898.)

A PPEAL by defendant from a judgment of the Minnehaha County Court in favor of plaintiff in an action brought to recover the statutory penalty for the defendant's refusal to send a telegraph message, and also to recover the damages caused by such refusal. *Reversed.*

The facts are stated in the opinions.

Mr. George H. Fearons, with Messrs. Bailey & Voorhees, for appellant:

Appellant was legally entitled to require compliance by respondent with its reasonable rules and regulations before it was obliged to transmit the message in controversy, and was entitled to require the message to be written upon, or attached to, its message blank.

Appellant's rule 1 is as follows: "Each message for transmission will be written upon the form provided by the company for that purpose, or will be attached to such form by the sender, or by the person presenting the message as the sender's agent, so as to leave the printed heading in full view above the message."

Rule 1 was such as appellant had the right to enact, and having enacted it, respondent was compelled to observe it.

Wheeler, Carr. p. 180; Gray, Communication by Telegraph, § 18; *Barlett v. Western U. Teleg. Co.* 62 Me. 209, 16 Am. Rep. 487; *State v. Chovin*, 7 Iowa, 204; *State v. Overton*, 24 N. J. L. 485, 61 Am. Dec. 671; *Com. v. Power*, 7 Met. 598, 41 Am. Dec. 465; *State v. Gould*, 58 Me. 279; *Burlington & M. R. R. Co. v. Ross*, 11 Neb. 177; *Crocker v. New London, W. & P. R. Co.* 24 Conn. 249; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *Bennett v. Railroad Co.* 7 Phila. 11; *Hill v. Syracuse, B. & N. Y. R. Co.* 68 N. Y. 101; *Lillis v. St. Louis, K. C. & N. R. Co.* 64 Mo. 464, 27 Am. Rep. 255; *Western U. Teleg. Co. v. Reynolds Bros.* 77 Va. 178, 46 Am. Rep. 715; *Kiley v. Western U. Teleg. Co.* 109 N. Y. 281; *McAndrew v. Electric Teleg. Co.* 88 Eng. L. & Eq. 180; *Western U. Teleg. Co. v. Carew*, 15 Mich. 525; *Ellis v. American Teleg. Co.* 18 Allen, 226; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Clement v. Western U. Teleg. Co.* 187 Mass. 468; *Schwartz v. Atlantic & P. Teleg. Co.* 18 Hun, 157; *Baldwin v. United States Teleg. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Breese v. United States Teleg. Co.* 48 N. Y. 182, 8 Am. Rep. 526; *Kirkland v. Dinamore*, 62 N. Y. 171, 20 Am. Rep. 475; *Young v. Western U. Teleg. Co.* 65

N. Y. 163; *United States Teleg. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

If this is a reasonable regulation, then respondent had no right to refuse to comply with it, and he has no just cause of action against appellant for requiring observance of it.

Western U. Teleg. Co. v. Dozier, 67 Miss. 288; Gray, Communication by Telegraph, § 13; *Breese v. United States Teleg. Co.* 48 N. Y. 182.

Every stipulation on the message blank in controversy is supported by a vast weight of judicial authority.

The first stipulation is in regard to repeating messages.

Hart v. Western U. Teleg. Co. 66 Cal. 579, 56 Am. Rep. 119; *Ellis v. American Teleg. Co.* 18 Allen, 226; *Redpath v. Western U. Teleg. Co.* 112 Mass. 71, 17 Am. Rep. 69; *Clement v. Western U. Teleg. Co.* 187 Mass. 468; *Grinnell v. Western U. Teleg. Co.* 113 Mass. 299, 18 Am. Rep. 485; *Phillips v. Earle*, 8 Pick. 182; *Dunlap v. International S. B. Co.* 98 Mass. 371; *Western U. Teleg. Co. v. Carew*, 15 Mich. 525; *Wann v. Western U. Teleg. Co.* 37 Mo. 472, 90 Am. Dec. 895; *Becker v. Western U. Teleg. Co.* 11 Neb. 87, 88 Am. Rep. 856; *Breese v. Western U. Teleg. Co. supra*; *Redfield, Carr.* 405; *McAndrew v. Electric Teleg. Co.* 88 Eng. L. & Eq. 180; *Birney v. New York & W. Printing Teleg. Co.* 18 Md. 341, 81 Am. Dec. 607; *New York & W. Printing Teleg. Co. v. Dryburg*, 85 Pa. 298, 78 Am. Dec. 388; *Camp v. Western U. Teleg. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461; *Mowry v. Western U. Teleg. Co.* 51 Hun, 126; *Kiley v. Western U. Teleg. Co.* 109 N. Y. 281; *Lassiter v. Western U. Teleg. Co.* 89 N. C. 384; *Western U. Teleg. Co. v. Tyler*, 74 Ill. 168; *Dorgan v. Telegraph Co. (Ala.)* 1 Am. L. T. 406; *Pegram v. Western U. Teleg. Co.* 97 N. C. 57; *Passmore v. Western U. Teleg. Co.* 78 Pa. 238; *Harris v. Western U. Teleg. Co.* 9 Phila. 88; *Aiken v. Western U. Teleg. Co.* 5 S. C. N. S. 358; *Western U. Teleg. Co. v. Hearne*, 77 Tex. 88; *Western U. Teleg. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. Western U. Teleg. Co.* 58 Tex. 176, 44 Am. Rep. 614; *Western U. Teleg. Co. v. Edsall*, 68 Tex. 668; *Gulf, C. & S. F. R. Co. v. Wilson*, 69 Tex. 789; *Jones v. Western U. Teleg. Co.* 18 Fed. Rep. 717; *United States Teleg. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

If appellant is a common carrier, it may limit its common-law liability by special contract, and the contract and the stipulation upon the message blanks are simply an offer on the part of appellant to respondent to limit the common-law liability, if respondent so chooses.

Grinnell v. Western U. Teleg. Co. 118 Mass. 299, 18 Am. Rep. 485; *Western U. Teleg. Co. v. Dunfield*, 11 Colo. 385; *Heimann v. Western U. Teleg. Co.* 57 Wis. 562; *Western U. Teleg. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 718; *Cole v. Western U. Teleg. Co.* 88 Minn. 227; *Western U. Teleg. Co. v. Rains*, 63 Tex. 27; *Young v. Western U. Teleg. Co.* 65 N. Y. 163; *Ripley v. Astoria Ins. Co.* 30 N. Y. 186, 86 Am. Dec. 362; *Roach v. New York & E. Ins. Co.* 80 N. Y. 546; *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Wolf v. Western U. Teleg. Co.* 62 Pa. 83, 1 Am. Rep. 887; *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 867; *Western U. Teleg. Co. v.*

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Dougherty, 54 Ark. 221, 11 L. R. A. 102; *Messengale v. Western U. Tele. Co.* 17 Mo. App. 257; *Western U. Tele. Co. v. Meredith*, 95 Ind. 98; *Western U. Tele. Co. v. Pelle*, 2 Tex. L. Rev. 276; *McKinney v. Western U. Tele. Co.* 5 Tex. L. Rev. 178; *Hartwell v. Northern P. Exp. Co.* 5 Dak. 468, 8 L. R. A. 842.

The stipulation in the message blank in controversy, requiring all claims for damages to be presented within sixty days, is a reasonable regulation, which appellant even as a common carrier had a right to enact and enforce.

Wheeler, Carr. p. 180; *Western U. Tele. Co. v. Henderson*, 89 Ala. 510; *Thompson, Electricity*, § 197; *Given v. Western U. Tele. Co.* 24 Fed. Rep. 119; *Gray, Communication by Telegraph*, § 55; *Myrick v. Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *St. Louis Ins. Co. v. St. Louis, V. T. H. & I. R. Co.* 104 U. S. 148, 26 L. ed. 679; *Leonard v. New York, A. & B. Electro Magnetic Tele. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Baldwin v. United States Tele. Co.* 45 N. Y. 744, 6 Am. Rep. 165; *Squire v. Western U. Tele. Co.* 98 Mass. 232, 93 Am. Dec. 162; *Western U. Tele. Co. v. Way*, 83 Ala. 542; *Hill v. Western U. Tele. Co.* 85 Ga. 425; *Western U. Tele. Co. v. James*, 90 Ga. 254; *Western U. Tele. Co. v. Dunfield*, 11 Colo. 385; *Western U. Tele. Co. v. Fairbanks*, 15 Ill. App. 601; *Western U. Tele. Co. v. Meredith*, 95 Ind. 98; *Western U. Tele. Co. v. Jones*, Id. 234, 48 Am. Rep. 718; *Western U. Tele. Co. v. Yopet*, 118 Ind. 248, 8 L. R. A. 224; *Cole v. Western U. Tele. Co.* 83 Minn. 227; *Messengale v. Western U. Tele. Co.* 17 Mo. App. 259; *Sherrill v. Western U. Tele. Co.* 109 N. C. 527; *Wolf v. Western U. Tele. Co.* 62 Pa. 88, 1 Am. Rep. 387; *Beasley v. Western U. Tele. Co.* 39 Fed. Rep. 181; *Western U. Tele. Co. v. Rains*, 68 Tex. 27; *Western U. Tele. Co. v. Goslin*, 8 Tex. App. Civ. Cas. (Willson's) § 220; *Western U. Tele. Co. v. Oulberson*, 79 Tex. 65; *Lester v. Western U. Tele. Co.* 84 Tex. 818; *Western U. Tele. Co. v. Brown*, Id. 54; *Heimann v. Western U. Tele. Co.* 57 Wis. 562.

Common carriers are not liable for losses occasioned, in the language of the old authorities, "by the act of God or the public enemy."

Wheeler, Carr. p. 296; *Hutchinson*, Carr. 2d ed. §§ 174 et seq.; *Strouss v. Wabash, St. L. & P. R. Co.* 17 Fed. Rep. 209; *Smyrl v. Nolon*, 2 Bail. L. 421, 28 Am. Dec. 146; *Williams v. Grant*, 1 Conn. 487, 7 Am. Dec. 235; *Cott v. McMecken*, 16 Johns. 160, 5 Am. Dec. 200; *Blythe v. Denver & R. G. R. Co.* 15 Colo. 338, 11 L. R. A. 615.

The stipulation exempting appellant for errors in cypher or obscure messages is lawful.

Hadley v. Barendale, 26 Eng. L. & Eq. 398; *Thompson, Electricity*, § 858; *Gray, Communication by Telegraph*, §§ 77, 88, 246.

Under the Constitution of this state, appellant is not a common carrier, but is simply, as in other states, a private carrier of telegraphic messages.

Thompson, Electricity, § 187; *Gray, Communication by Telegraph*, § 8; *Ellis v. American Tele. Co.* 18 Allen, 226; *Breese v. United States Tele. Co.* 45 Barb. 274, 81 How. Pr. 86, 48 N. Y. 133, 8 Am. Rep. 526; *Tyler v. Western U. Tele. Co.* 60 Ill. 421, 14 Am. Rep. 88; *Birney v. New York & W. Printing Tele. Co.* 80 L. R. A.

18 Md. 341, 81 Am. Dec. 607; *Grinnell v. Western U. Tele. Co.* 118 Mass. 299, 18 Am. Rep. 485; *Western U. Tele. Co. v. Carew*, 15 Mich. 525; *Leonard v. New York, A. & B. Electro Magnetic Tele. Co.* 41 N. Y. 544, 1 Am. Rep. 446; *Schwartz v. Atlantic & P. Tele. Co.* 18 Hun, 157; *De Rutte v. New York, A. & B. Electric Magnetic Tele. Co.* 1 Daly, 547, 80 How. Pr. 408; *Western U. Tele. Co. v. Griswold*, 37 Ohio St. 301; *New York & W. Printing Tele. Co. v. Dryburg*, 85 Pa. 298; *Pinkney Bros. v. Western U. Tele. Co.* 19 S. C. 71, 45 Am. Rep. 765; *Abraham v. Western U. Tele. Co.* 6 West Coast Rep. 162; *Baxter v. Dominion Tele. Co.* 87 U. C. Q. B. 470; *Baldwin v. United States Tele. Co.* 45 N. Y. 744, 6 Am. Rep. 165, 54 Barb. 505; *Passmore v. Western U. Tele. Co.* 78 Pa. 238; *Wann v. Western U. Tele. Co.* 87 Mo. 472, 90 Am. Dec. 395; *Washington & N. O. Tele. Co. v. Hobson*, 15 Gratt. 122; *Barillett v. Western U. Tele. Co.* 62 Me. 209, 16 Am. Rep. 437; *Western U. Tele. Co. v. Fontaine*, 58 Ga. 433; *Camp v. Western U. Tele. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461; *Bryant v. American Tele. Co.* 1 Daly. 575; *Aiken v. Western U. Tele. Co.* 5 S. C. N. S. 858; *Dickson v. Reuter's Tele. Co.* L. R. 3 C. P. Div. 1, L. R. 2 C. P. Div. 62; *Fowler v. Western U. Tele. Co.* 80 Me. 381; *Little Rock & Ft. S. Tele. Co. v. Davis*, 41 Ark. 79; *Western U. Tele. Co. v. Munford*, 87 Tenn. 190, 2 L. R. A. 601; *Abraham v. Western U. Tele. Co.* 28 Fed. Rep. 815.

On Rehearing.

As to matters which do not limit its statutory duties or liabilities as a common carrier, it can make its own regulations for the conduct of its business, and such regulations, if reasonable, will be upheld by the courts.

Wheeler, Carr. p. 180.

A railroad company has the right to require a passenger to procure and pay for a ticket before entering the cars.

Burlington & M. R. R. Co. v. Ross, 11 Neb. 177; *State v. Gould*, 58 Me. 279; *Hilliard v. Gould*, 34 N. H. 280, 66 Am. Dec. 765; *Crocker v. New London, W. & P. R. Co.* 24 Conn. 249; *Stephen v. Smith*, 29 Vt. 160; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507.

A railroad company has the right to require passengers who have not purchased tickets to pay on the cars a sum additional to the usual fare.

Cincinnati, S. & O. R. Co. v. Skillman, 39 Ohio St. 444; *Toledo, W. & W. R. Co. v. Wright*, 68 Ind. 586, 84 Am. Rep. 277; *State v. Chovin*, 7 Iowa, 204; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460, 68 Am. Dec. 562.

A common carrier may lawfully require passengers to exhibit their tickets whenever called upon to do so by the proper officer of the carrier.

Wheeler, Carr. p. 139; *Louisville, N. & G. S. R. Co. v. Fleming*, 14 Lea, 128; *Willets v. Buffalo & R. R. Co.* 14 Barb. 585; *Havens v. Hartford & N. H. R. Co.* 28 Conn. 69; *DeLucas v. New Orleans & C. R. Co.* 38 La. Ann. 930; *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *Ripley v. New Jersey R. & Transp. Co.* 81 N. J. L. 388.

A common carrier may require that a passenger surrender his ticket immediately after

leaving the principal stopping place next before his point of destination, although there may be intermediate stations.

Vedder v. Fellows, 20 N. Y. 126.

A common carrier has the right to limit the time during which a ticket sold by it shall be valid.

Hill v. Syracuse, B. & N. Y. R. Co. 63 N. Y. 101; *State v. Campbell*, 82 N. J. L. 209; *Rawitzky v. Louisville & N. R. Co.* 40 La. Ann. 47; *Sherman v. Chicago & N. W. R. Co.* 40 Iowa, 45; *Powell v. Pittsburg, O. & St. L. R. Co.* 25 Ohio St. 70; *Lillis v. St. Louis, K. C. & N. R. Co.* 64 Mo. 464, 27 Am. Rep. 255; *Hall v. Memphis & C. R. Co.* 9 Fed. Rep. 585.

A common carrier of passengers can lawfully require that the holder of an excursion ticket shall present himself for identification at the office of the company at the terminal station.

Rawitzky v. Louisville & N. R. Co. supra.

A common carrier has the right to require that a passenger who breaks his journey shall have his ticket indorsed.

Bebe v. Ayres, 28 Barb. 275; *Dunphy v. Erie R. Co.* 10 Jones & S. 128; *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 284, 41 Am. Rep. 28.

A common carrier may require that the journey of a passenger shall be continuous.

State v. Overton, 24 N. J. L. 485, 61 Am. Dec. 871; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 432, 10 Am. Rep. 711; *Cheney v. Boston & M. R. Co.* 11 Met. 121, 45 Am. Dec. 190; *Gale v. Delaware, L. & W. R. Co.* 7 Hun, 670; *Terry v. Flushing, N. S. & C. R. Co.* 13 Hun, 859; *Stone v. Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458.

A common carrier may lawfully limit the use of a ticket to the person buying it.

Post v. Chicago & N. W. R. Co. 14 Neb. 110, 45 Am. Rep. 100; *Cody v. Central P. R. Co.* 4 Sawy. 114; *Freidendrich v. Baltimore & O. R. Co.* 53 Md. 201.

A common carrier may set aside a car for the accommodation of women, and may exclude all men unaccompanied by women from entering such car.

Brown v. Memphis & O. R. Co. 7 Fed. Rep. 51; *Chicago & N. W. R. Co. v. Williams*, 55 Ill. 185; *Memphis & C. R. Co. v. Benson*, 85 Tenn. 627.

A common carrier may exclude persons of color from a particular car.

Wentchester & P. R. Co. v. Miles, 55 Pa. 209, 36 Am. Dec. 744.

A common carrier may refuse to carry all persons who are disorderly.

Putnam v. Broadway & S. A. R. Co. 55 N. Y. 108, 14 Am. Rep. 190; *Atchison, T. & S. F. R. Co. v. Weber*, 83 Kan. 543, 52 Am. Rep. 543; *Sullivan v. Old Colony R. Co.* 148 Mass. 119, 1 L. R. A. 513; *Higgins v. Waterliet Turnp. & R. Co.* 46 N. Y. 23, 7 Am. Rep. 293; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *St. Louis, A. & T. R. Co. v. Mackie*, 71 Tex. 491, 1 L. R. A. 667; *Paddock v. Atchison, T. & S. F. R. Co.* 37 Fed. Rep. 841, 4 L. R. A. 231.

A common carrier may prohibit all persons from riding on the platform of its cars.

Moss v. Johnson, 22 Ill. 633; *Virginia Midland R. Co. v. Roach*, 83 Va. 373; *Graville v. Manhattan R. Co.* 105 N. Y. 525, 59 Am. Rep. 30 L. R. A.

516; *Alabama G. S. R. Co. v. Hawk*, 73 Ala. 113, 47 Am. Rep. 403.

A common carrier may eject from its conveyance a person who attempts to ply thereon a calling, the object of which is to injure the business of the carrier.

Jencks v. Coleman, 2 Sumn. 221; *Old Colony R. Co. v. Tripp*, 147 Mass. 35; *Barney v. Oyster Bay & H. S. B. Co.* 67 N. Y. 801; *Markham v. Brown*, 8 N. H. 523, 31 Am. Dec. 209; *Smallman v. Whiller*, 87 Ill. 545, 29 Am. Rep. 76.

A common carrier has the right so to arrange its trains that some of them shall stop only at the principal stations.

Dietrich v. Pennsylvania R. Co. 71 Pa. 432, 10 Am. Rep. 711; *Trottinger v. East Tennessee, V. & G. R. Co.* 11 Lea, 538; *Logan v. Hannibal & St. J. R. Co.* 77 Mo. 668; *Chicago & A. R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60; *Ohio & M. R. Co. v. Applewhite*, 53 Ind. 510; *Duling v. Philadelphia, W. & B. R. Co.* 66 Md. 120.

A common carrier may make reasonable regulations as to the place where the baggage of passengers shall be deposited, and if the passenger is informed of such regulations and does not observe them, he cannot recover for the loss of his baggage.

Gleason v. Goodrich Transp. Co. 82 Wis. 85, 14 Am. Rep. 716.

The foregoing illustrations demonstrate that a common carrier has the right, regardless of the common-law or statutory liability as a common carrier, to enact regulations for the conduct of its business, and to refuse carriage unless such regulations are observed by its patrons.

The sixty-day clause does not limit the statutory liability of a common carrier, and is a reasonable regulation; and the telegraph company, a common carrier, has the undoubted right to make its observance a condition precedent to the carriage of the message.

Southern Exp. Co. v. Caldwell, 86 U. S. 21 Wall. 264, 22 L. ed. 556.

The uniform holding of the courts has been that, in the absence of extraordinary circumstances, a clause similar to the sixty-day clause constitutes a reasonable regulation which the carrier has a right to enforce.

Wolf v. Western U. Teleg. Co. 62 Pa. 83, 1 Am. Rep. 887; *Western U. Teleg. Co. v. Dougherty*, 54 Ark. 221, 11 L. R. A. 103; *Heimann v. Western U. Teleg. Co.* 57 Wis. 562; *Masondale v. Western U. Teleg. Co.* 17 Mo. App. 257; *Western U. Teleg. Co. v. Meredith*, 95 Ind. 98; *Western U. Teleg. Co. v. Pells*, 2 Tex. L. Rev. 278; *McKinney v. Western U. Teleg. Co.* 5 Tex. L. Rev. 178.

The power of Congress over post roads, when exercised, is exclusive; and if a territory be deemed in this respect to occupy the same position as a state, its power to regulate commerce and post roads ceases the moment Congress has taken action.

Cooley v. Philadelphia Port Wardens, 53 U. S. 12 How. 299, 13 L. ed. 996; *Sturges v. Crowninshield*, 17 U. S. 4 Wheat. 122, 4 L. ed. 529; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 28; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Leloup v. Port of*

Mobile, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 184.

The act of July 24, 1866, was a valid exercise of the constitutional powers of Congress and abrogated any power which might formerly have been possessed by a state or territory upon the subjects covered by the act.

Pensacola Teleg. Co. v. Western U. Teleg. Co. *supra*; *Western U. Teleg. Co. v. Texas*, 105 U. S. 480, 26 L. ed. 1087; *Western U. Teleg. Co. v. Pendleton*, 123 U. S. 847, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; *Leloup v. Port of Mobile*, *supra*.

If, therefore, the territorial statute of January 12, 1866, conflicts with the act of July 24, 1866, it was repealed by implication, and no subsequent enactment could give it validity, and it consequently was not in force at the time of the admission of the state of South Dakota.

Pennsylvania v. Wheeling & B. Bridge Co. 54 U. S. 13 How. 518, 14 L. ed. 249; *Ex parte Conway*, 48 Fed. Rep. 77; *Western U. Teleg. Co. v. Charleston*, 56 Fed. Rep. 419; *Ounningham v. Neagle*, 185 U. S. 1, 34 L. ed. 55.

Under the Constitution of the United States, Congress possessed no power to delegate to the territory of Dakota the authority to enact the statute upon which this action is based. Therefore the provisions of the Civil Code concerning common carriers never became a law of the territory of Dakota.

American Ins. Co. v. 556 Bales of Cotton, 26 U. S. 1 Pet. 511, 7 L. ed. 242; *United States v. Gratiot*, 39 U. S. 14 Pet. 528, 10 L. ed. 573; *McOutloch v. Maryland*, 17 U. S. 4 Wheat. 816, 4 L. ed. 579; *Scott v. Sanford*, 60 U. S. 19 How. 398, 15 L. ed. 691; *First Nat. Bank v. Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *The "City of Panama"*, 101 U. S. 453, 25 L. ed. 1061; *Murphy v. Ramsey*, 114 U. S. 15, 29 L. ed. 47; *Church of Jesus Christ of L. D. S. v. United States*, 136 U. S. 1, 34 L. ed. 478.

Power to legislate cannot be delegated.

Cooley, Const. Lim. 2d ed. p. 116; *Territory v. Stewart*, 1 Wash. 98, 1 R. A. 106; *People v. Riordan*, 73 Mich. 508; *Re Oloherly*, 2 Wash. 137; *Port of Eureka Harbor Comrs. v. Excelsior Redwood Co.* 88 Cal. 491; *Shepherd v. Wheeling*, 30 W. Va. 479; *Bradshaw v. Lankford*, 73 Md. 428, 11 L. R. A. 582; *United States v. Rider*, 50 Fed. Rep. 406; *United States v. Keokuk & H. Bridge Co.* 45 Fed. Rep. 178; *People v. Johnson*, 95 Cal. 471; *Dougherty v. Austin*, 94 Cal. 601, 16 L. R. A. 166; 3 Am. & Eng. Enc. Law, p. 398, note 2; 2 Dill. Mun. Corp. 4th ed. §§ 715, 779.

If the territories have exceeded the powers conferred upon them, or which Congress had a right to confer upon them, their acts in excess of such power are absolutely void.

The purported statute in controversy attempts to enact a code of laws governing common carriers.

By it carriers of messages, which include telegraph companies, were declared to be common carriers. This was in derogation of the common law under which, it is well settled, telegraph companies are not common carriers.

Thompson, Electricity, § 187; *Gray, Communication by Telegraph*, § 11.

State statutes imposing penalties upon tele-

graph companies for a failure to deliver messages are invalid, so far as affects interstate messages.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306.

Messrs. A. C. Boylan and Joe Kirby, for respondent:

The essentials of a contract are that it shall be free from fraud, menace, or duress; that the minds of the parties shall meet. If one of the parties can compel the other to enter into certain obligations, then it is no longer a contract but simply a *dictum* of the one party.

Hutchinson, Carr. 2d ed. § 2378.

A common carrier cannot refuse to receive property for transportation because the consignor will not enter into a special contract as to its liability therefor.

McMillan v. Michigan S. & N. I. R. Co. 16 Mich. 79; *Michigan C. R. Co. v. Hale*, 6 Mich. 243.

Comp. Laws, § 3886, provides: "The obligation of a common carrier cannot be limited by general notice on his part, but may be limited by special contract.

If common carriers can only limit their liability by contract in writing signed by the sender, such provision of the law would be negatived if they could compel the sender to sign such contract.

Hartuell v. Northern P. Exp. Co. 5 Dak. 463, 8 L. R. A. 842.

The carrier cannot refuse to take goods for carriage under the common-law liability if the consignor should refuse his assent to a limitation.

Tiedeman, Pol. Powers, 257; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 466; *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *Holliester v. Nowlen*, 19 Wend. 234, 32 Am. Dec. 455.

After the first hearing of the case *Kellam*, J., delivered the following opinion:

On the 4th day of January, 1892, the respondent offered to the appellant at its office in the city of Sioux Falls a written message confessedly unobjectionable in matter, and requested that it be transmitted in the usual way to the party to whom it was addressed, and then and there offered to pay the usual compensation therefor. The message was written on ordinary white writing paper. The company declined to send the same unless written upon, or attached to, one of its message blanks. This the respondent refused to do unless the stipulations contained in such message blank should be first erased, so that he would not be bound thereby. Under these circumstances the message was refused by the company. Upon these facts, which appear to be undisputed, respondent brought an action against the appellant company to recover actual damages, and \$50 in addition thereto, under section 8910, Comp. Laws. The section reads as follows: "Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and \$50 in addition thereto." Upon the trial the respondent proved his actual damages, and had a verdict for 25 cents

actual and \$50 statutory damages. Upon this verdict judgment was entered, a new trial refused, and the company appeals.

While other assignments of error, which will be hereafter noticed, were presented and argued, it is evident that the major question is the right of the appellant company to insist upon the message being received and sent subject to the stipulations contained in the message blank, and, if the person offering the message refuse to agree thereto, to decline to receive or transmit the same. If the law sustains the company's right to so insist, or to refuse the message, then, upon the facts in this case, respondent should not have recovered, for it is uncontradicted that the message was refused upon the distinct ground that the respondent positively declined to have it sent subject to the stipulations printed upon the message blank.

By the statute law of this state (Comp. Laws, § 3881), "every one who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry." That the word "messages," as here used, was intended to include telegraphic messages, is evident from the closely following sections, wherein a "carrier by telegraph" and a "carrier of messages by telegraph" are expressly named, and their duties as such defined. From the adoption of the Civil Code in 1872, until the legislative session of 1873-74, the state of California had the same statutory provisions, but at the session named the above-quoted section was amended by inserting an express exception of "telegraphic messages." During the short time such original provision was there in force, we do not find any reported case in which it was considered. Prior to the adoption of such Code provision the supreme court of that state had held in *Parks v. Alta California Tel. Co.* 18 Cal. 422, 78 Am. Dec. 589, that the defendant company, as a general telegraph company, was a common carrier; but the decisions of the courts have been, with great unanimity, against this view, and under the amended statutes it is now so held in California. *Hart v. Western U. Tel. Co.* 66 Cal. 579, 56 Am. Rep. 119. Appellant, however, advances the proposition that these provisions of the old Civil Code, being the sections of the compiled laws, above cited, which declare telegraph companies to be common carriers, are superseded and repealed by, because inconsistent with, the Constitution. This contention is founded largely upon section 11, article 17, of the Constitution: "Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph in this state, and to connect the same with other lines, and the legislature shall by general laws, of uniform operation, provide reasonable regulations to give effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of, any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph." We think appellant claims too much for this section. It simply declares the right of an association,

corporation, or individual to construct and maintain telegraph lines within this state, and to connect them with other lines, and then forbids the consolidation of competing lines. To carry into effect this general right to construct and maintain, and this prohibition against consolidation, the legislature is charged with the duty of providing suitable and reasonable laws and regulations, of uniform operation; regulations by and under which the right to construct and maintain may be used and exercised, and the prohibition of consolidation be enforced. We are not convinced that there is anything in the constitutional section which would forbid the legislature now, if it had never been done before, to impose upon telegraph companies the character and duties of common carriers. But, even if we understand this constitutional section to mean that the legislature should provide reasonable regulations for the conduct of the current business of telegraph companies, we should not think it had the retroactive effect of repealing former legislation, even though assailed as unreasonable. It is a general rule that neither constitutions nor statutes should be so construed as to have a retroactive effect, unless such intention is clearly expressed. *Cutting v. Taylor*, 8 S. D. 11, 15 L. R. A. 691; *Cooley, Const. Lim.* pp. 62, 63; *Sutherland, Stat. Constr.* §§ 463, 464; *Albyer v. State*, 10 Ohio St. 589; *People v. Gardner*, 59 Barb. 198; *Ex parte Burke*, 59 Cal. 6. Although peculiar to our state, and the statute itself an exceptional one, I think we must recognize its effect to be to make, in this jurisdiction, a telegraph company "a common carrier of whatever it thus offers to carry," and its duty to receive and transmit respondent's message must be tested by its rights and duties as a common carrier. An individual or corporation becomes a common carrier of just what it offers to carry. Its duty to the public springs from its offer to the public, and must be measured by it; so that the carrier who only offers to carry grain in canvas sacks cannot be required to carry grain in bulk. But while the carrier may thus, in general, determine for himself the character and condition of what he will carry, he cannot, by offering to carry for the public under a qualified liability, constitute himself a common carrier with such a liability, only, as he advertises to assume. As a common carrier it was appellant's legal duty, if able to do so, to accept and transmit respondent's message, if offered at a reasonable time and place, and if it was of a kind that it undertook or was accustomed to carry. Comp. Laws, § 3882. The ability of appellant to receive and transmit the message; that it was offered at a reasonable time and place; and that the message itself, except as to the paper on which it was written, was of a kind that it was accustomed to carry, are not disputed.

The dominant question in this case, upon the merits, being whether the stipulations upon the message blank, or any of them, so far restricted appellant's liability as a common carrier as to justify respondent's refusal to consent to them, as a condition of having his message accepted and sent by appellant, we have thought it just to both parties to

examine them severally, expressing our opinion upon each, so far as they are involved by the facts in this case. It is not claimed that either of the regulations or stipulations printed upon the message blank, and which respondent was required to assent to, offended against the rule of impartiality, which appellant, as a common carrier, was bound to observe. Respondent, however, strenuously insists that the stipulation on the printed blank would, if assented to by him, have the effect of relieving the company from a liability imposed upon it by law, as a common carrier, and consequently he ought not to be compelled to agree to it, as a condition of having his message sent.

The first matter objected to is as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the original office for comparison. For this, one half the regular rate is charged, in addition." So much is only explanatory and advisory. Then follows: "It is agreed between the sender of the following message and the company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor, in any case from unavoidable interruption in the working of its lines, or for errors in cypher or obscure messages." Then follows the rates for sending insured messages. The order in which the rates, terms, and conditions are stated upon which the company would receive and transmit this message are, of course, not important. The essential thing to know is, Did they tally with the duty of the company, as a common carrier. As such common carrier, it must insure, subject to conditions and exceptions hereinafter noticed, the correct transmission of the message, for which it was entitled to a just and reasonable compensation. This, by the printed form, it offered to do, and stated the compensation. There is no claim that the compensation named for such service was not just and reasonable, and no such question was raised. The effect of the printed condition is the same as though the rate for an insured message—that is, the compensation for assuming all the duties of a common carrier—had been first stated, and then had followed an offer that for a less compensation it would send the message without incurring the full liability of a common carrier. It left the respondent free to exercise his election as to which offer he would accept, and determine for himself whether he would pay the company for insuring the correct transmission of the message, as a common carrier, or pay less, and assume a part of the risk himself. A common carrier may have two rates for the transportation of goods,—one covering its full common-law liability, the other, a special or limited liability,—so long as the shipper has a choice between them, at reasonable rates. He cannot be denied the right to have

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his goods carried by the carrier under its common-law liability, but if he desires, and neither statute nor public policy forbid, he may enter into a special contract with the carrier, limiting its common-law liability. *Atchison, T. & S. F. R. Co. v. Dill*, 48 Kan. 210. It is matter of common knowledge that the sending office marks upon the message form the rate or compensation paid, and thus is preserved, for the protection of both parties, some evidence, at least, of the election of the sender, and the resulting contract. It was entirely competent for the appellant to limit by special contract its obligation as a common carrier. Section 8886, Comp. Laws. The respondent was not obliged to make such a contract unless he chose. It was a matter of agreement between them. Parties who use telegraph lines are usually economical of their time. In most cases it is important that messages go at once. There is generally little time or opportunity for negotiation. As an expeditious and direct means of bringing both parties to a definite understanding, the company provides and furnishes to the public message forms containing its proposal of terms. The sender of a message may elect either. One of its offers covers its duty and liability as a common carrier. The sender may pay the tariff fixed for that service, and hold the company to its liability as a common carrier. We are unable to perceive how the offer of the company to qualify its full liability as a common carrier, and accept a less compensation therefor, if the sender so desires, can affect the rights of either. The offer only becomes binding when accepted and signed, and the sender is under no compulsion. He may pay for and get the full liability of a common carrier, or pay less, and get a limited liability. The causes or conditions named in the stipulation as excusing full performance of the company's obligation, and as a common carrier, are "unavoidable interruption in the working of its lines," and "errors in cypher or obscure messages." An "unavoidable interruption" is one that cannot or could not be avoided; and while the courts have not been strictly at one in their views as to what, in modern times, should be regarded as equivalent to "the act of God or the public enemy," of the old authorities, our statute (sec. 8899) expressly makes "any irresistible superhuman cause" sufficient ground for avoiding the common carrier's liability, and section 8890 definitely fixes the measure of a telegraph company's duty in the transmission of messages to be the exercise of the "utmost diligence." We should be unwilling to rule, as a matter of law, particularly in view of the peculiar nature of telegraphic communication, that the utmost diligence could prevent or successfully guard against an "unavoidable interruption in the working of its lines." It may sometimes be a question for the jury whether the facts in a particular case bring it within the rule, but, where the interruption is proved to be broadly unavoidable, we think the company would not be liable. Whether, strictly, as a common carrier, appellant could exact, as a condition of the acceptance and transmission of a cypher or obscurely written

message, that the sender should release it from liability for an incorrect sending, we need not now determine, for the refused message was confessedly neither.

It was further provided, as one of the stipulations to which respondent should consent, as a condition of sending his message, that "no responsibility regarding messages attaches to the company until the same are presented and accepted at one of its transmitting offices." This would seem to be quite consistent with the provisions of our statute making the carrier's duty to commence when whatever is to be carried is offered "at a reasonable time and place;" but that, like the stipulation as to cypher and obscurely written messages, is not a question in this case, for it is undisputed that the message was offered at the proper office of the appellant, so that such stipulation could not restrict or affect appellant's liability to respondent in this case.

Another stipulation of the message blank was that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." Appellant here insists that this condition does not propose, nor is its effect, to limit in any way its responsibility as a common carrier, but is rather in the nature of a reasonable regulation, which appellant has a right to make, and which respondent, without any special contract on his part, was bound to observe, and cites cases in support of that view, notably that of *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 23 L. ed. 556. That case came before the court on plaintiff's demurrer to defendant's plea averring an express agreement upon the part of the plaintiff shipper that defendant should not be liable for loss or damage unless claim therefor was made within ninety days, and the question presented and decided was whether such an agreement, when made, was binding on the plaintiff. As to the necessity for an agreement in order to so qualify its liability, the court says: "Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a clear and express stipulation to that effect obtained by him by his employer;" thus treating the stipulation in question not as a reasonable regulation, which it was competent for the carrier to make, and binding on the shipper without his consent, but as an agreement depending upon the consent of both parties. The court held that such an agreement was not such an attempted restriction of the carrier's responsibilities as would be invalid, but being reasonable, and fully assented to by both parties, it was binding; but that is not equivalent to saying that the carrier could compel the shipper to enter into such a contract, or require it as a condition of accepting his shipment. The very fact that such limitation of liability is the subject of agreement between the parties implies that either party may refuse to make such agreement. However such agreement may be proved else-

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where, our statute provides that here it can only be manifested by the signature of the consignor, etc. Comp. Laws, § 8888. In *Hartwell v. Northern Exp. Co.* 5 Dak. 468, 8 L. R. A. 342, our territorial supreme court rejected the defense of the carrier that the claim of loss upon which the action was founded was not presented to the company within the time specified in its receipt, upon the distinct ground that under the controlling statute just referred to there was no special contract so providing, or binding upon the parties. It was a rule or regulation of the company, and as such was printed in the receipt delivered to the consignor, but the court held that it did not operate to make the liability of the company different in any respect from what it would otherwise be, because, not being signed by the consignor, it was not a special contract, as required and defined by the statute. Now if, without such special contract, the liability of the carrier is not thus limited, and with it is, can the carrier refuse the offering of a shipper of "whatever it is accustomed to carry," unless he will so contract to limit the carrier's liability? We think not. The carrier's duty is to receive and carry subject to the full measure of liability, unless restricted by mutual agreement; and except as to "rate of hire, the time, place, and manner of delivery," such an agreement can only be shown by the signature of the shipper or sender. In *Tiedeman, Pol. Powers*, pp. 256, 257, the learned author, after recognizing and discussing the right of a common carrier to modify and restrict its liability by special agreement with its patron or employer, says: "But the contract must be freely and voluntarily made. The carrier cannot refuse to take goods for carriage under the common-law liability, if the consignor should refuse his assent to a limitation." To the same effect, see *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465. Nor can a carrier require of a shipper a waiver of any of his rights as a condition precedent to receiving and carrying his freight. *Missouri P. R. Co. v. Pagan*, 72 Tex. 127, 2 L. R. A. 75. To sustain such a stipulation, where fairly made, is only to concede the right and power of the parties to make it, and comes far short of meaning that the carrier may exact the making of it as a condition precedent to the discharge of his duty as a common carrier. The statute was evidently intended to settle within this jurisdiction the question of how, and to what extent, the general liability of a common carrier may be limited; and by providing, as it does, that it can only be accomplished by a special agreement, it has deliberately left it with either party to consent, or to refuse to consent, to such an agreement. The right to exercise such freedom of will by the respondent in this case would be denied and destroyed if he were compelled to consent under penalty of having his message refused. It has been suggested that respondent could found no right of action upon refusal of appellant to transmit his message unless he would agree to the stipulation, because, if made under such compulsion, it would not

be enforceable against him, and therefore harmless; but such conclusion would be consistent with neither the duty of the appellant, nor the right of the respondent. This right and this duty were correlative, and each was a measure of the other. Whatever respondent had a right to have sent, it was appellant's duty to send. If it was respondent's right to have his message transmitted without agreeing to this condition, it was appellant's duty to transmit it without imposing such condition; and it could not justify a refusal to send on the ground that the stipulation sought to be exacted as a condition precedent might, by proper effort on his part, be avoided by respondent, because made under compulsion, or because void and nugatory (if such statute should be held to apply to such a case), under section 8582, Comp. Laws.

Following the line of these views, we are of the opinion that appellant could not, as a common carrier, legally require respondent to enter into the agreement which we have just discussed, and so that it could not legally refuse to receive and transmit his message because he declined to make such agreement. Of course this decision will not be understood as touching the question of the right of the company to make and enforce reasonable general regulations for the convenient and orderly transaction of its business, and for the proper protection of its interests, consistent with its duties as a common carrier. The appellant did not object to respondent's message because it was written on respondent's letter head, instead of on a message blank, and so inconvenient for filing or preservation in accordance with the practice of appellant. Respondent offered to use the blank if appellant would erase the contract which he would otherwise be required to assent to in using it. The issue between the parties was distinctly as to the right of appellant to require assent to the stipulations restricting its liability as a common carrier, and this decision covers only that question. Its refusal to receive and transmit respondent's message, under the facts proved, constituted a refusal within the meaning of section 8910, Comp. Laws. Such refusal gave respondent a cause of action, and his right of action was not destroyed or affected by the fact that he afterwards sent substantially the same message. If to refuse the first message was an actionable wrong to respondent, persistence in it by appellant, to the extent of compelling respondent to submit to it, and to send another message on appellant's terms, did not cure or undo the first wrong. The testimony seems to show that respondent offered and attempted to have his message sent in the afternoon, between 2 and 4 o'clock; that it was refused under the circumstances above recited; that he then wrote a letter to the party to whom he desired to send the message, but subsequently, and that evening about 7 o'clock, feeling doubtful of its reaching the party in time, he went to the office and sent upon one of the appellant's blanks a message of very nearly the tenor of the message previously refused. There was nothing in this to waive the wrong

of the refusal, or affect respondent's legal right to complain of it.

Finally, it is assigned as error that during the trial the jury was allowed to separate for a few moments without being admonished by the court, as required by section 5051, Comp. Laws, not to converse among themselves, or with others, upon the subject of the trial. Whether, in any case, this fact alone would constitute reversible error, it is not now necessary to determine. The facts were not in dispute, and the law, as we understand it, applied to the conceded facts, plainly required the verdict which the jury rendered. Under such circumstances the appellant could not have been prejudiced.

The judgment of the county court is affirmed.

All the Judges concur.

A petition for rehearing was subsequently filed, in response to which, on December 9, 1893, **Bennett, P. J.**, delivered the following opinion:

This case was before us at a former term, and an opinion was filed June 26, 1893, which is published in 4 S. D. 105. The only point upon which the appellant takes issue with the court in its opinion is that portion of it which holds that the stipulation found on the message blank of the company, which each patron of the company is required to sign before a message will be sent, that says: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company,"—limits the common-law liability of a common carrier, and could not require respondent to enter into this agreement before receiving and transmitting his message; the appellant's contention being that this condition in the message contract does not purport, nor is its effect, to limit its responsibility, but is merely a regulation of its business, which it has a right to make. This contention was fully argued on a former hearing, and very fully considered by the court in the opinion prepared by Justice Kellam; and, were this the only reason urged for a rehearing, we should be inclined to refuse it. But appellant's counsel calls our attention to another question, which was alluded to in the oral argument, and but lightly referred to in his brief, which may have some material bearing upon the merits of the case, and which was not considered by the court. The question is, that section 8910, Comp. Laws, upon which respondent bases his action, is not now, and never has been, in force in this state. In support of the proposition he cites us to title 65, U. S. Rev. Stat. as amended by 19 Stat. at L. 252, by which enactment counsel for appellant contend that the section of the Compiled Laws above referred to has been repealed and abrogated, so far as the appellant is concerned; and our attention is called to a large number of decisions in support of this contention. In view, therefore, of the importance of the case, not so much so as to it alone, but its effect upon other cases which we are informed are now pending between appellant and respondent,

and in order that a full determination may be had of all questions in controversy in this action, we shall grant a rehearing as prayed for; and therefore direct the clerk of this court to place the case upon the calendar of this term, with directions that the counsel for the appellant shall prepare his briefs upon the questions raised in his petition for a rehearing, and serve it upon the counsel for the respondent within twenty days after notice of this order, and thereupon the respondent shall have twenty days after such service to prepare his brief, and serve it upon appellant's counsel. Should appellant deem it necessary, he shall have ten days in which to file and serve a reply brief. After the expiration of this time the cause shall stand for hearing at such time as the convenience of the court and the attorneys for the respondent and appellant will permit. The same number of briefs on each side shall be filed in the office of the clerk of this court as is required by our rules upon an original hearing of a cause.

Fuller, J., on October 29, 1895, delivered the opinion of the court:

This case, now before us on rehearing, is reported in 4 S. D. at page 105. There is no dispute about the facts, which are fully stated in the former opinion, and the only question of law engaging our attention, concerning which we are inclined to take a different view, will be disposed of in determining the right of a telegraph company to decline to accept a message for transmission for the sole reason that the sender will not consent to the following stipulation: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

The right of a common carrier to make and insist upon a substantial compliance with reasonable rules and regulations, designed to protect its interests and promote the safe and convenient transaction of business, when the same do not affect its liability, has been so uniformly recognized by all the courts that any citation of authorities would be redundant; and, although sections 3886 and 3888 of the Compiled Laws authorize and would sustain an express agreement limiting the obligations of a telegraph company to accept, transmit, and deliver a telegram, a regulation exacting such an agreement as a condition precedent to the acceptance of the message is repugnant to the spirit of the statute, and would be condemned as fraudulent, oppressive, and contrary to every consideration of public policy. We are therefore called upon to consider and determine whether the regulation complained of was reasonable, and whether, by its acceptance, the company's common-law liability or statutory obligation was limited or modified. The message which plaintiff refused to write upon one of the ordinary blanks furnished by the defendant to its patrons, because its agent and operator declined to erase, among other stipulations, the clause requiring any claim for damages or statutory penalties to be presented in

writing within sixty days, was addressed to a client of the plaintiff residing at a neighboring railway station, and omitting date, signature, etc., was written in the following language, upon a sheet of white writing paper: "Come down in morning. Want to see you as to your case."

It is *prima facie* apparent from the nature of this message, and from the proximity of the parties interested in the subject to which it relates, that, ordinarily, sixty days would be a reasonable time within which to apprise the company of any damages occurring from a neglect of duty in transmitting or delivering the same; and if, from any cause, it should become unreasonable in its application, the courts would not sustain its enforcement. The stipulation relates to and impliedly concedes that the company is bound to pay any damages which may be sustained by reason of its inexcusable neglect to perform every duty required by law; and its obligation to accept, safely transmit, and promptly deliver the message is in no manner modified, limited, or intrinsically affected thereby. The defendant was ready and willing to receive and transmit plaintiff's message, subject to all the liability imposed by the statutory or common law; but in view of a multiplicity of similar transactions, and in order to be able to determine whether the damage, if any should be sustained, was occasioned by some superhuman, irresistible cause, or the negligence of officers or agents, it had been taught by common experience to require as a condition precedent, but not as a limitation of liability, that it should be notified and advised of any claim for damages within a reasonable time. Such a regulation is beneficial to the patrons of the company, as it tends to insure prompt adjustment of claims for damages, and is entirely consistent with sound business principles; and from the very nature of the service to be performed, and from the probable difficulty in ascertaining facts concerning which no notice has been given until after years have elapsed, it evidently tends to avoid vexatious litigation, promote the ends of justice, and subserve the welfare of the people generally. True it is that cases may be found where a similar regulation has been construed to constitute a limitation of liability, and some courts have held that the clause has the effect of a statute of limitations; but the reasoning of the opinions in which such a conclusion has been reached is, in our opinion, unsound, and we decline to follow the decisions.

The statutory time within which an action for damages may be instituted against a telegraph company is in no manner shortened by requiring a mere claim therefor to be made within a reasonable time. The action may be brought at any time within the statutory limitation. Insurance companies, regardless of distance and facilities for communication, habitually require, as a condition precedent, notice of a death or fire to be given forthwith, and even sworn proof of loss to be furnished at the home office of the company within thirty, sixty, or ninety days; and it will hardly be claimed that such a requirement limits the time within which an action

may be brought under the statute, or that the stipulation is inconsistent with considerations of sound public policy. Before presenting authorities in support of our position, we emphasize, by repetition, that the defendant would be clearly liable for damages and the statutory penalty for refusing to accept and send plaintiff's message to its proper destination if the regulation to which he refused to assent and conform was an unreasonable rule, or limited either the liability of the company or the time within which an action might be commenced. The legislative intention, as expressed in every statute of limitation, is to prevent the indefinite postponement of the time within which an action may be brought; and the evident design, purpose, and effect of the regulation complained of is not only to insure better service to the public, by enabling the company to promptly investigate any alleged dereliction of duty on the part of its agents, but to promote an early settlement of just demands, and make it possible to resist, in courts of justice, groundless, false, and fraudulent claims for damages; and, while some of the authorities from which we shall quote incidentally mention the provision requiring notice to be given within a specified time as a limitation of liability, they have forcefully rejected the doctrine in unambiguous declarations, and by deciding their cases in accordance with the views expressed in this opinion.

It has been held that "a printed stipulation at the bottom of an express company's receipt for a package, that the company shall not be liable for any loss unless written claim therefor shall be made at the shipping office within thirty days from that date, is valid, and must be complied with." *Southern Exp. Co. v. Hunnicutt*, 54 Miss. 566, 28 Am. Rep. 885. In *Hartwell v. Northern P. Exp. Co.* 5 Dak. 463, 3 L. R. A. 342, the jury was instructed that "no written claim was necessary, and that, if they found that the plaintiff made a claim to the company's agent at the point where the trunk was shipped within the required time, and that the company had knowledge of the loss, they would be authorized in finding a verdict for the plaintiff;" and the court held that "the defendant had no reason to complain of the charge," and says: "Under the issues as submitted to the jury, they must have found that the claim was made within ninety days." Although the question whether such a regulation constitutes a limitation of the action or of the liability of a common carrier does not seem to have been regarded by counsel for either party as essential to a decision of the case, the learned judge who wrote the opinion in discussing the proposition, at page 476, 5 Dak., says, concerning our statute of limitations: "The language of the statute confines its prohibition of limitation to enforcement of rights, and is especially intended to cut off all limitations of time for commencement of actions. The provision of this receipt is perhaps rather a condition precedent than a limitation; and, as it is not necessary to this case to determine whether the limitation in this receipt comes within

the prohibition of this statute, we shall leave this question for adjudication by the court whenever it shall be fully presented in a case involving this precise point."

Concerning the regulation under consideration, the supreme court of Indiana says: "Here there is no attempt to limit or impair the operation of the statute; nothing is taken from the duty imposed on the telegraph company, nor is that duty lessened or circumscribed in any particular. The duty is left undiminished, but a limitation is fixed within which a claim for loss or injury resulting from a breach shall be made. It is one thing to limit a duty, and quite another thing to prescribe a time for making a claim based on the nonperformance of that duty. The cases cited in the original opinion fully sustain the power of the telegraph company to make reasonable rules and regulations, and a rule embodied in the contract that the claim shall be presented within sixty days is unquestionably a reasonable one."

In a broad sense, the word 'damages' means that which is assessed in the plaintiff's favor as the amount of his recovery, and the statutory penalty is in this sense 'damages.' *Western U. Teleg. Co. v. Jones*, 95 Ind. 235, 48 Am. Rep. 718.

From 25 Am. & Eng. Enc. Law, at pages 798 and 799, we quote the following: "The stipulation contained in the usual contract of sending, to the effect that the company will not be liable for damages in any case where the claim is not presented in writing within a certain length of time after the message is filed with the company for transmission, does not tend to limit the liability of the company for the consequence of its negligence, and is not unreasonable, where the time allowed is not too short to enable the party claiming damages to become aware of the injury and to present his claim properly. The reasons for this rule are obvious, and it has been upheld where the time was limited to sixty days, to thirty days, and to twenty days, after the filing of the message for transmission, though the rule as to the reasonableness of any particular length of time may change with peculiar circumstances."

In *Western U. Teleg. Co. v. Dougherty*, 54 Ark. 221, 11 L. R. A. 102, the views of the court upon the proposition are expressed as follows: "We know of no principle of the common law that would prohibit it. It was not a contract to cover the negligence of the telegraph company. It was a stipulation against the delay and neglect of the plaintiff in presenting his claim, and it does not appear unreasonable. By reason of the character of the business, and the great number of messages sent over the lines of a telegraph company, and the importance of early information of claims to enable the company to keep an account of its transactions, and the impossibility of recalling them all and accounting for them from memory after the lapse of a considerable period of time, it does not appear that a stipulation that a claim for damages should be presented in writing within sixty days from the time the message is sent is unreasonable. . . . Such a condition is not only not a stipulation against the negligence

of the company, but it implies that a liability may be incurred for negligence; and it requires that one who seeks to recover damages for such negligence shall present his claim in writing within sixty days or be held to have waived it."

In *Kansas* a stipulation that "no claim for loss or damage on live stock will be allowed unless the same is made in writing before or at the time the stock is unloaded," was held to be in contravention of no statute, and repulsive to no consideration of public policy, and the court said: "The contract pleaded does not pretend to relieve the defendant from the consequences of his own negligence. It only stipulates that the shipper shall on his part perform certain duties." *Goggin v. Kansas P. R. Co.* 12 Kan. 416.

In *Sherrill v. Western U. Teleg. Co.* 109 N. C. 527, the court goes on to say: "The stipulation that the company will not be liable unless the claim is presented 'in writing and within sixty days,' is not a stipulation restricting the liability of the telegraph company for negligence. *Massengale v. Western U. Teleg. Co.* 17 Mo. App. 257. If it were, it would be void, as was held in *Thompson v. Western U. Teleg. Co.* 107 N. C. 449; *Smith v. Western U. Teleg. Co.* 88 Ky. 104; *Gillis v. Western U. Teleg. Co.* 61 Vt. 461, 4 L. R. A. 611, in which last case numerous authorities are cited. But this stipulation is rather against the neglect of the plaintiff in not making known his cause of complaint within a reasonable time. It is a reasonable requirement, enabling the company to inquire into the nature and circumstances of a mistake in or of the delay or nondelivery of the message, while the matter is still within the memory of witnesses. In view of the number of telegrams constantly passing over the wires, some such stipulation is absolutely necessary to protect the company from imposition. It is not a statute of limitations restricting the time within which action may be brought."

In *Wolf v. Western U. Teleg. Co.* 62 Pa. 88, 1 Am. Rep. 887, the court, speaking through Justice Agnew, said: "This condition has no relation to the duty of the telegraph company, its operation being confined to a duty to be performed by the employer before he can maintain an action for a neglect of the company's duty, to wit, to give notice of his claim within sixty days. Similar provisions in policies of insurance have been held to be good. . . . In relation to the duties which concern the public, the unreasonableness of the rules adopted by these companies must, therefore, be scanned with an eye to their public policy. But, clearly, it is not unreasonable that a telegraph company should require notice of claims for its defaults within a reasonable time, before being held to answer for the alleged default. From the very nature of its business this may be essential to its protection against unfounded claims. These companies have often to wrestle with the elements themselves, in the storms which prostrate their lines or prevent their working, and are not to be held to a harsher rule than common carriers, who are excused by the act of God. Within sixty days the cause preventing the transmission

of a message on a particular day might be easily ascertained and shown, which, after the lapse of several years, could not be discovered or proved. It is urged that the employer might not discover the failure to send his message forward within this time. How far this fact would displace the condition it is not proper now to say; but the reason is inapplicable to this case, where, from the nature of the message, its failure to reach its destination must be known, and was known, immediately by the employer. Another reason justifying the reasonableness of the provision for notice of the claim is found in the multitude of messages transmitted requiring a speedy knowledge of claims to enable the company to keep an account of its transactions, before, by reason of their great number, they cease to be within their recollection and control. If authority be needed, in addition to these reasons, it will be found in the case of *Lewis v. Great Western R. Co.* 5 Hurlst. & N. 867."

In *Cole v. Western U. Teleg. Co.* 38 Minn. 227, the court says: "It cannot be contended that a regulation requiring the sender of a message to present his claim for damages in writing promptly to the company is an unreasonable one. Considering the character of its business, such regulations would be necessary for its own protection, and to enable it reasonably to ascertain the facts in the case, and to secure and preserve the proper evidence. It is not a regulation intended to shield the company from the consequences of a neglect of duty on its part, but prescribing a duty to be performed by the plaintiff before he should be entitled to maintain his action."

The following cases are to the same effect: *Sherrill v. Western U. Teleg. Co.* *supra*; *Smith-Frazier Boot & S. Co. v. Western U. Teleg. Co.* 49 Mo. App. 99; *Heimann v. Western U. Teleg. Co.* 57 Wis. 562; *Western U. Teleg. Co. v. Meredith*, 95 Ind. 93.

In *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 888, the reasonableness and validity of such rules and regulations are discussed by Justice Gray, of the United States Supreme Court.

Concerning the ordinary regulation which relieves the company from liability for its negligence in transmitting an unrepeatable message, Mr. Justice Earl, in *Kiley v. Western U. Teleg. Co.* 109 N. Y., at page 235, says: "That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other states of the Union and in England."

It appearing that the stipulation under consideration has been upheld and enforced as a reasonable regulation limiting no liability, in jurisdictions where by express statutory enactment all contracts to limit such liability are declared to be null and void, the right to exact, as a condition precedent, compliance with reasonable rules which in no manner pertain to the carrier's liability for negligence, is not affected by the provision of our statute which authorizes a contract limiting the liability of a common carrier.

In a leading case (*Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556), Mr. Justice Strong, speaking for the Supreme Court of the United States, says: "The question, then, which is presented to us by this record is, whether the stipulation asserted in the defendant's plea is a reasonable one, not inconsistent with sound public policy. It may be remarked, in the first place, that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and having made his claim, he may delay his suit. It may also be remarked that the contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law and inoperative. Such was our opinion in *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857, 21 L. ed. 627. A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required." Page 268, L. ed. 558. "It purported to relieve the defendants from no part of the obligations of a common carrier. They were bound to the same diligence, fidelity, and care as they would have been required to exercise if no such agreement had been made. All that the stipulation required was that the shipper, in case the package was lost or damaged, should assert his claim in season to enable the defendants to ascertain the facts; in other words, that he should assert it within ninety days." Page 272, L. ed. 560.

If we are correct in our conclusion that, under the circumstances of this case, the requirement under consideration, though beneficial to the company, neither limited its liability nor the time for commencing an action, and was reasonable, and, by securing promptness in presenting a claim for damages, tended to enable plaintiff to hold defendant to the strictest accountability, the force and effect of the foregoing authorities, as applied to this case, is not diminished by the fact that consent had been obtained by the signing of telegrams written on blanks containing the printed regulations, or by the delivery and acceptance of a receipt for the property transmitted, which in law has been construed to constitute an assent to the provisions thereof. Our conclusion therefore is that our former decision should be disaffirmed, and the judgment appealed from is reversed.

30 L. R. A.

Kellam, J., dissenting:

I adhere to the original decision and opinion. In my judgment, the error of the present opinion is fundamental. Its theory and the scope of the question involved, as viewed by the court, are indicated at the outset as follows: "Although sections 3886 and 3888 of the Compiled Laws authorize and would sustain an express agreement limiting the obligations of a telegraph company to accept, transmit, and deliver a telegram, a regulation exacting such an agreement as a condition precedent to the acceptance of the message is repugnant to the spirit of the statute, and would be condemned as fraudulent, oppressive, and contrary to every consideration of public policy." It is thus evident that the court understands that the duty to "accept, safely transmit, and promptly deliver" embraces all the "obligations" of the telegraph company as a common carrier, which a regulation of the company is not equally efficacious to control as an express agreement of the parties; in other words, that the precise manner in which a company shall perform its statutory duty is so important that nothing short of an express agreement can change or modify it, but that its obligation to respond in damages for a violation of its duty is of such minor importance that it may legally exact, as a condition precedent to the performance of its duty, that the party offering the message shall expressly and unqualifiedly agree that it shall not be liable at all unless such party shall perform another condition precedent, not required by the law, but by a demand of the company. I had always supposed that a stipulation prescribing conditions under which there should be no liability, when without such stipulation there would be full liability, was a stipulation limiting liability. "Liability" and "obligation" are correlative terms. The obligation must measure the liability, and whatever cuts off or excuses liability reaches back and affects the obligation, for the obligation of the carrier, like that of any other person, is only to meet his liability. The mistake of the foregoing opinion, in my judgment, is in misinterpreting the scope of our statute and the judicial decisions which it was meant to codify, and in making it refer, not to the general obligation of a carrier, but only to the particular manner in which he performs his service of carriage.

The opinion proceeds to demonstrate—unnecessarily, I think, for nobody disputes the proposition—that this very provision, when made the subject of an express agreement between the parties, has often been held enforceable as reasonable; and so it is argued that, because it is a reasonable stipulation for the parties to make, it is one which the company may require a party to assent to and make before it will undertake to perform the duty imposed upon it by law. Such logic has not often, and probably never, been applied to other cases. A provision in a mortgage for an attorney's fee for foreclosure is held to be reasonable and enforceable when the parties have so agreed; but I think a court, finding a party under obligation to give a mort-

gage, and so decreeing, would be slow to say that the mortgagee might exact such a stipulation simply because, if voluntarily made, the court would uphold it as reasonable. Why not leave both parties on an equal footing in the determination of the question of what is and what is not reasonable, and not compel one of them, in form at least, to stipulate away his right to raise the question, regardless of excusing facts, as a condition precedent to having his message sent? Section 8910, Comp. Laws, entitles every person whose message is refused contrary to law to \$50 in addition to his actual damages. In *Kirby v. Western U. Teleg. Co.* 4 S. D. 463, this court was very positive and explicit in characterizing this \$50 as a penalty, "imposed upon the carrier as a pecuniary punishment for his failure to comply with the provisions of the statute." But this court finds no difficulty in holding that the company may exact an agreement in advance, and as a condition upon which, only, it will receive a message, that it shall not be liable for this penalty, imposed as a punishment on grounds of public policy, unless the sender shall comply, not with some provision of the law, but with a particular regulation which it has made. Here, as before, the question is not, What would be the effect of such an express agreement if voluntarily made? but, Has the company the right to exact such an express agreement before it will receive a message?

I make these suggestions in the belief that the present opinion, except in form, does not reach the question in controversy; certainly, none of the cited cases decide it. They all go upon the question of what stipulation or agreement, when duly made by the parties, will be sustained as reasonable. None of them touch the question of the right of the carrier to exact a formal execution of such an agreement upon the part of the sender before it will receive and send his message. I cannot but regard the quotation appearing in the prevailing opinion, taken from *Kiley v. Western U. Teleg. Co.* 109 N. Y. 285, as at least an infelicitous expression by a very learned judge. If it was meant to declare the legal right of the company to exact the making of such a contract by the sender before his message would be received, then it is sufficient to establish the remark as *dictum* that no such question was in the case. The contract had been expressly made between the company and the sender, and the court was only determining the legal effect of such a contract when made by the parties. The opinion starts out by saying: "The telegram was written on one of the ordinary blanks of the company. Immediately above the telegram were the words, 'Send the following message subject to the above terms, which are hereby agreed to.'" The court, finding that the parties had voluntarily made a contract, proceeded to construe the stipulation found in such express contract. Of the cases cited by Judge Earl as supporting the text, it is remarkable that not a single one of them treats of the right of the company to exact the making of such an agreement on the part of the sender, as a condition precedent to the sending of a message. In all of them, except

Kirkland v. Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475, the agreement had been voluntarily and expressly entered into, and the courts held that the stipulations of such contract were enforceable, because they were such as the parties might reasonably make. *Kirkland v. Dinsmore* held that an express company delivering to a shipper a receipt for goods, which he accepts without objection, has a right to infer an assent on the part of the shipper to the reasonable conditions of such receipt, thus making a contract between them. But in this jurisdiction the law is otherwise, by express statute. It is the settled law that a railroad company, as a common carrier, may make reasonable regulations for the conduct of its business; but I am not satisfied that it is settled law that the railroad company may refuse to sell a passenger a ticket unless he will in advance enter into an agreement that the ticket is accepted by him subject to certain conditions or regulations of the company. It may be said that such an agreement would not change the rights or liabilities of either party, because the company's regulations, if reasonable, would be enforced without an agreement, and, if unreasonable, would not be enforced with an agreement. Why not say the same thing in the case of the telegraph company? The majority opinion says: "We are therefore called upon to consider and determine whether the regulation complained of was reasonable." I respectfully insist that that question is not before us. So far as I know, nobody questions the right of the company, as a common carrier, to make reasonable regulations for the conduct of its business, nor, so far as I know, is any body questioning the reasonableness of this particular regulation. The law itself imposes upon the company, as a common carrier, certain duties. It also confers upon it certain rights, and among them is the right to make reasonable regulations for the management of its business, and it says these regulations, so far as reasonable, are binding upon those who do business with it. This being all that is necessary to protect the rights of both parties, the law goes no further. It does not allow either party to require from the other the execution of an additional contract with reference to such regulations. If such contract is not to, and does not, change the rights and obligations of either party, then it is useless. It is what the statute denominates an "idle act," which cannot be required of either party. Comp. Laws, § 4719. If, on the other hand, such agreement is designed to affect what would otherwise be the rights or obligations of either party, then surely one party cannot compel the other to assent to it, for mutual voluntary assent is the life of every agreement.

I do not suppose it would be claimed that one party, more than the other, has the right to insist upon the execution of a contract by the other before he would perform on his part. Suppose, then, this company should discontinue the use of the contract feature of its blank, and should simply print its regulations at the head of its message blank; could one offering a message for trans-

mission require the company to execute an agreement with him that it would transmit and deliver the message and respond in damages, if any occurred, in compliance with its printed regulations? I apprehend the ready answer of the company to such a demand would be this: "There are our regulations. If reasonable, they are equally enforceable by and available to both parties, and as well without as with an agreement. An executed written agreement would not change the rights of either party, and we decline to make it." Except for the decision of this court as now announced, I would have supposed such an answer adequate, and to justify the company in its refusal to execute a further contract. The right of the company to demand such a contract before it will undertake the duties imposed upon it by law once conceded, where is it to stop? May it include within its terms only such of its regulations as it considers of particular advantage to itself, omitting others which the sender of the mes-

sage may desire to have it contain? Is it left with the company to dictate the terms of the agreement? Suppose the sender should say to the company: "You have another regulation with reference to the prompt and free delivery of messages, which does not appear in this agreement. I want that put in." May the company refuse, and still require the sender to sign the agreement as it has prepared it, as a condition of having its message sent? If so, such a discrimination between the parties would seem to me to furnish an apt illustration of making fish of one and fowl of the other. One of two things must certainly be true,—either the making of the agreement changes the rights of the parties, or it does not. If it does, one party cannot insist upon its being made against the consent of the other, for then it would not be an agreement. If it does not, then the making of the agreement is an idle act, which is never required. With these suggestions, I adhere to the former, original opinion.

NEW YORK COURT OF APPEALS.

Abel C. VAIL, *Respt.*,
v.

BROADWAY RAILROAD COMPANY of
Brooklyn, *Appt.*

(147 N. Y. 377.)

A passenger riding on the platform of a street car is not a passenger "on any railroad" who assumes the risk of injury, under the provisions of the New York general railroad law of 1850, § 46, as that was not intended to apply to street railways.

(November 26, 1895.)

A PPEAL by defendant from a judgment of the General Term of the Brooklyn City Court affirming a judgment of the Trial Term in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Thomas S. Moore, for appellant:

It is not negligence *per se*, under the authorities, to stand on the front platform of a street car, independent of the statute (*Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 63, 41 Am. Rep. 345, but it is not by any means the law that a person in that place is relieved from the necessity of showing due care or of proving facts and circumstances from which it may be inferred.

Wexton v. Troy, 139 N. Y. 281; *Reynolds v. New York C. & H. R. R. Co.* 58 N. Y. 248; *Wietrowski v. Lake Shore & M. S. R. Co.* 124 N. Y. 425.

Under the statute this company is freed from

liability for the injury sustained by the plaintiff in this case.

Chapter 906 of the laws of 1867 provides that the requirements of section 81 of the railroad act of 1850 shall not apply to street or horse railroads except as therein provided,—a clear implication that otherwise it would apply, and that the act generally did so apply.

Re Washington S. A. & P. R. Co. 115 N. Y. 447.

The care to be taken by a common carrier of its passengers is certainly very great, but some limitations are reasonable in the case of street railroads as well as in the case of steam railroads.

Among such reasonable limitations is a provision that when the carrier has provided sufficient accommodation for its passengers within the vehicle, if a passenger refuses to avail himself of it and takes up a dangerous and exposed position on the outside, he should bear any injury resulting, as an assumed risk.

Clark v. Eighth Ave. R. Co. 86 N. Y. 138, 93 Am. Dec. 495; *Ward v. Central Park, N. & E. R. R. Co.* 11 Abb. Pr. N. S. 411; *Craighead v. Brooklyn City R. Co.* 123 N. Y. 391; *Madencamp v. Second Ave. R. Co.* 1 Sweeny, 500; *Solomon v. Central Park, N. & E. R. R. Co.* Id. 298; *Nolan v. Brooklyn City & N. R. Co.* 87 N. Y. 66, 41 Am. Rep. 345; *Hayes v. Forty-Second Street & G. S. F. R. Co.* 97 N. Y. 259; *Connolly v. Knickerbocker Ice Co.* 114 N. Y. 104.

Mr. Thomas E. Pearsall, for respondent:

It is not negligence *per se* for one riding upon the front platform of a street car to omit

NOTE.—For street railways as railroads, see also *Bloxham v. Consumer's Electric L. & St. R. Co.* (Fla.) 29 L. R. A. 507; *Funk v. St. Paul City R. Co.* (Minn.) 29 L. R. A. 208; *Byrne v. Kansas City, Ft. 80 L. R. A.*

S. & M. R. Co. (C. C. App. 6th C.) 24 L. R. A. 633; *Thompson-Houston Electric Co. v. Simon (Or.)* 10 L. R. A. 251, and cases cited; *Montgomery v. Philadelphia City Pass. R. Co.* (Pa.) 9 L. R. A. 369.

to take hold of the iron bar or rail to prevent being thrown from the platform.

Ginna v. Second Ave. R. Co. 67 N. Y. 596. It is not contributory negligence *per se* to ride on the front platform of horse cars.

Nolan v. Brooklyn City & N. R. Co. 87 N. Y. 63, 41 Am. Rep. 345; *Dixon v. Brooklyn City & N. R. Co.* 100 N. Y. 170; *Ginna v. Second Ave. R. Co.* *supra*; *Clark v. Eighth Ave. R. Co.* 86 N. Y. 135, 93 Am. Dec. 495; *Sheridan v. Brooklyn City & N. R. Co.* 86 N. Y. 89, 93 Am. Dec. 490; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Burns v. Bellefontaine R. Co.* 50 Mo. 189; *Meesel v. Lynn & B. R. Co.* 90 Mass. 284; *Maguire v. Middlesex R. Co.* 115 Mass. 239.

And this rule is not affected by there being room inside of the car.

Nolan v. Brooklyn City & N. R. Co. *supra*. Laws 1850, chap. 140, § 46, cannot fairly be said to have any application to horse cars, and the fact that the defendant's act of incorporation in general terms makes the provisions of the general railroad act applicable to its company does not strengthen its case on this point.

Laz v. Forty Second Street & G. S. F. R. Co. 14 Jones & S. 448; *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 17 N. Y. S. R. 565, affirmed, 121 N. Y. 112; *Weymouth v. Broadway & S. A. R. Co.* 2 Misc. 507, affirmed, 142 N. Y. 681.

The front platforms of street cars have never been held a place of great danger by our courts; nor have they been considered so by the courts of foreign jurisdiction.

Nolan v. Brooklyn City & N. R. Co. 87 N. Y. 66, 41 Am. Rep. 345; *Meesel v. Lynn & B. R. Co.* 90 Mass. 284; *Germantown Pass. R. Co. v. Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Maguire v. Middlesex R. Co.* 115 Mass. 239.

O'Brien, J., delivered the opinion of the court:

The plaintiff recovered a verdict against the defendant for his damages sustained in consequence of a serious personal injury while riding in one of the defendant's cars as a passenger on the 20th of October, 1892. It is conceded that there was evidence of the defendant's negligence in the case sufficient to require its submission to the jury. It is quite clear also that upon the question of the plaintiff's negligence contributing to the injury, so far as that question depends upon general principles, and not upon special statutes, the case was one for the jury. The plaintiff was, at the time of the accident, riding upon the front platform of the car, smoking cigar, which he had when entering it from the street.

The only question in the case which this court has the right to review is whether the action was defeated by the provisions of § 46 of the general railroad law of 1850. Laws 1850, chap. 140, § 46.

That section reads as follows: "In case any passenger on any railroad shall be injured while on the platform of a car, or any baggage, wood, or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the in-

jury; provided said company at the time furnished room inside its passenger cars sufficient for the proper accommodation of the passengers."

The fact that the defendant has omitted to plead this statute as a defense would ordinarily be a sufficient answer to the point. When a railroad company, in an action to recover damages by a passenger, sustained in consequence of a breach of the duty which the corporation owes to him as such, claims immunity under some provision of a statute, it should plead all the facts upon which the immunity claimed rests. *Weymouth v. Broadway & S. A. R. Co.* 2 Misc. 507, 142 N. Y. 681. But as this question was not raised at the trial, we prefer to dispose of the objection upon broader grounds. The question is whether this statute was ever intended to have any application to a street railroad. It is quite certain that the companies themselves have not so regarded it, since it is a matter of common knowledge that they receive passengers every day when there is no place for them except upon the platforms, and have for years. The construction which such corporations themselves have for many years given to this statute should not be entirely disregarded when seeking for its true meaning and when urged as a defense by one of the companies to an action in which it admits its own negligence. It may be conceded that the general language used is broad enough to cover the case, but words and language must, in the construction of a statute, always yield to what appears to have been the intention of the lawmakers. The literal meaning of words or phrases should never be permitted to pervert the purpose of the law, or to defeat the end which the legislature had in view, or to enlarge the operation of the law and extend it to subjects not within the legislative mind, or the evils intended to be remedied. When the intention of the law can be ascertained the courts will not allow this intention to be thwarted or perverted because the proper words were not used, but all will be made to conform to reason and good discretion. 1 Kent, Com. 462; *People v. Potter*, 47 N. Y. 875.

The general purpose of the act of 1850 was to provide for the operation of steam railroads. It is perfectly manifest and has always been conceded that many of its provisions can have no application whatever to street railroads. In the nature of things a provision of this character, intended primarily to prevent accidents and injuries to passengers on trains operated by steam and running at a high rate of speed, is not applicable to a street railroad, the cars of which are drawn through city streets at the rate of a few miles per hour. The danger to passengers standing upon the platform of steam cars when in motion is great and obvious, while that to passengers on the platform of street cars is almost nothing, as is fully demonstrated by the practice of the general public and the companies themselves. Moreover, the words employed in construing the section indicate quite clearly that what the legislature had in mind was riding on the platform of steam railroads. The section speaks of

"trains," and of "baggage, freight, and wood cars," terms which can have no application to the defendant. The notice required was to be posted in the cars "then in the train," an expression which never was in popular use with reference to street railroads. The use of the words "any railroad" cannot be permitted to control the meaning of the law, in view of the notorious fact that at the time of its enactment, or since, there is not the slightest reason to believe that the legislature apprehended any evil or danger from riding on the platform of street cars. To hold at this day that a passenger riding on the platform of a street car, under the circumstances urged by defendant, is doing so at his own risk, because in violation of the statutes, would be to impose upon the public and the railroads themselves duties and obligations that have not heretofore been generally supposed to exist. Such a construction would unnecessarily extend the operation of the statute to cases and to a state of things manifestly not within its original scope or purpose.

We do not think that the incorporation in the defendant's charter of all the provisions of the general railroad law, with the exception of two sections mentioned, strengthens the defendant's position. All that was intended by that was that such portions of the general law as were applicable to street railroads should become a part of the charter.

It was not intended by reference to the general law in the act incorporating the defendant to give to the section in question any other or broader application than that which was in the mind of the legislature when originally enacting it.

The law can mean nothing more when specifically made a part of the defendant's charter than it does as it appears upon the statute book, or as it came from the legislature in the first instance.

It appeared that one of the rules of the defendant corporation, in force at the time of the accident, was to the effect that "smoking on the closed cars is prohibited except on the front platform." It might well be held, we think, that this corporate regulation was intended to and did modify the notice posted in the car, and so operated as a waiver of any immunity conferred under the provisions of the general law referred to. The true construction of the provision of the act of 1850 referred to was sharply involved in the case of *Butler v. Glens Falls, S. H. & Ft. E. Street R. Co.* 17 N. Y. S. R. 565, and from the disposition of the case afterwards made in this court it is quite evident that it was held that it did not apply to a street railroad. 131 N. Y. 112.

For these reasons the judgment should be affirmed, with costs.

All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NATIONAL TELEPHONE MANUFACTURING COMPANY

v.

John E. DU BOIS *et al.*, *Appts.*

(.....Mass.....)

1. Courts of equity are not open to a foreign corporation as matter of strict right, but as a matter of comity.
2. Jurisdiction will not be taken on service by publication of an action by a foreign corporation having a place of business in the state, to recover a debt, contracted in another state and not reduced to judgment, from a nonresident whose only property in the state consists of his interest as partner in a firm whose property, assets, books, vouchers, papers, and accounts are all, with few exceptions, in another state, where the principal business of the firm is carried on and two of the partners live.

(January 1, 1896.)

APPPEAL by defendants from an order of the Superior Court for Suffolk County overruling demurrers to the bill and motions to dismiss in a suit brought to reach assets of defendant DuBois which were alleged to be in

NOTE.—For personal judgment on service by publication, see also *Moyer v. Bucks (Ind.)* 16 L. R. A. 251, and *note*.

80 L. R. A.

possession of one of the other defendants as his copartner. *Reversed.*

The facts are stated in the opinion.

Messrs. Johnson, Clapp, & Underwood, for appellants:

Under Pub. Stat. chap. 151, § 2, the court has power only to apply in satisfaction of the debt "the interest of a copartner in the partnership property."

The interest of a copartner is his proportion of the partnership assets after they have been realized and converted into money, and all the debts and liabilities have been paid and discharged.

1 Lindley, Partn. 2d Am. ed. *340; *Pierce v. Jackson*, 6 Mass. 242; *Tobey v. McFarlin*, 115 Mass. 98; *Maxwell v. Cochran*, 136 Mass. 73.

In the case at bar the interest of defendant Dubois could not be reached under Pub. Stat. chap. 151, § 2, cl. 11, as it was not property within this state.

Carver v. Peck, 181 Mass. 291.

A part of the partnership property cannot be seized to pay the indebtedness of an individual partner.

Tobey v. McFarlin, *supra*; *Allen v. Wells*, 23 Pick. 450, 38 Am. Dec. 757; *Pond v. Kimball*, 101 Mass. 105; 2 Lindley, Partn. (authorized Am. ed.) 358, notes; *Claggett v. Kilbourne*, 66 U. S. 1 Black, 346, 17 L. ed. 213; *Gibson v. Stevens*, 7 N. H. 352.

In this state seizure by an officer of the goods of a copartnership for the satisfaction of the debt of one partner is wrongful and an act of trespass.

Sanborn v. Royce, 183 Mass. 594; *Fay v. Dugan*, 135 Mass. 242; *Parsons*, Partn. 4th ed. §§ 112 et seq.; *Rogers v. Batchelor*, 37 U. S. 12 Pet. 221, 9 L. ed. 1068.

This court has no jurisdiction over the interest of the defendant DuBois in the partnership of DuBois & Van Tassel Brothers, to apply it in satisfaction of the plaintiff's claim, because:

1. No decree *in personam* can be rendered against the principal defendant, as he has not been served with process and has not appeared and waived the want of jurisdiction.

Needham v. Thayer, 147 Mass. 536; *Spurr v. Scoville*, 8 Cush. 578; *McCann v. Randall*, 147 Mass. 81.

2. The only means by which the court could acquire jurisdiction is by a proceeding *quasi in rem* against the interest of said John E. DuBois in the copartnership.

Inasmuch as the plaintiff's claim is not in judgment, under Stat. 1884, chap. 285, the court must first enter a judgment establishing such claim, before it can examine into the question of the right of the defendant DuBois in the alleged copartnership.

Draper v. Holting, 168 Mass. 127.

The jurisdiction of the court to enter a judgment establishing such claim must be based upon the court's first having obtained possession or control over the interest of the defendant.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *Freeman v. Alderson*, 119 U. S. 185, 30 L. ed. 372; *Elliott v. McCormick*, 144 Mass. 10; *Needham v. Thayer*, 147 Mass. 536; *Boswell v. Otis*, 50 U. S. 9 How. 386, 13 L. ed. 164; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161; *Desper v. Continental Water Meter Co.* 187 Mass. 252; *Merrill v. Beckwith*, 168 Mass. 508; *Spurr v. Scoville*, 8 Cush. 578; *Felch v. Hooper*, 119 Mass. 52.

All the cases in which creditors' bills to reach and apply property under this statute have been maintained may be grouped into three classes:

1. Where the principal debtor is within the jurisdiction of the court and has been served with process, so that the court can compel him to transfer the property by means of its personal decree, irrespective of the location of the property.

Wilson v. Martin-Wilson Automatic Fire Alarm Co. 149 Mass. 24, 151 Mass. 515, 8 L. R. A. 309; *Anthracite Ins. Co. v. Sears*, 109 Mass. 383; *Carver v. Peck*, 131 Mass. 291.

2. Property actually within the state in the custody or control of some person having power of disposal over it, or accountable for it to the principal defendant.

McCann v. Randall, 147 Mass. 81; *Davis v. Werden*, 18 Gray, 306; *Silloway v. Columbia Ins. Co.* 8 Gray, 199.

3. Simple contract obligations due to non-resident debtor defendants, where the party owing is within the jurisdiction of the court.

Lord v. Harte, 118 Mass. 271; *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161; *Pinney v. McGregory*, 102 Mass. 187; *Clark v. Blacking-*

ton, 110 Mass. 378; *Felch v. Hooper*, 119 Mass. 52; *Desper v. Continental Water Meter Co.* 187 Mass. 252; *Merrill v. Beckwith*, 168 Mass. 508.

In cases where the defendant is personally not before the court, there must be some person having custody or control over the property within the jurisdiction of the court.

Phoenix Ins. Co. v. Abbott, 127 Mass. 558; *Desper v. Continental Water Meter Co. supra*; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 515, 8 L. R. A. 309.

The interest of a copartner in the partnership property is not tangible property situated anywhere; it is a mere personal right, and has no *situs* other than that of the owner.

Fourth Nat. Bank v. New Orleans & O. R. Co. 78 U. S. 11 Wall. 624, 20 L. ed. 82; *Otis v. Boston*, 12 Cush. 44; *Bemis v. Boston*, 14 Allen, 866; *Carver v. Peck*, 131 Mass. 291; *Desper v. Continental Water Meter Co.* 187 Mass. 254; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 24.

The interest of the partner Du Bois is not in the custody or control of any person within this state, or who is personally before the court.

Lindley, Partn. 2d ed. p. 340, note 1, and cases; *Parsons*, Partn. 4th ed. § 112; *Fourth Nat. Bank v. New Orleans & O. R. Co.* 78 U. S. 11 Wall. 624, 20 L. ed. 82; *Moody v. Gay*, 15 Gray, 457.

The filing of the bill does not constitute an attachment of property sought to be reached, even where the property is within the state.

Fish v. Fiske, 154 Mass. 302; *Squire v. Lincoln*, 187 Mass. 399; *Powers v. Raymond*, Id. 458.

This statute is framed to enable residents of Massachusetts to collect debts contracted by them within the state against persons having property within the state, refusing to pay their debts.

Pierce v. Equitable Life Assur. Soc. 145 Mass. 56; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 149 Mass. 27.

Mr. William H. McInnes, for appellee:

Stat. 1884, chap. 285, § 2, expressly provides that by a bill in equity brought under Pub. Stat. chap. 151, § 2, cl. 11, the interest of a copartner in the partnership property may be reached and applied in payment of the plaintiff's debt.

No language occurs in any of the statutes giving jurisdiction in equity in proceedings against absent defendants, which makes the obtaining of an attachment, or even of a temporary injunction, necessary to the jurisdiction. On the contrary, the omission of language to any such effect is in sharp contrast with the provisions of Pub. Stat. chap. 164, § 1.

Stat. 1851, chap. 206; Stat. 1858, chap. 34; Pub. Stat. chap. 151, § 2, cl. 11; Stat. 1884, chap. 285; Pub. Stat. chap. 141, § 22.

The contention that even if a temporary injunction had issued the property would still be out of the control of the court, and therefore that the court would still have no jurisdiction, goes to the extent of saying that the Statute of 1831, chap. 206, which applied only to foreign debtors, was entirely nugatory.

See *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 518, 8 L. R. A. 309.

The courts of this commonwealth have al-

ways regarded this bill as a process in the nature of an equitable trustee process or an equitable attachment.

Chapman v. Banker & Tradesman Pub. Co. 128 Mass. 478; *Phenix Ins. Co. v. Abbott*, 127 Mass. 558; *Tucker v. McDonald*, 105 Mass. 424; *Maxwell v. Cochran*, 186 Mass. 78.

When there is a *res* within the commonwealth which it is sought to reach under the statutes expressly provided therefor, such suit is a proceeding *in rem* and the courts have jurisdiction.

Felch v. Hooper, 119 Mass. 52; *McCann v. Randall*, 147 Mass. 81; *Wilson v. Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 518, 8 L. R. A. 309.

That the complainant is a New Hampshire corporation cannot deprive the court of jurisdiction, as by comity such an artificial person is permitted to sue in this state.

Bissell v. Briggs, 9 Mass. 463, 6 Am. Dec. 88; *Roberts v. Knights*, 7 Allen, 449; *Smith v. Mutual L. Ins. Co.* 14 Allen, 836; *Peabody v. Hamilton*, 106 Mass. 217; *Johnston v. Trade Ins. Co.* 182 Mass. 432; *Bailey v. Hemenway*, 147 Mass. 826.

Morton, J., delivered the opinion of the court:

The plaintiff in this case is a New Hampshire corporation, with a place of business in Boston, whose claim had not been reduced to judgment, and does not relate to a contract made in this state. The claim is for labor, materials, and disbursements performed, furnished, and made in the state of Pennsylvania. The principal defendant is a resident of Pennsylvania, with no property here except his interest as partner in a firm whose property, assets, books, vouchers, papers, and accounts are all, with some few exceptions, in DuBois, in the state of Pennsylvania, where its principal business is carried on, and where one of the other two partners lives, with the principal defendant. The service is by publication. The courts of equity in this state are not open to the plaintiff as matter of strict right, but as matter of comity. *Smith v. Mutual L. Ins. Co.* 14 Allen, 836, 839. And if it appears that complete justice cannot be done here, or that the amount involved is small, and the defendant will be subjected to great and unnecessary expense and inconvenience, and that the investigation required will be surrounded, if conducted here, with many and great, if not insuperable, difficulties, which all will be avoided, without es-

pecial hardships to the plaintiff, if suit is brought against the defendant in the state where he lives, and where the alleged debt was contracted, and where personal service can be made on him, we think that our courts should decline to take jurisdiction. *Pierce v. Equitable Life Assur. Soc.* 145 Mass. 56; *Bank of North America v. Rindge*, 154 Mass. 203, 13 L. R. A. 56; *Post v. Toledo, C. & St. L. R. Co.* 144 Mass. 341, 59 Am. Rep. 86. All of these circumstances are found in this case. The amount of the claim is \$72.75, which, of itself, prior to the passage of Stat. 1884, chap. 285, would have prevented the court from taking jurisdiction. *Chapman v. Banker & Tradesman Pub. Co.* 128 Mass. 478. We do not think that statute was intended to encourage foreign corporations in bringing suits like the present, or to take away the power of the court to deal with them as equity and justice might require. The alleged debt was contracted in Pennsylvania, and had not been reduced to judgment when this suit was brought, either there or anywhere. There has been no personal service in this proceeding. According to the agreed facts, it is manifest that the principal defendant will be subjected to great and unnecessary expense if compelled to come here, and that the investigation required to ascertain his interest will be surrounded with difficulties which all will be avoided without any apparent hardship to the plaintiff, if it brings its suit in Pennsylvania. It is true that the agreed facts find that "it would appear from an examination of the books, vouchers, and papers, at the offices in Pennsylvania and in Boston, that the interest of the said John E. DuBois [the principal defendant] . . . was in excess of the amount sought to be recovered in this suit, including costs and any possible cost of liquidating the affairs of the partnership in Massachusetts;" and for the purposes of the suit it is also agreed that the assets in Pennsylvania greatly exceed the entire indebtedness of the firm. But it is expressly stipulated that nothing contained in the agreed statements is to be regarded as a waiver on the part of any of the defendants of the question of jurisdiction. The objection to jurisdiction was seasonably taken, and, without adverting to other grounds that have been urged by the defendants, we think that for the reasons stated the bill should be dismissed; and it is so ordered.

Bill dismissed.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *ex rel.* H. W. CHILDS,
Attorney General,

v.
John B. SUTTON.

(.....Minn.....)

*Article 4, section 9, of the Constitution

*Headnote by BUCK, J.

of this state provides as follows: "No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster." *Held*, that, under this constitutional provision, the disability of a member of the legislature to hold office does not cease until the expiration of the full period of time for which he was elected.

NOTE.—As to incompatibility of offices, see Attorney General v. Marston (N. H.) 13 L. R. A. 670, and 80 L. R. A.

note; Chambers v. State (Ind.) 11 L. R. A. 613, and note; De Turk v. Com. (Pa.) 5 L. R. A. 853, and note.

(December 12, 1895.)

PETITION for a writ of quo warranto to oust respondent from the office of inspector of boilers. *Ouster decreed.*

The facts are stated in the opinion.

Messrs. H. W. Childs, Attorney General, and **George B. Edgerton**, for relator:

If we are to be governed by the natural force of language, the word "time," as used in the section, comprehends the whole constitutional term.

The legislature sought to remove from the incumbent an inducement for causing a vacancy in the office for which he had been elected.

Ellis v. Lennon, 86 Mich. 408; *Waldo v. Wallace*, 12 Ind. 569; *Shelby v. Alcorn*, 86 Miss. 273, 72 Am. Dec. 169; *Sublett v. Bedwell*, 47 Miss. 266, 12 Am. Rep. 338; *Smith v. Moore*, 90 Ind. 294; *Story*, Const. §§ 867-869.

A constitutional ineligibility cannot be cured at the polls.

People v. Clute, 50 N. Y. 451, 10 Am. Rep. 506; *Sublett v. Bedwell*, *supra*; *Saunders v. Haynes*, 13 Cal. 145; *State v. Smith*, 14 Wis. 497, *Com. v. Chuley*, 56 Pa. 270, 94 Am. Dec. 75.

Messrs. Davis, Kellogg, & Severance, for respondent:

What the constitutional convention had in mind was to render it impossible for a senator or representative, while such, to fill any other office. That is, the sole purpose of the section was to prevent the holding of the office of senator or representative and at the same time some other position in one of the co-ordinate branches of the state government other than the legislative.

The right of resignation of an office is an absolute right and any office holder has the right to resign any time he sees fit.

United States v. Wright, 1 McLean, 511; *People v. Porter*, 6 Cal. 27; *Gates v. Delaware County*, 12 Iowa, 405; *Bunting v. Willis*, 27 Gratt. 155, 21 Am. Rep. 388.

From the earliest times it has been the law in Minnesota that where a constitutional provision has been practically construed, and such construction has been continuously acted upon, the courts will not construe the provision otherwise if it can be avoided.

Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539; *Faribault v. Misener*, 20 Minn. 396; *State v. Benedict*, 15 Minn. 198; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241; *State v. Lee*, 29 Minn. 458; *Willis v. Mabon*, 48 Minn. 149, 16 L. R. A. 281; *Endlich*, Interpretation of Statutes, § 527; *Cooley*, Const. Lim. pp. 81 *et seq.*

The proper construction of the section under consideration has engaged the attention of the attorney general's office, of the supreme court, of the executive, and of the people at different times for over thirty years, and the construction has been uniform and in favor of the position of the respondent.

Cole's Case, Ops. Atty. Gen. pp. 146, 147; *Page's Case* (1873), Id. pp. 277-280; *Re Barnum*, Id. pp. 406, 408; *Barnum v. Guman*, 27 Minn. 466, 38 Am. Rep. 304.

As to the effect of resignation to relieve from disability to hold office during the time for which an office was elected, the above case is believed to be 30 L. R. A.

Buck, J., delivered the opinion of the court:

At the general state election held on the 6th day of November, 1894, the respondent, John B. Sutton, was elected to the office of representative of the twenty-third legislative district for the term commencing on the first Monday of January, 1895, and ending on the first Monday of January, 1897. Pursuant to such election, he duly qualified and entered upon the discharge of his duties as such member at the commencement of the session for the year 1895, and in that capacity served until the 2d day of May of that year, when he resigned his office as such member. The legislative session during which he served as a member terminated prior to his resignation. On the 4th day of May, 1895, Sutton was appointed to the public office of inspector of boilers for the fourth congressional district in this state, which office is one of great public importance and responsibility, it having been created by an act of the legislature prior to Sutton's election as a member thereof. Upon his appointment to the office of inspector of boilers, Sutton qualified and entered upon the performance of the duties of the office, and as such officer he has continued to and now occupies and holds said office, claiming the right so to do by virtue of his appointment. This proceeding is by a writ of quo warranto to oust and exclude the respondent, Sutton, from further acting as such inspector of boilers, upon the ground that he is prohibited by the Constitution from holding such office until the expiration of the time for which he was elected as representative. The clause relied upon by the attorney general to sustain his contention is art. 4, § 9, of the Constitution, and reads as follows: "No senator or representative shall, during the time for which he is elected, hold any office under the authority of the United States or the state of Minnesota, except that of postmaster; and no senator or representative shall hold an office under the state, which had been created or the emoluments of which had been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature." In treating of constitutional provisions, we believe it is the general rule among courts to regard them as mandatory, and not to leave it to the will or pleasure of a legislature to obey or disregard them. Where the language of the Constitution is plain, we are not permitted to indulge in speculation concerning its meaning, nor whether it is the embodiment of great wisdom. A Constitution is intended to be framed in brief and precise language, and represents the will and wisdom of the constitutional convention, and that of the people who adopt it. It stands, not only as the will of the sovereign power, but as security for private rights, and as a barrier against legislative invasion. It has been well said that "the Constitution, which underlies and sustains the social structure of the state, must be beyond being shaken or affected by unrec-

one of first impression, although it was held in *Smith v. Moore*, 90 Ind. 294, that refusal to accept an office prevents the application of such provision.

essary construction, or by the refinements of legal reasoning." *People v. Rathbone*, 145 N. Y. 484, 28 L. R. A. 834. The rule with reference to constitutional construction is also well stated in the case of *Newell v. People*, 7 N. Y. 9, as follows: "If the words embody a definite meaning, which involves no absurdity, and no contradiction between different parts of the same writing, then that meaning apparent upon the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have the right to add to or take away from that meaning. This is true of every instrument, but when we are speaking of the most solemn and deliberate of human writings, those which ordain the fundamental laws of states, the rule rises to a very high degree of significance. It must be very plain nay, absolutely certain, that the people did not intend what the language they have employed, in its natural signification, imports, before a court will feel itself at liberty to depart from the plain reading of a constitutional provision."

In the case at bar it is not necessary for us to speculate upon the intention of the framers of the Constitution in adopting the provision in question. A bare reading of this provision suffices to enable us to ascertain and understand its meaning, and we need not search for light through the uncertainties of extraneous interpretation or construction. It is a part of the organic law of the state that no senator or representative shall, during the time for which he is elected, hold any office under the authority of the state of Minnesota. Is there any uncertainty or ambiguity about this language? Has it any of the characteristics which demand a construction to be placed upon it by the judiciary of this state, other than that which is transparent from the language itself? The respondent, Sutton, became a representative of the legislature of the state of Minnesota on the first Monday in January, 1895, and the time for which he was elected continues until the first Monday in January, 1897. He was not merely prohibited from holding any office during the time which he might serve, but during the time for which he was elected. The difference is obvious, and the language too sweeping to be disregarded. The respondent could not nullify the constitutional prohibitory clause, "during the time for which he is elected," by his resignation of the office of representative. The time for which he was elected was the entire constitutional term of two years, and, whether he resigned during that time or not, he was not permitted to hold any other office, under the authority of this state, during such entire term. Evidently, it was the intention of the framers of the Constitution, by the language used, to prevent, so far as possible, trafficking in public offices, and, so far as appropriate language, with definite and well-understood meaning, is concerned, they did so. But this clause is absolute in its express terms that no members of the legislature, during the time for which he was

elected, shall hold any other office under the authority of the state of Minnesota. Hence, whether a member holds an office either by trafficking for it, or by an appointment conferred upon him, without solicitation and without bargaining for it, he still comes within the constitutional prohibition. It is not merely a question of whether he obtained the office in an honorable manner, but the prohibition is so far-reaching as to prohibit its being held, no matter what the conditions are upon which it was obtained.

It is due to the respondent that we should say distinctly that there is nothing in the record whereby anything dishonorable in obtaining this office can be imputed to him, or to the one appointing him. Undoubtedly he is holding this office under an erroneous view of the meaning of the constitutional provision above referred to, but nevertheless against its express prohibition.

There are several other constitutional provisions bearing upon this question of holding office which we may, perhaps, examine with profit. A member of the legislature is forbidden to hold any office under the state, the emoluments of which had been increased during the session of the legislature of which he was a member, until one year after the expiration of his term of office in the legislature. There can be no serious question raised as to the right of a member of the legislature to resign his office; but, if he does so, it cannot enlarge his right to hold another office, in violation of this constitutional prohibition. The disability only ceases at the expiration of the full period of time for which he was elected. This prohibition against holding other offices also applies to the judiciary. Const. art. 6, § 11, provides that "the justices of the supreme court and the district court shall hold no other office under the United States nor any other office under this state. And all votes for either of them for any elective office under this Constitution, except a judicial office, given by the legislature or the people during their continuance in office, shall be void." As the judges have no legislative power, the rule applied to them is different, but not less rigid. Even a vote cast for them by the people or the legislature, for any office except a judicial one, is absolutely void; and bartering by them for other official positions would be utterly useless. But this prohibition as to votes for them only applies during their continuance in office. When their terms cease, the disability no longer exists, and during their terms, having no legislative power, the temptation to traffic in official positions is wanting; and, when their terms expire, they stand upon equal footing with other citizens, so far as concerns their right to hold office.

We are not unmindful of the fact that there is a long line of opinions given by the attorney general of this state which are not in harmony with the views herein expressed upon the main question here involved, but, however able those opinions may be considered, yet, when the act of the respondent in holding the office of inspector of boilers, under the circumstances, clearly contravenes an express power of the Constitution, we feel

it our imperative duty to so hold and determine; and, while there may have been others holding offices under similar circumstances, one or more violations of a constitutional provision, we need hardly say, is no justification for any further violation of that instrument. Perhaps there is some apparent excuse and justification for the respondent's appointment and holding this office, in view of the opinions to which we have referred, and in view of the language used by the court in the case of *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 804. Great reliance is placed by the respondent's counsel upon this case to sustain his position, and there is language used which seems to justify the meaning which counsel claims for it; but, in view of the fact that the syllabus in that case makes no reference to this constitutional question, but does expressly state another ground upon which the case was decided, and in view of the further fact that the language used in the opinion seems to place the decision substantially upon another ground, we must regard what was there said in reference to the constitutional provision here under consideration as *obiter*. There are other statements, however, in that opinion, which we regard as sound law, *viz.*: "Ineligibility to hold an office, and ineligibility to an election to it, are not identical. One may be disqualified from holding an office at the time of his election thereto, and yet be eligible to an elec-

tion to it; and if, before he is required to enter upon its duties, the disability is removed, he may also take and hold it." To illustrate this position, suppose a member of the house of representatives of the last legislature should, at the general election in the month of November, 1896, be elected to the office of governor of this state, his eligibility to the latter office could not be successfully challenged, because the time for which he was elected a member of the legislature would expire before the commencement of his official term as governor. In such case it could not be said that he was holding another office during the time for which he was elected a member of the legislature. It is therefore the holding of another office, and not the election to it, which is prohibited during the time for which a member of the legislature was elected.

We are of the opinion that the respondent, in holding the office of inspector of boilers, as charged in the writ of quo warranto, comes within the prohibition of the Constitution (article 4, § 9), and it is therefore adjudged that said respondent, John B. Sutton, is guilty of unlawfully holding and exercising the office of inspector of boilers for the fourth congressional district in this state. And it is further ordered and adjudged that said John B. Sutton be ousted and excluded from said office of inspector of boilers, and that judgment be entered accordingly.

MARYLAND COURT OF APPEALS.

AGRICULTURAL INSURANCE COMPANY of Watertown, New York, *App't.*,

v.

James K. HAMILTON, to Use of J. Thomas C. HOPKINS *et al.*

(.....Md.....)

1. A dwelling house is vacant or unoccupied in the sense in which those terms are employed in a policy of insurance, when it is not used as a fixed abode, although employees occasionally sleep there and some provisions are kept in the house, which is visited to obtain them.
2. The forfeiture of an insurance policy as to the risk upon a dwelling house by virtue of a provision that the entire policy shall be void for vacancy or nonoccupancy, avoids it also as to personal property in the house.
3. The fact that loss is by indorsement made payable to mortgagees as their interest may appear does not prevent a breach of condition of the policy from making it void as to the mortgagees as well as to other parties.

(December 6, 1905.)

APPEAL by defendant from a judgment of the Circuit Court for Harford County in

NOTE.—For severability of insurance policy, see *Wright v. Fire Ins. Asso.* (Mont.) 19 L. R. A. 211, and *note*; also *Trabue v. Dwelling House Ins. Co.* (Mo.) 23 L. R. A. 719.

30 L. R. A.

favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Frank C. Gorrell and Thomas H. Robinson for appellant.

Messrs. J. T. C. Hopkins, William H. Harlan, and S. A. Williams for appellees.

McSherry, J., delivered the opinion of the court:

On the 11th of June, 1899, the appellant, a fire insurance company, wrote a policy of insurance upon the dwelling house, barn, and personal property of the appellee, insuring the same against loss by fire for the term of three years. Upon the expiration of this policy in 1892 a second one for the same amount, for another term of three years, and covering the same property, was issued by the same company. At the time the first policy bears date, and continuously on from then until the month of December, 1892, the dwelling house covered by the policy was actually occupied by the appellee and his family as a place of abode, but in December, 1892, he and his family moved out of the house and went into and occupied another dwelling some few hundred yards away and located on the opposite side of a public highway.

He took with him nearly all his furniture,

though he left in the house from which he moved a few beds and some trifling household articles, a trunk containing clothing, and some provisions stored in a pantry. He and his family ceased to live in the house mentioned in the policy. On the 27th of December, 1893, the house from which he moved and which was insured under the policy issued by the appellant, was totally destroyed by fire. Due proof of loss was filed, but the company refused to pay the loss, and based its refusal upon a ground which will be stated later on. Thereupon suit was brought on the policy. When both policies were issued the property was subject to a mortgage held by Messrs. Hopkins and Harlan, to whose use the suit was entered just before the trial in the court below, and across the face of both policies there was written in red ink the words "Loss, if any, payable to mortgagees as interest may appear." Among other terms and conditions contained in the policy sued on it is expressly provided that "this entire policy, unless otherwise provided by agreement indorsed thereon or added hereto, shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days."

For nearly three months after the appellees removed from the insured dwelling no person occupied the house at all, and on March 6, 1893, permission was granted to the insured to remove the household furniture, family provisions, wearing apparel, and organ as insured under the policy, into another dwelling "the insurance to cease at the former and apply at the latter location from" the date just named; but there was no agreement, memorandum, or assent indorsed upon or added to the policy that the dwelling house from which the appellee had previously removed should remain vacant or unoccupied at the risk of the insurer. During a portion of the time from March, 1893, down to the fall of the same year, two and sometimes three of the workmen employed by the appellee upon his farm and in his canning business slept in the house described in the insurance policy, but they did not occupy it during the daytime, and did not cook or eat their meals there. Within a week before the destruction of the house by fire a man in the service of the appellee spent one night in the house; and occasionally whilst the hands slept there one of the sons of the appellee also slept in the house. During the whole period of time intervening between December, 1892, when the appellee moved out of the house and December 27, 1893, when the house was burned, the appellee's wife went daily to the house to get provisions stored and kept there.

For a portion of this time a large number of cases of canned goods, manufactured by the appellee, were stored in the house; and at the time of the fire, in addition to the trifling articles of household furniture, the clothing and provisions that were there, some fifty odd bushels of wheat were stored in one of the first-floor rooms. There is no proof as to how the fire originated. When the evi-

dence closed, numerous prayers for instructions were presented by the defendant, but as the fourth raises the controlling question in the case and embodies the ultimate ground upon which the company resists payment of the demand made upon it, we need neither examine nor consider any of the others. The fourth prayer is in these words: "That there is no evidence in this case that the dwelling house that was destroyed by fire, as testified to, was occupied as a dwelling, within the proper construction of the policy of insurance offered in evidence in this case, on the 27th day of December, 1893, or that it had been so occupied at any time within ten days preceding said fire, and that no agreement permitting the property to be vacant and unoccupied was indorsed or added to the policy of insurance offered in evidence, and their verdict must be for the defendant." This, together with several other prayers, was rejected. The verdict and judgment were against the insurance company, and it has brought up this appeal.

The distinct inquiry is thus presented for the first time in this court, as to what is the meaning of the terms "vacant or unoccupied," as applied to dwelling houses under fire insurance policies embodying a forfeiture clause of the kind we have said the policy sued on contains.

In *Kelly's Case*, 32 Md. 431, 3 Am. Rep. 149, and in *Weaver's Case*, 70 Md. 539, 5 L. R. A. 478, this court repudiated the principle of interpretation adopted in some cases, that insurance contracts are to be construed most strongly against the underwriter; and adopted the sounder view that the intention of the parties, as gathered from the whole instrument, must prevail.

What, then, is the obvious meaning of the terms "vacant or unoccupied" as applied to a dwelling house which, when insured, was inhabited or lived in? A dwelling house means a place of abode—a habitation—a house occupied or intended to be occupied as a residence. Occupation of a dwelling house primarily implies a living in it, and consequently a fair and reasonable interpretation of the words "vacant and unoccupied" when used to describe a dwelling house, would seem to be that the house is without an occupant—without some person living in it.

An actual use of the house as a place of abode or habitation is what the insurer contemplates and what the policy designs to secure. When the occupant of a dwelling house moves out with his family, taking part of his furniture and nearly all his wearing apparel, and makes his place of abode elsewhere, such dwelling house while thus deserted, must be regarded as unoccupied—that is, vacated—if the word be given its natural and ordinary signification. It is the very situation against the hazards of which the company clearly undertook to guard itself by an express stipulation and condition inserted in the very contract upon which the suit is founded. Obviously the word "unoccupied" as applied to a dwelling house in a fire insurance policy, signifies "not used as a residence;" and consequently a desig-

ated tenement becomes unoccupied when it is no longer used for the accustomed and ordinary purposes of a dwelling or place of abode. Hence no matter what other use it may be devoted to, so long as it ceases to be a place of actual abode—a place really occupied as a residence or habitation—it is vacant or unoccupied according to the plain import of those words, and according, too, to the sense in which they are manifestly employed in the contract of insurance. It is not a mere casual or occasional sleeping in a house that constitutes an occupancy of it. The element of a fixed abode is an essential ingredient of every concept of occupancy when applied to a dwelling house; and the term "unoccupied" is employed to express the directly opposite condition.

A political or a commercial residence does not necessarily involve an actual occupancy of a particular place. Such a residence is largely a question of intention; whereas an occupancy of a particular place as a dwelling is not a matter of intention at all, but purely one of fact, and is absolutely inseparable from an actual, obvious abiding or living there. The insurance policy has a manifest reference to a continuous physical condition of the house as a habitation, and not to the mental purpose or mere intention of the owner with respect to what he considers his residence. The prohibiting clause was designed to be descriptive of the thing insured in a particular that affects the hazard of the risk, and was not intended to have relation to the mere intent of the owner. If, therefore, the house be not used as a dwelling house in which people live and have their abode, it is unoccupied even though some of the owner's property may be stored there and even though occasionally some one may sleep there. If used for these last-named purposes it may be a place of storage or of temporary shelter but it is obviously no longer occupied as a dwelling house. This view is fully supported by numerous well-considered adjudications, to some of which we will now refer.

Thus, in *Herrman v. Adriatic F. Ins. Co.*, 85 N. Y. 162, the plaintiff was living in the dwelling house at the time the policy was issued; he left the place in November leaving the dwelling furnished and in charge of his farmer, who occupied the farm house, a different structure, and members of whose family visited and aired the dwelling once a week. The plaintiff and his wife also visited it once a fortnight. Besides the furniture all the summer clothing of the plaintiff and his family was left in the dwelling. In the following April the dwelling with its contents was destroyed by fire. In an action upon the policy it was held that the dwelling house was not occupied within the meaning of the policy, which provided that if the house should "become vacant or unoccupied, and so remain for more than thirty days, without notice, etc., the policy would be void, and a recovery was not allowed."

In *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140, it was held that a dwelling house in which no one lived, but in which a former occupant had left some trifling articles of furniture, not of such a character as to be

valuable for use elsewhere, was "vacant and unoccupied" within the meaning of those terms as used in the insurance policy. In *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, it was held that a policy was avoided where the house, between the time that elapsed from the removal of the tenant, several days before the fire, until the day of the fire, was unoccupied except by the presence of the owner for a short time during each day for the purpose of cleaning it up. In *Bonenfant v. American F. Ins. Co.*, 76 Mich. 653, it was decided that "occupancy of premises," within the meaning of a condition in a policy of insurance, implies an actual use of the house as a dwelling house, and the mere fact that the occupant may have left some one to look after it when he moved out with his furniture and vacated it will not save the furniture. In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, it was held that insurers were not liable for loss which occurred at a time when no one lived in the house, though some articles belonging to a recent tenant and some belonging to the insured were in it at the time of the accident, and the land on which the house was situated, and which was described in the policy, was occupied.

In *Halpin v. Athena F. Ins. Co.*, 120 N. Y. 70, it was decided that where an insured manufacturing establishment is leased by the insured, and the tenant thereafter ceases business, leaving the building closed and in charge of one who lives in a house on the premises some distance from the factory and who is intrusted with the keys and visits the premises three or four times a week, the premises are unoccupied. In *Continental Ins. Co. v. Kyle* (124 Ind. 132) 9 L. R. A. 81, with copious notes upon which we have drawn largely, it was held that a building is vacant or unoccupied within the meaning of an insurance policy which declares that the insurance shall be void in case it becomes vacant or unoccupied where a tenant has moved out although for the purpose of letting new tenants come in, and they intended to move in the next day after the fire occurred, and had already made some repairs on the house but nothing had been left in it but two or three carpenter's planes. In *Keith v. Quincy Mut. F. Ins. Co.*, 10 Allen, 223, which case arose under a policy of insurance on a trip-hammer shop, it was held that it was not sufficient to constitute occupancy that the tools remained in the shop and that the plaintiff's son went through the shop almost every day to look around and see if things were right. So a dwelling house and barn are "unoccupied" if the former is used by the insured and his servants for the sole purpose of taking meals there while working upon an adjacent farm and the barn is a mere storage room. *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 423, 17 Am. Rep. 117; *Reid v. Lancaster F. Ins. Co.*, 90 N. Y. 382. In *Cook v. Continental Ins. Co.*, 70 Mo. 610, 35 Am. Rep. 438, the court said:

"When this policy was issued, the plaintiff kept what witness called a 'Ladies Boarding House,' and had eight girls with her. After she left the premises, there was no one living in it. She lived in Kansas City, and

Southwick was by her instructed to sleep in the house, but he did not sleep in it after Wednesday night next preceding the Saturday night of the fire. His sleeping there at night was not an occupation of the house within the meaning of the policy. He did not occupy the house during the day. It is true there is more danger from incendiaries at night than in the daytime, but dwelling houses unoccupied during the day are in more danger from that class than when occupied, and the abandonment of the premises by plaintiff diminished the security against the destruction of the house by fire.

'Occupation of a dwelling house is living in it.' 'A mere supervision over it is not sufficient.' It was plaintiff's business, under the policy, to see that the house was occupied." See also *Farmers' Ins. Co. v. Wells*, 42 Ohio St. 519; *Sleeper v. New Hampshire F. Ins. Co.* 56 N. H. 401; *North American F. Ins. Co. v. Zaenger*, 63 Ill. 464; *Fitzgerald v. Connecticut F. Ins. Co.* 64 Wis. 468; *Stupetski v. Transatlantic F. Ins. Co.* 43 Mich. 373, 38 Am. Rep. 195; *Poor v. Humboldt Ins. Co.* 125 Mass. 274, 28 Am. Rep. 228; *Bennett v. Agricultural Ins. Co.* 50 Conn. 420; *American Ins. Co. v. Padfield*, 78 Ill. 169.

These adjudged cases and many more that might be referred to announce, we think, conclusions entirely in accord with the natural and obvious meaning of the words contained in the restrictive condition to which we have alluded. That the dwelling house described in the policy sued on was vacant or unoccupied in the sense in which those terms are employed in the policy at the time the fire occurred seems to us to admit of no serious controversy, notwithstanding the fact that some of the employees of the plaintiff occasionally slept there, and notwithstanding the further fact that some of the provisions of the plaintiff were kept in the house and his wife daily visited the house for the purpose of getting provisions therefrom.

But it was insisted that the fourth prayer should not have been granted, because at least some of the personal property contained in the house was covered by the policy, and that

the forfeiture of the policy as to the risk upon the house did not involve or carry with it a forfeiture as to the personal property. This position is wholly untenable. When the policy became void because of the non-occupancy of the house, it became void as an entirety. It was an indivisible and entire contract, and when by its express terms it became invalid, it became invalid for all purposes and to all intents. This stipulation in regard to the forfeiture is applicable to the policy as an entirety. This is settled in Maryland beyond contention or controversy. *Bowman v. Franklin F. Ins. Co.* 40 Md. 632.

Nor can the fact that the loss was by indorsement made payable to the mortgagees as their interest might appear at all affect the question before us. When a loss has happened that is covered by a valid policy, it is possible that a controversy may arise as to whether a payment has been rightly made to the insured when the policy has prescribed that the loss shall be payable to the mortgagees as their interest may appear. In such cases it has been held that the insured has no authority by an accord and satisfaction between himself and the company to defeat the right of the mortgagees from recovering the amount due under the policy. *Hathaway v. Orient Ins. Co.* 184 N. Y. 409, 17 L. R. A. 514. But here the validity of the policy is made to depend upon the insured continuing to occupy the premises, and no matter to whom the loss may be made payable, it cannot be recovered by any one if by the terms explicitly set forth in the policy no right of action can accrue at all upon the violation of some specific condition whose observance by the insured is made necessary to fix the insurer's liability.

As we think the circuit court erred in refusing to grant the appellant's fourth prayer, the judgment in favor of the appellee must be reversed, and as this view of the case is decisive against the right of the appellee to recover at all, a new trial will not be awarded.

Judgment reversed, with costs above and below.

MICHIGAN SUPREME COURT.

Gurdon K. JACKSON

v.

BRITISH AMERICA ASSURANCE COMPANY, *Ptff. in Err.*

(.....Mich.....)

1. A provision in a marine policy blank, upon which a fire insurance contract is written,

for navigation by the vessel insured, does not so far conflict with a clause in a fire policy blank providing for insurance while the property is "located and contained as described herein" as to be waived by a rider attached to the marine blank waiving all provisions which conflict with the fire blank, although the description in the rider locates the property at a particular place.

2. Riders attached to a policy of insur-

NOTE.—Effect of riders or slips attached to insurance policies.

As to the construction of a policy of insurance, see notes to *Kratzenstein v. Western Assur. Co.* (N. Y.) 5 L. R. A. 799 (1890); *Equitable L. Assur. Soc. v. Hazlewood* (Tex.) 7 L. R. A. 217 (1890); *Hoose v. Prescott Ins. Co.* (Mich.) 11 L. R. A. 840 (1890), and briefs in *American Steam Boiler Ins. Co. v. Chicago* 30 L. R. A.

Sugar Ref. Co. (C. C. App. 7th C.) 21 L. R. A. 574 (1892); and *Minneapolis Threshing Mach. Co. v. Firemen's Ins. Co.* (Minn.) 23 L. R. A. 576 (1894).

Upon the rights given by the attachment of a mortgage slip to an insurance policy, see note to *Phenix Ins. Co. v. Omaha Loan & T. Co.* (Neb.) 23 L. R. A. 679 (1894).

This note is confined exclusively to cases show-

ance on a vessel, describing it as "laid up" in a harbor, and giving permission "to make repairs" and "sit out in the spring" and "move from dock to dock" to load and unload, do not prevent the policy from covering the vessel while on a voyage which is permitted by the body of the policy.

3. The construction to be given to an insurance policy will not be controlled by the fact that in correspondence relating to the loss the insured apparently sought to bring it within the policy as interpreted by the insured.
4. The cost of repairs to a vessel insured against fire at the time it sunk while burning need not be minutely proved to justify a recovery on a policy making the insurer liable only for the actual cash value of the property destroyed or the cost of replacing it.
5. A diver who has examined a vessel sunk while burning is not incapacitated to give his opinion that the vessel is a total loss by the fact that he regarded himself as not competent to estimate the cost of repairs necessary to replace it.

(July 2, 1895.)

ing the effect of a rider or slip attached to a policy of insurance, and does not therefore include cases wherein the application, survey of the property, prospectus or pamphlet of the company, referred to in the policy, has or has not been considered as part thereof. Neither does it cover the vast number of cases wherein it has been held that conditions attached to a policy may or may not form a part thereof and be construed together with the policy, according as to whether they are or are not referred to in express terms in the policy, and thereby made a part thereof by virtue of such reference.

The question as to the effect of a rider or slip attached to a policy is, according to the authorities, to be determined by a special declaration contained in the policy, such riders or slips being considered as a part of the contract when they are connected with the policy, and so even if they appear anywhere upon its face, though not written in the body.

In such cases, as in others, the policy is the contract, and if outside papers are to be imported into it, this must be done in so clear a manner as to leave no doubt of the intention of the parties. *Goddard v. East Texas F. Ins. Co.* 97 Tex. 99, 60 Am. Rep. 1 (1896); *Farmers' Ins. & L. Co. v. Snyder*, 16 Wend. 481, 30 Am. Dec. 118 (1836).

And this is so for the reason that the policy as delivered and accepted is conclusively presumed, in an action at law, to express the entire contract of the parties. *Phoenix Ins. Co. v. Wilcox & G. Guano Co.* 65 Fed. Rep. 724, 730, 25 U. S. App. 201 (1895).

And for the further reason that if the slip was attached to the policy when delivered to the assured, and by mistake failed to express the actual agreement, a court of equity is the only jurisdiction in which the policy can be reformed and corrected. *Ibid.*

So, the courts have held that written clauses and riders will prevail over the ordinary and printed forms of insurance contracts, and that as the contract is an instrument prepared by the insurer, all doubts or ambiguities are to be resolved against him, and further that the whole instrument must be considered, and so construed, as to give effect to the intent of the parties as indicated by the language implied. *Gunther v. Liverpool & L. & G. Ins. Co.* 84 Fed. Rep. 501 (1898).

Where the iron safe clause was contained in a slip attached to the policy, of which slip the assured declared he had no notice, the court stated that in order to constitute any statement or prom-

ERROR to the Circuit Court for Bay County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. D. Goulder and George Clinton, with *Messrs. Shaw & Wright*, for plaintiff in error.

Mr. T. E. Tarsney, with *Messrs. T. A. E. Weadock and J. O. Weadock*, for defendant in error:

The language of the policy, being that of the insurer, selected by it and intended for its benefit, must be clear and unambiguous, and any reasonable doubt as to its meaning must be resolved in favor of the insured.

The language of the policy must be construed with reference to the nature of the property to which it is applied, and must be presumed to have been used with reference to the purpose for which said property is ordinarily used, as well as the manner in which it is usually used.

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of the insured a warranty, it must be made a part of the policy either by appearing in the body of the instrument or by a proper reference in the policy to some other paper in which it was to be found. *Goddard v. East Texas F. Ins. Co. supra.*

Such a clause is in the nature of a condition precedent, and as such must form part of the contract between the parties. *Ibid.*

So, when there is a doubt as to the intention of the parties to treat the paper as a part of the policy, the courts give the benefit of the doubt to the assured, and construe the policy liberally in his favor. *Ibid.*; *Gunther v. Liverpool & L. & G. Ins. Co.* 84 Fed. Rep. 501 (1898).

In *Landman v. Hartford Ins. Co. (La.)* 19 Ins. L. J. 572 (1890), the defendant contended that the plaintiff warranted the keeping of books showing the condition and progress of the business, purchases, etc., which books were to be kept in an iron safe, and that the warranty was broken by failure so to keep. The plaintiff sought to meet such defense by showing that it was the custom of the insurer to keep the books of his business in an iron safe as stipulated, but that by accident or oversight on the particular occasion in question the precaution was omitted, and by contending that the iron-safe clause was not in the body of the policy, but upon a slip, and not referred to as among the failures which would work a forfeiture, and that such clause was a mere representation and not a warranty. The court, however, did not consider that the paper upon which the clause in question was found could be regarded as a mere slip for collateral attachment, the regular form of the policy having upon its face a blank space intended to be filled up by writing, with a description of the property and such other matter as might be deemed essential. The facts of the case showing that instead of writing within the space, the company pasted across the entire face of the policy a sheet of paper containing the essential description with certain concessions, setting forth both the three-fourths and the iron-safe clause, and terminating with a special declaration that the said sheet was "attached to and made the written part of the policy," which was duly signed by the company's agent. It was therefore held that the sheet formed an essential portion of the policy, its terms and stipulations entering into the body and life of the contract, and that if a distinction was to be drawn it was entitled to higher consideration, as the filling in or writing which belonged in a special manner

Minn. 85, 18 Am. Rep. 335; *Reynolds v. Commerce F. Ins. Co.* 47 N. Y. 604; *Teutonia Ins. Co. v. Boylston Mut. Ins. Co.* 20 Fed. Rep. 149; *Olson v. St. Paul F. & M. Ins. Co.* 35 Minn. 482, 59 Am. Rep. 833; *Continental Ins. Co. v. Kyle*, 124 Ind. 132, 9 L. R. A. 81; *Lyons v. Providence Washington Ins. Co.* 18 R. I. 347, 43 Am. Rep. 32; *London & L. F. Ins. Co. v. Graves*, (Ky. Ct. App.) 43 Am. Rep. 35, note; *Longueville v. West Assur. Co.* 51 Iowa, 553, 33 Am. Rep. 146; *Holbrook v. St. Paul F. & M. Ins. Co.* 25 Minn. 229; *Fritz v. Home Ins. Co.* 78 Mich. 565; *Frost's Detroit Lumber & W. W. Works v. Miller & Mfrs. Mut. Ins. Co.* 37 Minn. 300; *Merchant's Mut. Ins. Co. v. Allen*, 121 U.S. 67, 30 L. ed. 858; *Gulf of California Nav. & Exp. Co. v. State Invest. & Ins. Co.* 16 Ins. L. J. 579; *Grant v. Lexington F. L. & M. Ins. Co.* 5 Ind. 23, 61 Am. Dec. 74; *Western Ins. Co. v. Cropper*, 32 Pa. 351, 75 Am. Dec. 561; *White v. Smith*, 33 Pa. 186, 75 Am. Dec. 589; *Bradley v. Nashville Ins. Co.* 3 La. Ann. 708, 43 Am. Dec. 465.

Hooker, J., delivered the opinion of the court:

The plaintiff's vessel having been burned in Detroit river, while on a voyage from Bay City to Cleveland, an action was brought and judgment obtained by him upon a policy of insurance, and defendant has appealed. The first and most important question raised by the record is whether the policy covered the vessel after leaving Bay City, and this depends upon a construction of the policy, which consists of the ordinary marine policy, with certain riders attached. It is conceded to indemnify against loss by fire only. Defendant claims that it was winter insurance, and covered the property only while the vessel was in the harbor of Bay City; while the plaintiff asserts that it was a fire policy, covering the vessel from the 4th of December to the 1st of May, and that by the express terms of the policy she might navigate the Lakes and Detroit river after April 1st. As

to the contract as distinguished from the printed matter of the general form, and that the clause was in the nature of a warranty such as the company had the right to exact as a condition determinative of their entry at all into such a contract.

The case of *Landman v. Hartford Ins. Co.* *supra*, was distinguished by the court from that of *Goddard v. East Texas F. Ins. Co.* 67 Tex. 69, 40 Am. Rep. 1 (1884), upon the ground that that action did not cover the case then before the court, inasmuch as in the *Goddard* Case it was declared that the clause was upon a separate slip pasted to the policy, but it did not appear that the clause was upon a sheet, intended to constitute the very filling itself of the blank left in the printed form, and declared specifically to be such writing in, and containing matter which was the very life of, the contract; and upon the further ground that in the *Goddard* Case the insurer was ignorant of the existence of the clause, while in the case then before the court, the clause carried out a statement and formal promise and agreement signed by the assured, the knowledge of which was not denied; and upon the further ground that in the *Goddard* Case the books were intact, preserved and presented for the company's inspection, while in that case, material books were absolutely lost as a direct consequence of the plaintiff's failure to comply with the contract and warranty. In the above case the court further stated that even if the *Goddard* Case had been absolutely antagonistic, they would not have followed it, preferring the reasons of the judges of the first circuit of the court of appeals of that state (Louisiana), and of the judge of the first instance in the same cause as expressed in the case of *Dreyfus & Co. and Loape v. Marx*, consolidated No. 114, upon the docket of the circuit court, which case does not, however, appear to be officially reported.

In *Davis v. Boardman*, 12 Mass. 80 (1815), the following memorandum was annexed to the policy: "Should this vessel and cargo be insured in England, in time to attach, this policy is to be canceled on the assured's producing a copy of the policy, or the original, and paying $\frac{1}{2}$ per cent." The facts showed that the insurance was made in England by the plaintiff's agent there on the vessel only. The court held the underwriters liable as insurers of the cargo, the intent and effect of the memorandum being, that if the ship was insured in England, the insurance on the ship was to be void; and that if the cargo was insured in England, the insurance made on the cargo was to be void, the memorandum being co-extensive with the policy, the condi-

tion which was to annul the contract being applicable to both or either of its parts according to the event, the court acting upon the maxim *reddendo singula singula*.

In *Haven v. Gray*, 12 Mass. 71 (1815), the defendants assured for plaintiffs \$11,000, upon a specified number of bales of cotton valued at \$11,400, on board a certain ship at and from the United States to Europe, for the purpose of disposing of the outward cargo and procuring a return cargo, and at and from thence to the United States, the following memorandum being annexed to the policy: "It is understood that the risk is to attach to the proceeds of the articles mentioned in this policy in the return cargo." The vessel on its arrival at a foreign port, the markets being dull, consigned the cargo to a mercantile house, and took a return cargo on credit, before the outward cargo was sold. A total loss occurring upon the return voyage, the court held the underwriters liable provided it was shown that the return cargo was intended as a substitute for the outward cargo, and was considered as the proceeds of the same.

In *Gloucester Mfg. Co. v. Howard F. Ins. Co.* 5 Gray, 497, 66 Am. Dec. 373 (1855), the agent of the insurance company, having in his possession printed forms of policies of insurance signed by the officers of the company to be filled out, countersigned, and issued by him, before the delivery of the policy or the acceptance thereof, or the payment of the premium, added to the policy a memorandum, to the effect that the building insured was in the course of construction. The court held that such act was within the authority of the agent, and that the memorandum bound the company, even though, as shown by the application, the buildings were finished and the conditions of insurance, provided that applications therefor should be in writing and specify the construction, materials, character, and occupation of the building, and be looked upon as a part of the contract and a warranty, and even though the agent, whose duty it was to make monthly returns of the written parts of all insurance policies, did not make such return until after the loss occasioned by the fire.

Where the iron-safe clause was printed in a slip attached to and made part of the policy, it was held that the stipulations therein contained constituted a part of the policy, the court stating that the rule was that stipulations such as that contained in the iron-safe clause would be taken as embraced in, and constituting a part of, the policy, if they appeared anywhere upon its face, though not written in the body, and that the mere fact that

stated, the policy was written upon a blank marine policy, which, if not qualified, would have insured the vessel against the other usual risks of navigation. It provided as follows: "The British America Assurance Company does make insurance, and cause five thousand dollars to be insured, upon the body, tackle, apparel, and other furniture of the steamer called the 'Burlington,' from noon of the 4th day of December, 1893 (the said vessel being warranted by the insured to be then in safety), to noon of the 1st day of May, 1894, unless sooner terminated or made void by conditions hereafter expressed. Warranted by the insured to be employed exclusively in the freighting or passenger business, or both, and not to carry quicklime in the lower hold, and to navigate only the waters, bays, harbors, rivers, canals, and other tributaries of Lakes Superior, Michigan, Huron, St. Clair, Erie, and Ontario, and River St. Lawrence to Quebec, usually navi-

gated by vessels of her class, during the portion of the life of this policy between noon of April 1st and noon of November 30th; . . . and between noon of November 30th and noon of April 1st ensuing said vessel shall be laid up and safely moored, satisfactorily to this company." It was stamped: "This is a fire policy only."

If this were the only provision upon the subject, it is plain that plaintiff's contention that he had a right to navigate the vessel after April 1st without affecting his insurance is correct, but upon defendant's behalf it is contended that the riders and the circumstances under which the policy was obtained, and plaintiff's correspondence since the loss, exclude the plaintiff's construction, and show that it was the intention of the parties that the policy should be limited to such time as the vessel should remain in the harbor where she then was.

We will first consider the effect of the

the agent of the company knew at the time of the issuing of the insurance that no safe was kept by the assured upon his premises did not amount to a waiver of the clause. *Criger v. Standard F. Ins. Co.* 49 Mo. App. 11, 16 (1892).

In *Goddard v. East Texas F. Ins. Co.* 57 Tex. 60, 60 Am. Rep. 1 (1886), the iron-safe clause was not written or printed upon the same paper with the rest of the instrument, nor was it referred to in the policy as forming a part of the contract between the assured and the insurance company, and the clause did not in any terms provide that it should constitute a warranty; it was pasted on the policy in the midst of a sentence which had no reference to the stipulations of the assured in such connection as to destroy the sense of the sentence, and the policy was complete without the attached paper, and expressly stipulated in other parts what were its warranties and conditions. The court therefore held that such clause did not amount to a warranty, but at most to a representation, and stated that if the insurers did not embody their warranties in the policy itself, or import them into that instrument by a proper reference to other papers in which they were contained, and the contract was capable of an interpretation which would make them mere representations, the company must expect them to be so construed.

But in *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* (Tex.) 28 S. W. 1027 (1894), the iron-safe clause was held to constitute a warranty, even though attached to a paper which contained most of the provisions of the policy in a separate slip of paper, which was only referred to and adopted as a part of the contract in another slip containing a description of the property insured, which was also attached, there being two slips, each stating that the iron-safe clause formed a part of the contract. In that case, therefore, before the assured could recover under the policy the court held that he must show that he had complied with the conditions imposed by such clause.

The case was appealed to the supreme court, but a writ of error was denied, and the judgment affirmed. *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.* (Tex.) 29 S. W. XXI.

So, in *American F. Ins. Co. v. First Nat. Bank* (Tex.) 30 S. W. 384 (1895), the policy sued on was a printed form on which the agent added such references and descriptions as were necessary to form the contract of insurance, following the description of the property on which specific insurance was placed, with the expression that the policy issued in consideration of the stipulations therein

contained and subject "to the three-quarters value and iron-safe clauses attached to, and made a part of, the policy." These clauses were on a printed slip attached to the face of the policy, by being pasted with mucilage, on the margin of the policy opposite the written clauses, which slip read as follows: "It is a condition of this policy that in the event of loss or damage by fire of the property insured this company shall not be liable for an amount greater than three fourths of the cash market value of the same, not exceeding the amount of the policy at the time immediately preceding such loss or damage," and "that the assured under this policy heroby covenants and agrees to keep a set of books, showing a record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where said business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory, and in the event of a failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss." The court below charged the jury that "the iron-safe clause" was not a warranty, and refused a special charge that such clause was a warranty, but upon appeal the court held that the clause referred to was a part of the contract of insurance, and was by its own terms made a condition necessary to be complied with before a recovery could be had.

And again, in the case of *Home Ins. Co. v. Cary* (Tex.) 31 S. W. 821 (1895), the iron-safe clause attached to a policy of insurance was held to amount to a warranty and construed as part of the contract of insurance, any breach whereof on the assured's part would avoid the contract, the iron-safe clause in that case being contained in a sheet which was expressly made a part of the contract, and was stipulated to be a warranty the failure to comply with which avoided the policy.

In the above case, in the largest sheet of paper, the slip containing the iron-safe clause was merely referred to, and the latter slip stated that it was attached to the policy, giving the number, but the court stated that it would be inaccurate to speak of either of these papers as constituting the policy, when neither was complete without the

riders, in and of themselves. It is elementary that all parts of the policy are to be harmonized and given effect, if it can be consistently done, and that, unless the riders are irreconcilable with the printed clause quoted, such clause must stand. If they are inconsistent and irreconcilable the riders must control. The first rider upon the policy was as follows: "On the hull, and on the engines, boilers, machinery, tackle, small boats, apparel, and furniture, belonging to and while on board of the steamer Burlington, laid up and properly moored in the harbor of Bay City, Mich. Permission is hereby given to do painting, and to make necessary alterations and repairs, and to fit out in the spring, and to move from dock to dock for the purpose of loading and unloading cargo." Another rider was attached, reading as follows: "This policy covers against fire only, on the terms and conditions of the standard form fire policy of the state of New York, and anything in this policy

conflicting therewith is hereby waived." The significant provisions of these riders, and those alleged to affect the question under discussion, are: (1) The language, "steamer Burlington laid up and properly moored in the harbor of Bay City, Mich." (2) "Permission to do painting and to make necessary alterations and repairs, and to fit out in the spring." (3) The privilege "of moving from dock to dock for the purpose of loading or unloading cargo." (4) The exclusion of all risks but fire. (5) The limitation to the terms of the standard form policy. (6) The waiver of provisions of the policy written, so far as they conflicted with the standard policy.

The fact that the first rider describes the property insured differently from the body of the policy has no especial significance. It is somewhat more specific in articles mentioned; it may be doubtful whether it is more comprehensive. The provisions numbered 4 and 5 clearly limit the risk to losses by fire.

other, and that together they formed the contract and must be so treated. *Ibid.*

Again, in *American F. Ins. Co. v. Center (Tex.)* 33 S. W. 554 (1895), the main contention was that the assured had failed to comply with the iron-safe clause in the several policies issued by the defendant companies, and that such clause amounted to a warranty on the assured's part which precluded a recovery under the policy. The assured contended that the clause was waived by the conduct of the agent of the company after the fire, but as to this latter issue the court made no finding. The iron-safe clause was of the same import in each policy, and in the American provided that the assured was to keep books showing a record of all business transacted, together with the last inventory of stock insured securely locked in a fire-proof safe at night, and at all times when the store was not actually open for business, or in some secure place not exposed to a fire which would destroy the business premises, and that the assured would produce such books and inventory in case of loss, or in case of failure so to do the policy was to be deemed null and void so that no action could be maintained thereon. In all the policies except one it was printed upon a slip of paper pasted on the face of the policy at the space usually left blank for the insertion of a description of the property insured, and upon such slip alone was the description of the stock of goods and also the amount of insurance. This slip was signed by the agent of the company as part of the policy and if removed from the policy showed no contract. In the body of the policy was a provision requiring the insured to exhibit to any person designated by the company all that remained of any property therein described, and to submit to examinations under oath by any person named by the company, and to subscribe the same, and to produce for examination all books of accounts, bills, invoices, and other vouchers or certified copies thereof, if the originals were lost, and permit extracts and copies thereof to be made, the policy concluding with the provision that it was made and accepted subject to the foregoing stipulations together with such other provisions, agreements, or conditions as might be indorsed thereon or added thereto; and that no officer, agent, or other representative of the company should have power to waive any of its provisions or conditions except such as, by the terms of the policy, might be the subject of agreement indorsed hereon or added thereto. The last inventory taken before the fire was destroyed for the reason that it was not kept

in the safe as required, and no copy of it could be produced. The court held that the failure to so produce it, and thus comply with the provisions of the policy, amounted to a breach of the condition, and precluded a recovery under the policy, the clause in question amounting to a warranty.

In *Pool v. Milwaukee Mechanics' Ins. Co. (Wis.)* 65 N. W. Rep. 54 (1895), the policy was to be void if the insured thereafter procured any other contract of insurance, unless otherwise provided by agreement indorsed thereon, or added thereto, and there was a further proviso that the company was not to be liable to a greater proportion of any loss than the amount the policy therein should bear to the whole insurance upon the property, and that the policy was made and accepted subject to the stipulations and conditions therein "together with such provisions, agreements, or conditions" as might be indorsed thereon or added thereto, it being further provided that the provisions or conditions of the policy could only be waived by writing indorsed thereon or added thereto; and further that "any privilege or permission affecting the insurance under this policy" must be so written thereon or attached thereto. There was a written statement, of even date with the policy, attached thereto, as forming a part thereof, signed by the company's agent, to the effect that "if, at the time of the fire the whole amount of insurance on the property covered by this policy be less than 80 per cent of the actual cash value thereof," then the defendant should, "in case of loss or damage, be liable for only such proportion of such loss or damage as the amount insured by this policy shall bear to the said 80 per cent of the actual cash value of such property." The court in considering this policy held that while such writing so attached did not expressly authorize such additional insurance without such consent, yet it did, by necessary implication, authorize the same, and make it an object for the plaintiff to take additional insurance until the 80 per cent of the actual cash value of the property should be obtained, and in case it should be obtained then the company was, in case of total loss, to pay the full face of the policy, and that therefore, the additional insurance having been taken by the company's agent, the policy was not void by reason of such additional insurance.

In *Gunter v. Liverpool & L. & G. Ins. Co.* 84 Fed. rep. 501 (1888), the contract (one of the ordinary printed forms of policy) contained provisions restricting its operation and saving the company from claims for loss arising under circumstances

They are irreconcilable with the provision of the marine policy as to other risks, and must govern in that respect, and plaintiff does not question this. There is more question over the effect of the limitation to the terms of the standard form policy. This standard form policy referred to appears to be the "standard fire insurance policy of New York," and a copy is included in the record. It is said to be identical with the Michigan form. Counsel for the defendant claim that this rider gives the same effect to the policy as though written upon a standard form blank, and that in such blank there is no provision for navigation during certain portions of the year, but, on the contrary, the printed part of the standard policy uses the following language, *vis.*: "To the following described property, while located and contained as described herein." It is said that this provision should be substituted for the other, and if that be done there is nothing to indicate that the vessel might leave the place where she was moored, except to go from

dock to dock in that harbor for the purpose of unloading and loading cargo. These riders, like the policy, were signed by the underwriter, and we may dismiss the provision in relation to the waiver of inconsistent provisions by saying that it was the waiver of the company, and not of the plaintiff, made for the benefit of the plaintiff, and not the defendant. It was doubtless designed to cover the various provisions pertinent to marine risks, but which had no application to a purely fire risk. On the part of the plaintiff, no express waiver was necessary, for, by accepting this policy, he agreed to take insurance according to the terms of the standard policy, and cannot insist on anything in the policy taken that is necessarily in conflict with it. There is therefore no especial significance to the waiver unless its language implies that the provisions of the marine policy apply where they are not inconsistent with the standard policy. Had the standard policy blank been used, and the clause quoted from the same been followed

which exposed them to some unusual hazard, such as the storage, use, keeping, or allowing on the premises temporarily or permanently for sale or otherwise of petroleum and other inflammable liquids which they were not willing to accept, without the written permission indorsed on the policy, excepting, however, the use of refined coal kerosene or other carbon oil for lights, if the same were drawn and the lamps filled by daylight. Riders were attached to the policy at the time it was issued, containing the customary privileges attached generally to policies, as follows: "Privileged to use kerosene oil for lights; lamps to be filled and trimmed by daylight only," and, "privileged to keep not exceeding five barrels of kerosene oil on said premises." In an action upon the policy, the facts showing that the fire was caused in consequence of the insured permitting his servants to furnish oil to a neighbor at a time when it was necessary to use a lighted lamp, the company were held not liable the policy being forfeited, there being nothing in the clause giving the privilege to keep five barrels of kerosene oil inconsistent with the restrictions as to drawing contained in the policy, the clause of the policy and the two riders standing perfectly together.

Where, by marine policies the insurers insured the plaintiff for one year against loss by fire, etc., on a certain tug in the "bays and harbor of New York, East and North or Hudson rivers, waters of New Jersey, Long Island sound and shores, and as far as New Bedford, and all inland waters as far south as Norfolk, Virginia, and all waters adjacent, connecting or tributary to any of the above waters," and subsequent to the date of the policy the following rider was attached: "Permission is hereby given the tug . . . to use port and harbor of Charleston, to go as far as the jetties at Charleston, but not to cover on trips either way between Norfolk and Charleston," upon a claim for loss by fire on the tug after leaving Norfolk on a trip to Charleston, the court held that the language of the rider was so explicit and unambiguous that it could not properly be narrowed by legal construction so as to make the policy cover any part of the trip to Charleston, even while within the inland waters of Chesapeake bay, though the rider did in some respects extend the scope of the insurance, by giving the privilege of the use of the port and harbor of Charleston, and the waters as far as the jetties. *Mark v. Home Ins. Co., Mark v. Orient Ins. Co.,*

Mark v. British-America Ins. Co. 88 Fed. Rep. 170 (1892).

In *Phenix Ins. Co. v. Wilcox & G. Guano Co.* 65 Fed. Rep. 724, 18 U. S. App. 81 (1896), action was brought to recover on a policy against loss by windstorms, cyclones, or tornadoes on property damaged by the cyclone of August, 1893. The material portion of the policy showed that the company insured the premises therein mentioned against loss or damage by windstorm, cyclone, or tornado, subject to the freshet clause, the words "subject to co-insurance clause," and the words "subject to freshet clause," being written and not printed upon the policy. Immediately over the words "subject to freshet clause" there was a printed slip pasted to the margin of the policy as follows: "It is hereby distinctly understood and agreed that this company is not liable for any loss or damage to the property herein insured which may occur by reason of freshets, floods, or high water; said insurance being limited to loss or damage by cyclone, windstorm, or tornado. Attached to and forming part of tornado policy,"—giving the number of the policy and the company in which insured, and signed by the agents. In the policy produced in evidence there was no slip attached over the words "subject to co-insurance clause" but the policy contained a clause providing for other insurance, and limiting the liability of the insurance company to a proportion of the loss in such case. The question was whether the insurance company was liable for the full amount insured, or only for such proportion of the loss as the amount of the insurance bore to the sound value of the property, the company's contention being that the slip was attached to the policy and limited its liability, and the company's agent testified that he had intended to annex to the policy a slip "average or co-insurance clause" which limited the responsibility in case of "fire" and that the whole matter was explained to the assured at the time of taking the policy and upon renewals thereof, but this was denied, although the evidence showed that such a slip was attached to the first policy. It was further shown that there were various co-insurance clauses attached to policies by different underwriters, some requiring the assured to become co-insurers for the deficiency if the insurance did not amount to a certain percentage of the whole value of the property, and others stating the different percentage, and it also appeared that

by the provision in relation to navigation after the 1st of April, it would have been a valid policy, and would have covered the property while in other waters than the harbor of Bay City. There is nothing inconsistent with the standard policy, or contrary to the law, in such a provision. Who can doubt that such a provision in a policy covering a threshing machine, a circus outfit, or a steam vessel would be efficacious? Indeed, the mere issuance of a policy upon property which, from its nature and use, is not adapted to its remaining in a given place, has been held to constitute insurance against its destruction while abroad. Especially has this doctrine been applied to livery stock, farmers' property, and in one instance to a lady's dolman while in the hands of a furrier for repair. See *May, Ins. §§ 401a-401c; Benton v. Farmers' Mut. F. Ins. Co.* (Mich.) 26 L. R. A. 241, and *note*. There is no necessary conflict between such provisions, and, had this clause providing for navigation been printed upon the rider, no dispute could arise over it.

This brings us to the consideration of the first provision. It is urged that it would have been easy for the underwriter to limit the insurance upon the Burlington while laid up and moored, etc., and that the omission of the word "while" indicates the intention to limit her to that place during the period of insurance, an inference which is said to be intensified by the third provision, as to moving from dock to dock. On the other hand, plaintiff suggests that the place of moving was descriptive merely. The trouble with the defendant's claim about this is that it nullifies the provision regarding navigation, which we have shown is not inconsistent with the standard policy. It seems to us that the language may not only be reconciled with the plaintiff's claim, but that the words had a meaning and purpose consistent with the

navigation clause. If it be conceded that the general terms of the standard fire policy apply, these two riders become necessary, or, if not indispensable, at least useful to set at rest possible questions that might arise. The evidence shows that the underwriter did not care to take this risk. It was represented to him that she was in a safe place, properly moored in Bay City harbor, and the rider stated that she was there. Under the standard policy alone, this would have been nothing unusual, nor does it seem to us any more so under the clause quoted from the marine policy, which requires the vessel to be laid up and moored satisfactorily to the underwriter, if it was desired to indicate a place of mooring. Again, under the marine policy clause, there is nothing to indicate that the vessel might move from dock to dock previous to the 1st of April, and, if the plaintiff desired to unload after obtaining the policy or load in the spring before April 1st, it was prudent to have the clause inserted. We have little doubt that it was inserted at his instance, and it was as consistent with an intention to start upon a voyage April 1st under the clause in the marine policy as May 1st upon the defendant's theory. The provision as to repairs was made necessary by reason of the provision relating to repairs in the standard policy. There is evidence tending to show that, under a strictly marine policy, repairs, etc., might be made during the winter, but the standard policy provides that the same shall become void if mechanics are employed in building, altering, or repairing for more than fifteen days. This provision is done away with by the rider.

This leaves only the telegram from the plaintiff to be discussed upon this branch of the case. After the fire the plaintiff furnished proofs of loss, and the underwriter's agent wrote as follows, *viz.*:

"We have no insurance on steamer *Burlington*.

the clause which the insurance agent would have affixed to the policy, had he completed it as he intended, was a printed clause applicable to a loss by fire, and not a loss by cyclone, and further, it not being shown that there was any usage or custom upon the question, that the words "subject to co-insurance clause" had no definite meaning in themselves, but referred to some particular clause which the company's agent intended to affix. The court therefore held that the court below committed no error in stating to the jury that if the above clause had been attached which the insurance agent testified had been omitted, it was one which was applicable only to a loss by fire, and would not have affected the loss in that case, which was by cyclone; and further, that there was no error in instructing the jury that the contract, being of a doubtful meaning, was to be construed most strongly against the insurer.

In *Kenyon v. Burthen*, 1 Dougl. 12, note (1778), it was held that though a written paper was wrapt up in the policy when it was brought to the underwriters to subscribe, and shown to them at that time, or even though it was wafered to the policy at the time of subscribing, yet it was not in either case a warranty or to be considered as a part of the policy itself, but only as a representation.

So, where it was sought to prove that a written memorandum inclosed with the policy was always considered as a part thereof, the court found that 80 L. R. A.

it was a mere question of law, and refused to bear evidence in support of the theory, and held that such a paper did not become a strict warranty by being folded up in the policy. *Fawson v. Ewer*, 1 Dougl. 12, note (1778).

And in *Bize v. Fletcher*, 1 Dougl. 12, note (1778), where it appeared that at the time the insurers underwrote the policy a slip was wafered to it, which described the state of the ship and also gave particulars of the intended voyage, which particulars had not been complied with, it was held that this was only a representation, and the jury were directed, if they thought there was not any fraud intended, and that the variance between the intended voyage described in the slip and the actual voyage did not tend to increase the risk, to find for the plaintiff.

In *Gadachens v. Thornton*, 3 El. & Bl. 868 (1854), insurance was procured upon premises in California described in the policy as "brick building used as a dwelling house and store (described in the paper attached to this policy)" such paper being a minute description purporting to be a certificate, the description being accurate, up to a given date, after which the premises were altered. The alteration of the premises was not known to the company when the policy was signed, and later the premises were destroyed by fire. It was held the description in the policy amounted to a warranty and precluded the plaintiff from recovery. E. W.

ton burned in Detroit river. See your policy, which insures Burlington while laid up and safely moored in harbor of Bay City, Mich."

To this the plaintiff replied by telegram as follows:

"Burlington was moored safely at dock when you wrote insurance, but you gave permission to fit out in the spring, and to move from dock to dock for the purpose of loading and unloading cargo. Look at your contract."

It is argued from this correspondence that the plaintiff sought to maintain that he was within the contract, and that the vessel had the right to go from Bay City to Cleveland to load and unload cargo, thereby implying that he recognized the fact that she had not the right to navigate, unless under that provision. This language justifies both of these inferences, but this alone is not in our opinion sufficient to change the construction to be given the policy. We are therefore satisfied that each of the provisions in the rider had a specific purpose, and that such purposes were entirely consistent with the express provision in the marine policy, providing for navigation after April 1st, and therefore that the policy covered the vessel at the time of the fire. We have, then, a fire risk simply, under the standard policy, upon a vessel in Detroit river.

Counsel for the defendant assert that there was not sufficient proof to enable the court to determine the question of damages. The following provision is relied on, viz.: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to said actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." It is contended that, as the assured would not be entitled to recover more than the cost of repairing or replacing the property damaged with material of like kind and quality, it was incumbent upon the plaintiff to prove what that cost would be. The plaintiff's witnesses testified regarding the fire, but no one seems to have been able to give an estimate of the extent of the burning, except in a general way. They testify that the cabin burned, and the deck was burned through, but don't know how much the hold was injured. She was laden with lumber, and there was no means of telling accurately. When she sunk, she was thought to have broken in two, and although a diver examined her he was unable to tell definitely the extent of the injury. We think there was evidence to be considered upon this subject, and that a plaintiff cannot be required to make a minute examination during a conflagration, or to go to the bottom of the lake or sea to estimate the cost of repair of a vessel which sunk before she was entirely consumed. Defendant's claim, if the law, would render it impossible for a plaintiff to recover upon a purely fire policy, where the vessel sunk beyond the reach of divers. Even in shallow

water, shipbuilding and diving are frequently separate callings, and we cannot suppose it practicable to always find a diver qualified to estimate the repairs required, if he would be able to ascertain what repairs should be necessary when at the bottom of the sea or lake. No authorities are cited in support of the defendant's claim, and we think none can be found which hold to so strict a rule as is here invoked.

The court found that "the vessel was practically destroyed, so much so as to be a total loss." It is urged that "the only evidence in the case which can in any degree support a finding of a total loss was the testimony of one Quinn, and was improperly admitted, against objection and exception." Quinn was the diver. He spent about three hours examining the vessel, and, as it happens, was a ship carpenter by trade. He said that he examined her thoroughly from where she started to burn. After describing how and where she was burned, he said: "She was in pretty bad shape." Then followed the question:

Q. From your experience and knowledge of vessels, and your personal observation of this one, to what extent would you say she was injured by the fire?

A. I should say she is a total loss, so far as any use in rebuilding is concerned.

He said she could be raised, but might come up in pieces, and the job might perhaps be done for \$2,000. He did not know whether she was in shape to utilize when raised, but apparently thought it improbable. He could not estimate the cost of repair. After cross-examination he was asked the following question upon redirect:

Q. Is it your judgment, taking into consideration the condition in which you found the boat, and the necessary cost of raising her, independent of the cost of rebuild or repair, that the boat, in her present condition, is a total loss?

A. Yes, sir.

This was the answer excepted to. The objection was that the witness did not regard himself competent to estimate the cost of repairs. As will be seen, the cost of repairs was eliminated from the question as originally asked. We think that the court was not in error in permitting the witness to answer.

Upon the general question, whether there was proof that the loss was total, we think that there was evidence tending to show it, and it follows that it was for the circuit court to weigh, and we cannot review it.

We discover no error in the record, and the judgment will be affirmed.

McGrath, Ch. J., and Long and Montgomery, JJ., concurred.

Grant, J., dissenting:

I cannot concur in the construction placed by my brethren upon the contract of insurance upon which the plaintiff seeks to recover. It seems to me entirely clear that this was a contract for what is known as "winter insurance," and covered the property insured only when the boat was "laid up and prop-

erly moored in the harbor of Bay City." This construction follows from the further language of the contract: "Permission is hereby given to do painting, and to make necessary alterations and repairs, and to fit out in the spring, and to move from dock to dock for the purpose of loading and unloading cargo." No such language would be appropriate or necessary to cover a boat and its contents while engaged in navigation. There could have been no object in describing the "steamer Burlington laid up and properly moored in the harbor of Bay City," except it was to fix the *locus in quo* during the life of the policy. If it were the intention to insure the boat under all circumstances, it would only have been necessary to describe the property as the steamer Burlington and its contents. That the plaintiff so understood the

contract is evident from his telegram to the defendant:

"Burlington was moored safely at dock when you wrote insurance, but you gave permission to fit out in spring, and to move from dock to dock for the purpose of loading and unloading cargo. Look at your contract."

It thus appears that the plaintiff recognized the contract as one for winter insurance only, and sought to maintain its validity by interpreting the permission to move from dock to dock to apply to the boat when engaged in navigation. I do not think that courts should place a construction upon a contract different from that which the parties themselves have placed upon it, in a case where it is susceptible of two constructions.

I think the judgment should be reversed, and no new trial ordered.

NEBRASKA SUPREME COURT.

Gotlieb STORZ *et al.*, *Pliffs. in Err.*,

v.

Lena FINKELSTEIN *et al.*, Admrs., etc., of
L. M. Finkelstein, Deceased.

(.....Neb.....)

*1. No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.

2. Plaintiff sued the defendant for the purchase price of beer, to which the defendant, by way of counterclaim, pleaded payment for a license to sell beer, which, as defendant alleged, plaintiff had agreed to furnish, to enable defendant to make such sales. By reply, plaintiff alleged a custom, in accordance with which a retail traffic in beer had been carried on by defendant under and by virtue of a license held by the plaintiff, which traffic, in legal effect, was a violation of the statute of Nebraska regulating traffic in liquors. *Held*, that, for the purchase price of beer sold under these circumstances, plaintiff was not entitled to a recovery against the defendant.

(December 7, 1895.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendant in an action brought to recover the contract price of certain beer alleged to have been sold and delivered by plaintiffs to defendant. *Affirmed*.

The facts are stated in the Commissioner's opinion.

Messrs. Lake, Hamilton, & Maxwell, for plaintiffs in error:

In order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in illegal man-

ner, it is necessary to show that there was the wicked intention to break the law.

Waugh v. Morris, L. R. 8 Q. B. 208; *Addison*, Contr. Morgan's ed. 402.

While the intention to commit a crime, or to do an unlawful act, when nothing is done to carry that intention into effect, is not a crime, nor in any way punishable, yet the rule contended for here would impose a severe penalty or forfeiture upon one who did not even participate in the unlawful design, but simply knew of it, and that, too, for the benefit of the only party who entertained the wrongful intent.

Kreiss v. Seligman, 8 Barb. 441; *Collins v. Blantern*, 1 Smith, Lead. Cas. 662.

If the court should conclude that the contract is illegal, it being one that can be performed in a lawful manner, and nothing having been shown to have been done under it in violation of law, they should recover, if not on the contract, on a *quantum valebat*.

Drake v. Siebold, 81 Hun. 178; *Tyler v. Carrille*, 79 Me. 210; *Jaques v. Golightly*, 2 W. Bl. 1078; *Gregg v. Loomis*, 22 Neb. 174; *Imhoff v. House*, 36 Neb. 29.

Messrs. Eastabrook & Davis and C. E. Clapp, for defendants in error:

No action can be maintained in either of these cases: (1) if the contract provides that the goods are to be used for an illegal purpose; (2) if, in addition to knowledge on the part of the vendor of illegal purpose of the vendee, the vendor does any act, however slight, to aid, assist, or further the illegal purpose.

Spurgeon v. McElwain, 6 Ohio, 443, 27 Am. Dec. 266; *Lightfoot v. Tenant*, 1 Bos. & P. 551; *Hubbell v. Flint*, 13 Gray, 277; *Hull v. Ruggles*, 56 N. Y. 424; *Skiff v. Johnson*, 57 N. H. 475; *Aiken v. Blaisdell*, 41 Vt. 655; *Postler v. Thurston*, 11 Cush. 322; *Hooker v. De Paolos*, 28 Ohio St. 251; *Ruckman v. Bryan*, 3 Denio, 343; *McKinell v. Robinson*, 3 Mees. & W. 434; *Mosher v. Griffin*, 51 Ill. 184, 99 Am. Dec. 541; *Raymond v. Leavitt*, 46 Mich. 447, 41 Am. Rep. 170.

*Headnotes by RYAN, C.

NOTE.—As to right to recover price of property sold for unlawful use, see *Graves v. Johnson* (Mass.) 15 L. R. A. 834, and *note*.

80 L. R. A.

Ryan, O., filed the following opinion:

This action was brought by the plaintiffs in error, a partnership firm, engaged in the manufacture of beer, to recover of defendant the sum of \$707.06, the price of certain beer alleged to have been furnished by plaintiffs to defendant in the month of June, 1889. By way of counterclaim the defendant alleged that the beer was furnished him by plaintiffs under a written agreement, which required that the plaintiffs should furnish the license necessary under the laws of Nebraska, that plaintiffs had neglected to provide this license, and that, in consequence of such neglect, the defendant had been required to pay the sum of \$1,000 for such license. By reply, the plaintiffs averred that, if the defendant had taken out a license, it was to enable him to sell vinous and spirituous liquors, and not to enable him to perform his contract with the plaintiffs. There was also in the reply this language: "The plaintiffs further allege that there is, and has been since long before September 1, 1888 [the date of a written contract between plaintiffs and defendant], a usage and custom existing and prevailing among brewing companies generally, and particularly in the state of Nebraska, and in the city of Omaha, for each of said brewing companies to operate, in connection with its brewery, a bottling department for the purpose of bottling beer of its own manufacture exclusively; that, under said usage and custom, said bottling department had been conducted under the liquor license issued to the brewery, and through an agent who receives beer from the brewery, at a fixed price, and who operates the bottling department as a part of and in the interest of the said brewery; that the contract referred to in the defendant's answer was entered into by the plaintiffs and the said defendant with knowledge of and with reference to said usage and custom; and that said usage and custom thereby became and are a part of said contract." Upon the trial defendant admitted that he owed plaintiffs the amount claimed, and a verdict was accordingly returned. Thereupon defendant moved for a dismissal of the plaintiffs' action, and for a judgment for costs, for the reason that "the pleadings, upon their face, show that the sales for which plaintiffs sought to recover were made in pursuance of an unlawful contract between the plaintiffs and the defendant, and for the further reason that the contract under which the sales were made contemplated the resale of said beer by the defendant, with the intent and for the purpose, on the part of the said plaintiffs, of enabling the defendant to resell contrary to law." This motion was sustained, and judgment was accordingly rendered against the plaintiffs for costs.

From the fact that the plaintiffs brought suit for the price of the beer agreed upon between themselves and the defendant, it is clear that the defendant was not a mere agent for the sale of the plaintiffs' beer. The petition was framed upon the theory that plaintiffs had sold the defendant the beer for which suit was brought, though the use of the word

"sale" or any equivalent term was avoided. It is equally clear that, as a retail vendor of liquor, the defendant was, by section 25, chap. 50, Comp. Stat., required to pay a license of \$1,000; his place of business being, as it was, in the city of Omaha. By the reply there was alleged a custom, with reference to which the parties litigant had contracted, whereby the obligation to pay the required license was avoided, which arrangement was clearly in violation of the statute above referred to. The plaintiffs, however, insist that, since the defendant had admitted that he had obtained the beer from plaintiffs, and was owing that amount, judgment should have been accordingly rendered. This admission did not amount to a confession of judgment, neither did the verdict thereon returned, restricted, as the jury was, by the instruction of the court that the counterclaim was not by them to be considered. The question whether or not a recovery should be had by one of the two parties to a contract for the violation of a statute still remained open for determination by the court upon the pleadings. Whether or not this question was correctly decided by the court is the only one with which we are concerned. The plaintiffs have cited only one adjudged case which is directly in point, and, as the principle upon which that case proceeds must be far-reaching in its effects, the extent of its recognition, as well as its soundness, will now be considered at some length.

The case referred to is *Manchester & L. R. Co. v. Concord R. Co.* 66 N. H. 100, 9 L. R. A. 689, 8 Inters. Com. Rep. 819, in which there is quoted with approval the following language, found in 2 Morawetz, Priv. Corp. § 731: "If an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party and has failed to perform the agreement on his part must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case. . . . These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received." A review of the authorities cited in support of these propositions does not tend to establish the doctrine announced. It was held, in *White v. Franklin Bank*, 22 Pick. 181, that a suit could be maintained upon an entry in a deposit book made by the defendant's cashier, by which, in effect, the bank became bound to pay at a future time the amount of plaintiff's deposit, because the statute of Massachusetts prohibited banks from assuming such liability. In the opinion we find the following language: "The second objection, and that on which the defendant's counsel principally rely, proceeds on the ad-

mission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *particeps criminis*, no action can be maintained to recover it back. The rule of law is laid down by Lord Kenyon in *Howson v. Hancock*, 8 T. R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on Contracts, will reconcile most of the cases which are apparently conflicting: 'When money has been paid upon an illegal contract, it is a general rule that, if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books, namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and, instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law that the plaintiff should recover.' 2 Comyns, Contr. 109." The inhibition of the statute was with reference to the incurring by the bank of an indebtedness payable at a future day certain. The entry in the deposit book was as follows:

Dr. Franklin Bank Cr.
In account with B. F. White,
1887, Feb. 10th, to cash deposited, \$2,000.
The above deposit to remain until the 10th
day of August. E. F. Bunnell, Cashier.

This entry was held to be within the inhibition of the statute. The party forbidden was the one which violated the provisions of the statute. The depositor was by no means *in pari delicto*. Therefore, he was held entitled to recover the amount of his deposit. This distinction in principle was recognized in *Sacketts Harbor Bank v. Codd*, 18 N. Y. 240, and the liability of the defendant was accordingly adjudged to exist.

The action in *Dill v. Wareham*, 7 Met. 438, was to recover back the sum of \$500, paid by the plaintiff to the town of Wareham for the privilege of taking oysters within the limits. The power of the town to grant the privilege was denied by the statute, and, upon the refusal of the town to allow the privilege paid for, the suit was brought, as indicated. Chief Justice Shaw, in delivering the opinion of the court, said: "In regard to the 30 L. R. A.

sum of \$500, as it appears that it was received by the treasurer and went to the use of the town, and was so received in advance, upon a consideration which has failed, it must be regarded as money had and received by the town to the plaintiff's use; and therefore the action for that sum will lie." In *Episcopal Charitable Soc. v. Episcopal Church*, 1 Pick. 872, a note had been given by the rector and wardens of the church, upon request of the church society, which money had been not only borrowed for, but had been used by, the church society, and it was held that such society was bound to pay the amount so borrowed, even though there existed no direct legal authority in the rector and wardens to bind the church. As will be seen by the title of this case, it was an action by the lender of the money to recover the amount loaned. Hence, the principle laid down by Mr. Morawetz, even if abstractly correct, was not applicable, as it might have been if the rector and wardens, after having paid the note, had sued the church society to recover the amount so paid. The syllabus in *Whitney v. Peay*, 24 Ark. 23, begins with the statement: "The state issued bonds for the use of the Real Estate Bank, the bonds being prohibited by law from being sold for less than the par value thereof." But this proposition cuts no special figure in the case; for, these bonds having been pledged as security for a loan, the sole questions determined were as to the rights and liabilities of the original pledgee and his assignee of the pledge, and of assignee of such assignee, among themselves, as to the respective loans on the property pledged. The court held that the bonds must be returned to the original pledgee upon payment of the amount to secure which, originally, such pledge was made, notwithstanding the fact that, by subsequent pledges of the bonds, a loan of a larger sum had been effected. The recovery of judgment in *Philadelphia Loan Co. v. Towner*, 13 Conn. 249, was for an amount loaned in Pennsylvania. It was held, in this case, that the laws of Pennsylvania should govern, and that, as the charter of plaintiff had provided that "nothing therein contained should be construed to authorize the company to discount notes," the loan of money upon which the interest was reserved in advance constituted a discount, and that therefore no recovery could be had upon the note. The right of the loan company to recover judgment upon another theory, which was recognized by the supreme court of errors of Connecticut, is thus fairly stated in one paragraph of the syllabus: "Where a corporation, having power to sue and be sued, and to loan money under certain restrictions, made a loan, and afterwards took a note as security, in contravention of the provisions of its charter, it was held, in a suit on such note with the money counts, that, although there could be no recovery on the note, the money loaned, with the legal interest, might be recovered on the money counts." This principle was the only one involved in *Vanatta v. State Bank of Ohio*, 9 Ohio St. 27. In *Foulke v. San Diego & G. S. P. R. Co.* 51 Cal. 385, the opinion was very brief, and was correctly summarized in

this language of the syllabus: "The provision in the act concerning railroad corporations, that 'no contract shall be binding on the company unless made in writing,' refers only to contracts wholly executory; but the action against the corporation on such verbal executory contract must be brought upon an implied promise, and the recovery must be limited to the value of the benefit received by the corporation."

The lease of a certain part of a line of railroad was not authorized by the stockholders of the company by which said line was owned, as required by statute, and said lease was therefore held void. Inasmuch as the transaction was not tainted with any immorality, a recovery of just compensation for the use of the road was allowed without reference to the unauthorized lease. *Farmers' Loan & T. Co. v. St. Joseph & D. C. R. Co.* 1 McCrary, 247, 2 Fed. Rep. 117. In *Madison Ave. Baptist Church v. Baptist Church*, 73 N. Y. 83, there had been an attempted union of the two church societies, under an agreement that one should be merged in the other, which should be bound for and pay the debts of both. This was *ultra vires*, but, while the arrangement existed, and was supposed by all parties to be binding, debts were paid by the church supposed to be the sole survivor for the church supposed to have been merged in it. The court of appeals held that, for money so paid, the church whose debt had been thus paid was liable. In *Tracy v. Talmage*, 14 N. Y. 163, 67 Am. Dec. 182, it was held that, although the vendor was a party to the illegal contract, he was not *in pari delicto*, within the rule which forbids the court to grant one party to an illegal contract or transaction relief against the other, and that, where parties to a contract or transaction, not *malum in se*, but prohibited by a statute, are not equally guilty, courts may afford relief to the less guilty party. In *United States Exp. Co. v. Lucas*, 86 Ind. 861, it was held that an agent who had received money for which the company was liable could not, as a defense to an action of the company, his principal, set up that his said principal had failed to file in the proper recorder's office a statement of the capital employed in its business, as required by statute.

From this review of the principal authorities cited to sustain the rules quoted from 2 Morawetz, Priv. Corp. § 721, it is shown to be extremely probable that no court, except such, perhaps, as may have been misled by his statements, has ever enforced the aforesaid principle, laid down by Mr. Morawetz, "that, if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party and has failed to perform the agreement on his part must account to the latter for what has been so received." Equally without judicial sanction is his next proposition, that, "under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should

refuse to grant any relief in the case." The correct rule was quoted from the language of Lord Mansfield, in *Holman v. Johnson*, 1 Cowp. 848, by Eyre, Ch. J., in *Lightfoot v. Tenant*, 1 Bos. & P. 551. This language is as follows: "The objection that a contract is immoral or illegal sounds at all times very ill in the mouth of a defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff,—by accident, if I may so say. The principle of public policy is this, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says, he has no right to be assisted." After this introduction Lord Mansfield stated the question to be "whether the plaintiff's demand is founded upon the ground of any immoral act or contract; or upon the ground of his being guilty of anything which is prohibited by a positive law of this country." These clearly stated principles were recognized and enforced in *Spurgeon v. McElwain*, 6 Ohio, 442, 27 Am. Dec. 266; *Anchor v. Mansel*, 47 Me. 58; *Hubbell v. Flint*, 18 Gray, 277; *Hull v. Ruggles*, 56 N. Y. 424; *Skiff v. Johnson*, 57 N. H. 475; *Aiken v. Blaisdell*, 41 Vt. 655; *Foster v. Thurston*, 11 Cush. 823; *Hooker v. De Palos*, 28 Ohio St. 251; *Ruckman v. Bryan*, 8 Denio, 840; *McKinnell v. Robinson*, 8 Mees. & W. 484; *Mosher v. Griffin*, 51 Ill. 184, 90 Am. Dec. 541; *Raymond v. Leavitt*, 46 Mich. 447, 41 Am. Rep. 170. In *Wilde v. Wilde*, 87 Neb. 891, an action for divorce, the rule was applied that the courts will refuse to enforce contracts which are manifestly contrary to public policy or sound morals. The following language is quoted from *Luce v. Foster*, 42 Neb. 818: "When any portion of the consideration is illegal the promise cannot be enforced unless there are several promises, and that which relates to the bad consideration can be distinguished and separated from the others. In other cases the promise is unenforceable. All the text-writers so state the rule. See, for instance, Wharton, Contr. 839; Anson, Contr. 191; Pollock, Contr. 888. The rule is so well settled that a reference to the adjudications is unnecessary."

The first paragraph of the syllabus of *Gould v. Kendall*, 15 Neb. 549, is as follows: "No court of law or equity will lend its assistance in any way towards carrying out an illegal contract, therefore such a contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it." In the body of the opinion of the case last cited there is an analysis of the case of *Brooks v. Martin*, 69 U. S. 2 Wall. 70, 17 L. ed. 782, which, by the supreme court of New Hampshire, in *Manchester & L. R. Co. v. Concord R. Co.*, *supra*, was cited as a leading case in support of the erroneous doctrine stated

in section 721 of Morawetz on Private Corporations. By this analysis it was clearly shown by Judge Cobb that in the case of *Brooks v. Martin* a recovery was sanctioned, chiefly because, between the parties litigant, there had existed a partnership, and the property of the partnership had been the product of the money furnished by the party who had brought the suit. The discussion of this proposition may be fittingly closed by quoting from the above-mentioned opinion, delivered by Judge Cobb, his quotation from the language of Chief Justice Marshall, in *Armstrong v. Toler*, 24 U. S. 11 Wheat. 268,

6 L. ed. 471, as follows: "Questions upon illegal contracts have arisen very often, both in England and in this country; and no principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." No argument is necessary to illustrate the applicability of the rule just quoted to the facts of this case.

The judgment of the District Court is affirmed.

Irvine, C., did not take part in the determination of this case.

LOUISIANA SUPREME COURT.

Re John D. BELTON

(47 La. Ann. 1614.)

- *1. Though the shares of a corporation, after its creation, may be held by a less number of shareholders than that which the law would have required as a condition precedent to the organization of the same corporation, the corporation continues to exist.
2. Neither the want of officers by reason of failure to elect or by death, nor the burning of the mill which it was the object of a corporation to carry on, will, of itself, work a dissolution of the corporation.
3. The connection of an officer of a corporation with it is one of personal trust, and terminates at his death. The property of the corporation which he had in his possession or custody as such officer does not pass, at his death, into the possession of and under the control and administration of his administrator. The stockholders have the right to insist that corporate property should be placed in the hands and under the control of corporate agencies.
4. Where, the necessary offices of a corporation having all become vacated by the centering of its stock in the hands of two owners and the death of the owner of the majority of the stock, who, at the time of his death, held the principal office of the company, the administrator of this stockholder as such takes possession of all the corporate property, and takes no step looking to a replacement of officers, the remaining stockholder has the right to take judicial action looking to the appointment of a receiver by the court. If upon the trial of a demand for such an appointment it should be shown that corporate officers could not be replaced through corporate agencies, either by reason of the unwillingness or inability of the stockholders to do so, the court would be authorized itself to appoint a receiver. It would not follow that a third person should be selected as such receiver, nor that the representatives of the deceased stockholder would be deprived of the legitimate influence which they should have in the selection as holders of stock.

*Headnotes by NICHOLLS, Ch. J.

NOTE.—As to sole ownership of stock of corporation, see also *Louisville Bkg. Co. v. Eisenman* (Ky.) 19 L. R. A. 684
30 L. R. A.

(November 18, 1895.)

APPEAL by petitioner from a judgment of the Civil District Court for the Parish of Orleans in favor of defendant in a proceeding to obtain the appointment of a receiver of the Edna Rice Mill Company. *Reversed.*

The facts are stated in the opinion.

Messrs. Fenner, Henderson, & Fenner for appellant.

Mr. Henry Denis, for appellee:

The principal grounds upon which courts of equity grant their extraordinary aid by the appointment of receivers *pendente lite* are that the person seeking the relief has shown at least a probable interest in the property, and that there is danger of its being lost unless a receiver is allowed, the element of danger being an important consideration in the case. And a remote or past danger will not suffice as a ground for the relief, but there must be a well-grounded apprehension of immediate injury.

High, Receivers, § 11.

And, secondly, it must appear that possession of the property was obtained by defendant through fraud; or that the property itself, or the income from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.

Courts have no power to appoint a receiver *ex parte* without notice or hearing of the party in interest, and unless a basis for the appointment is alleged and proved.

State v. New Orleans, 43 La. Ann. 829; High, Receivers, §§ 17, 111, 115; *Frazier v. Wilcox*, 4 Rob. (La.) 517; *Martin v. Blanchin*, 16 La. Ann. 287; *Malady v. Malady*, 26 La. Ann. 488; *Baker v. Louisiana Portable R. Co.* 84 La. Ann. 754; *French v. Gifford*, 80 Iowa, 148; *Hedges v. Paquet*, 8 Or. 77; *Stark v. Burke*, 5 La. Ann. 740; *New Orleans Gaslight Co. v. Bennett*, 6 La. Ann. 456; *Brown v. Union Ins. Co.* 8 La. Ann. 182.

Plaintiff is not entitled to the appointment of a receiver in case of his own laches.

At the extinction of a corporation, its property vests in the stockholders, who thereby become joint owners of the same.

Citizens' Bank v. Levee Steam Cotton Press Co. 7 La. Ann. 287; *Stark v. Burke*, 5 La. Ann. 741.

Nicholls, Ch. J., delivered the opinion of the court:

In his petition in this case plaintiff alleged that he was a stockholder and creditor of the Edna Rice Mill Company, a corporation organized under the laws of this state; that it was organized about the 5th of January, 1890, by act before Raymond S. Clark, clerk of court and *ex officio* notary of the parish of Acadia; that in pursuance of the objects expressed in its charter the corporation erected an improved rice mill at Mermentau station, in the parish of Acadia, which it successfully operated for a period of about two years, when, on or about the 15th of January, the rice mill and plant were totally destroyed by fire; that at the time of the said fire the only stockholders of the corporation were Joseph Menge, who was the secretary and treasurer, William A. Reese, who was chairman of the finance committee, and petitioner, who was superintendent; that on or about the 24th of January, 1894, the said Joseph Menge died, and that the said William A. Reese has disposed of his stock to the succession of the said Menge; that after the destruction of the mill and plant as aforesaid various suits were instituted by the corporation against various insurance companies upon policies of fire insurance upon their property held by the corporation, which were pending and undetermined at the time of the death of the said Menge; that, after his death, his wife, Mrs. Ada Menge, as tutrix of her minor children and administratrix of his succession, assumed the administration of the affairs of the corporation generally, and the direction of the said suits in particular; that since that time she has continued and is continuing her administration of the affairs of said corporation generally, and the direction of the said suits in particular, has compromised the suits against the insurance companies, and has received from them sums aggregating more than \$15,000 in settlement of their indebtedness to the said corporation; that he is informed and alleges that she has collected other assets belonging to the said corporation, all of which she has and retains in her possession and under her control; that in all these matters the said Mrs. Menge has acted entirely without legal right, and in her administration of the corporation's affairs is and has been a mere *negotiorum gestor*; that her assumption of the administration of the affairs of the said corporation and her appropriation of all its assets was and is a flagrant trespass upon the rights of the petitioner, who is a stockholder and creditor of the same, and who, as such, is entitled to require that its affairs shall be properly administered; that the said corporation is now hopelessly derelict, the only stockholders being petitioner and the succession of the late Joseph Menge, represented by Mrs. Ida Menge, as aforesaid; that, besides being a stockholder, petitioner is also a creditor in a large amount; that there are various other creditors unpaid; that to the end that he may be enabled to assert his rights as a stockholder and creditor he desires that a receiver should be appointed by the court in accordance with law and the rights of all interested parties;

and that he suggests as a disinterested and suitable person for appointment as receiver George W. Nott, of the city of New Orleans. In view of the premises, he prayed that Mrs. Ida Menge, personally and as tutrix of her minor children and administratrix of her husband's succession, be cited; that after due proceedings there be judgment in his favor, appointing George W. Nott receiver and liquidator of the Edna Rice Mill Company, upon such condition as the court might fix, with power and authority as such to reduce to possession all of its assets, to pay its debts, and generally to do everything which may be necessary to properly wind up its affairs; and for general relief. Defendant, in her capacity as widow in community of the late Joseph Menge and natural tutrix of the minor children, issue of her marriage with said deceased, excepted to the demand upon the ground that the petition disclosed no legal cause of action, and she prayed that the demand be dismissed, but, in the event the exception be overruled, then she averred that plaintiff's petition was too vague and indefinite for her to answer the same, and she prayed that he be ordered to amend it, and aver how many shares of the capital stock of the Edna Rice Mill Company he claimed to own, and how and from whom and for what consideration he became the owner of the same; and also that he should aver for what amount he claimed to be a creditor of said company, and for what causes he claimed to be such; and that, in default of his filing his amended petition within a time to be fixed by the court, the suit be dismissed. The court, considering the exception of no cause of action well taken, sustained the same, dismissed the suit, and plaintiff appealed.

In the brief filed in this court plaintiff declares that, having been unable to effect any satisfactory settlement of his rights with Mrs. Menge, who has arrogated to herself all the rights and powers of the corporate body, he has brought this suit for the appointment of a disinterested third person as receiver and for a judicial settlement of the affairs of the corporation, which is hopelessly derelict, with no officers or duly-qualified representatives. He calls our attention to the form of the proceeding as not being an application for the appointment of a receiver on *ex parte* affidavits, but a demand contemplating a trial upon the merits, and a full opportunity for both parties to be heard. He declares that the power of the state courts to appoint receivers in proper cases has been clearly recognized, and that the only question before the court is whether the petition sets out a proper case for the exercise of its power or jurisdiction. He says it is the case of a corporation utterly derelict, with no officers or representatives authorized to take charge of its affairs; that there is no attempt here to divest the properly and legally constituted officers of a corporation of the control of its property and affairs; that it is a corporation without officers; that the administratrix of a deceased stockholder has assumed the administration of its affairs without any further right or authorization than

may be implied from the fact that she represents the heirs of her deceased husband, who was a stockholder; that he objects to the exclusive administration assumed by the defendant, and demands a judicial settlement of the corporate affairs, to the end that his rights as a stockholder and creditor, which are denied by the defendant, and those of other interested parties, may be regularly ascertained and protected. He claims that the appointment of a receiver is a matter which rests largely in the discretion of the court, and that this discretion can be intelligently exercised only after a trial upon the merits, when the court will have been put in possession of all the facts. The defendant resists the application. In her brief she calls our attention to the fact that, while plaintiff avers that there are various other creditors unpaid, plaintiff does not say who they are, nor what is due them, nor that they have made any complaint in the premises, nor that they join him in his application, or approve of his action; that he does not aver that the property or assets of the company are abandoned, and exposed thereby to loss or damage, but, on the contrary, says that they are under the administration and in the possession of the defendant; that he does not aver that her administration is bad or negligent or fraudulent; that he does not aver that he is exposed to any danger, immediate or remote, of loss or injury from her administration; that he does not aver that she has excluded him from a participation in such possession and administration, nor that he has made a demand upon her for such participation, nor that he has objected to or remonstrated against her administration and possession; that he does not aver that he has made a demand upon her for payment of his debt, or that she refuses to acknowledge it or pay it; that he does not aver that the corporation is insolvent; that the averment that the company is derelict is nullified by the averment that defendant administers its affairs as a *negotiorum gestor*; that defendant, in the interest of all parties concerned, took charge of the affairs of the company, as plaintiff (from his own showing an officer and director of the corporation), abandoned the care and management of it, having taken no care to protect its assets, from Joseph Menge's death, on the 26th of April, 1894, to the institution of this suit on the 12th of October, 1894; that plaintiff has been guilty of laches, and brought about the condition complained of, and has no legal right to apply for a receiver under such circumstances. She further asserts that plaintiff's petition discloses the fact that the corporation of the Edna Rice Mill Company is extinct, inasmuch as the number of its incorporators is reduced to two, and a corporation cannot be composed of less than three persons; that at the extinction of a corporation its property vests in the stockholders, who thereby become joint owners of the same; that therefore, on the face of the petition, plaintiff and defendant are simply joint owners of undivided property, each one having a right to hold and possess it until a partition takes place; that the right of the parties in such cases is to demand the partition of

the common property, and, if necessary, the sequestration of it *pendente lite*, but not the delivering of it into the hands of a receiver; that it is doubtful whether a receiver may be appointed in Louisiana as an incident to a partition suit, but that, in the absence of a partition suit, as a mode of dividing the property and settling the rights and interests of the joint owners between themselves, there being no creditors demanding it, no such appointment can be made. The plaintiff replies that the question of laches *vel non* cannot be raised on the trial of an exception of no cause of action; that such an issue could only be raised and determined on a trial upon the merits and evidence adduced; that it is true that the act under which the corporation was organized requires that there be originally at least three stockholders, and he is not prepared to say what might be the effect in such a case of the subsequent reduction of the number of stockholders to two, in so far as the right to continue business as a corporation is concerned, but that *quoad* its liquidation and the rights of stockholders and creditors the corporation does still exist; that the defendant, by purchasing the interest of the third stockholder, could not have affected the rights of the plaintiff as a stockholder; that the relations between the parties are exactly what they were constituted in the charter to which both subscribed; they are both stockholders in a corporation, and the assets are corporate assets, and are to be distributed as such.

The contention of the defendant that the Edna Rice Mill Company has been dissolved that by reason of that fact the property of the corporation has resolved itself into property held in joint ownership between the stockholders; that the present situation is that of certain joint property in the custody and possession of one of the joint owners, who is entitled to hold possession of the same as joint owner under the rules applicable to that kind of property, and subject alone to an action of partition,—is not tenable. If his premise that the corporation is dissolved were true, it might be that his conclusions would be correct. Possibly article 474 of the Civil Code may countenance that pretension; and true it is, in an *obiter* in the case of *Stark v. Burke*, 5 La. Ann. 741, the organ of this court declared that "by the civil law, on the dissolution of corporations of the class therein the subject of litigation, the property of the corporation belonged to its members, and must be divided among them;" but his premise is not true, and the result which he sets up as following therefrom has not arisen in this case. If it be true that by the mere centering of the stock of a corporation in the hands of two stockholders—a less number than the number of stockholders required as a condition precedent to the creation of the corporation—the corporation is dissolved *ipso facto*, and the property at once changes from corporate property to individual property held in joint ownership between the two, then the purchase by a single person of all the stock of a corporation would also dissolve it, and convert its property into the individual property of the single stockholder, subject to

be disposed of by him at will as such. That is not true. After a corporation has been formed our law in express terms declares that it is "an intellectual being, different and distinct from all the persons who compose it (Civ. Code, art. 485); that the estate and rights of a corporation belong to completely to the body that none of the individuals who compose it can dispose of any part of them. In this respect the thing belonging to a body is very different from a thing which is common to several individuals as respects the share which every one has in the partnership which exists between them." Article 486. "What is due to a corporation is not due to any of the individuals who compose it, and *vice versa*." Article 487. The rights and obligations of parties would be confounded and thrown into confusion by adopting the rule which defendant contends for. In Green's second edition of Brice's *Ultra Vires* (page 795), in a note, it is said: "A private corporation does not become dormant, or forfeit its franchises, because a single individual becomes, by purchase of the stock, sole owner of the corporate property and franchises, and if such sole owner continues the business under the corporate name, without notice to the public, he may be sued as such corporation. *Newton Mfg. Co. v. White*, 42 Ga. 148; *Cook v. Kent*, 105 Mass. 246." In Morawetz on Private Corporations (sec. 1009) the author says: "The decease of all the shareholders in such a corporation therefore does not terminate its existence; and it is well settled that all the shares in a corporation may be held by a single person, and yet the corporation continue to exist; and if the charter or by-laws should require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons, so as to conform to the letter of the rule." In support of this proposition he cites the aforementioned case of *Newton Mfg. Co. v. White*, *supra*; *Russell v. M' Lellan*, 14 Pick. 69, 70; and *Baldwin v. Canfield*, 26 Minn. 43. See *Fitzgerald v. Missouri P. R. Co.* 45 Fed. Rep. 819. It has been held that the owner of all the stock of a corporation is not authorized to pledge the property of the corporation to the prejudice of its creditors. *Stewart v. Gould*, 8 Wash. 367. In a note on the same page of Brice's *Ultra Vires* it is stated that the want of the proper officers by reason of failure to elect or by death does not cause dissolution, though the exercise of the

powers of the corporation may be thereby suspended, and that mere insolvency, proceedings in insolvency, the appointment of a receiver, or nonuser of the powers granted, does not of itself work dissolution. The authorities cited in support of these propositions are too numerous to be specially referred to. We are of the opinion that the Edna Rice Mill Company has not been dissolved, and that we must deal with its affairs as an existing company.

When Menge, the secretary and treasurer of that company, died, the position which he held, being a personal trust, did not pass to or devolve upon his administratrix, but became vacant, subject to replacement. The corporate property at his death did not pass under the control of the administratrix of the succession of Menge as such. The plaintiff has the undoubted right to insist that it be placed in the hands of some corporate agency. The situation either admits of this being done extrajudicially by the stockholders, and through methods provided for by the charter, or it does not. If it be possible to place corporate matters in the hands of corporate agencies selected by the stockholders themselves, and defendant has the means of bringing this about legally outside of any action by the court, she ought to avail herself of that power, and bring that result about; but, should she be either unable or unwilling to do so, she cannot insist that matters should remain as they are forever. We think plaintiff has made a sufficient showing to entitle himself to a hearing upon the merits. We cannot tell whether, when the case goes to trial, the situation at that time will be of such a character as to call for the exercise of the court's action in appointing a receiver. If the court should be called on to make such an appointment, it by no means follows that a third person will be appointed, or that the succession of Menge will be deprived of exercising the legitimate influence to which it will be entitled as a stockholder in the corporation. The allegations of the petition might have been in some respects more specific than they are, but they are sufficiently so to throw the whole case open to inquiry.

The judgment appealed from is hereby annulled, avoided, and reversed, and the cause is remanded for further proceedings according to law; costs to await the decision of the lower court.

Rehearing refused.

NEW YORK COURT OF APPEALS.

Richard W. EVANS *et al.*, *Repts.*,

KEYSTONE GAS COMPANY, *Appt.*

(148 N. Y. 112.)

1. The coincidence of the decay and death of vegetation with the existence

NOTE.—For liability for escape and explosion of gas, see *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337.
30 L. R. A.

of the leakage of a large amount of gas after the laying of a new main and until its recalking, and the fact of the healthy growth after the recalking, will sustain a conclusion by the jury that the escape of the gas was the cause of the injury.

2. The injury to shade trees by the escape of natural gas carelessly suffered to escape from a gas main in an adjoining street renders the gas company liable to the owner for the damage.

3. Damages to shade trees are measured

by the difference between the value of the land before and after the injury.

4. Testimony as to the value of shade trees is not admissible on the question of damages for their destruction, as the damages are measured by the depreciation of the value of the land.

5. An objection that evidence was incompetent on the question of damages cannot be made for the first time on appeal, where the objections in the court below were merely to the competency of the witnesses and as to the materiality of the evidence at that stage of the case.

(December 12, 1885.)

APPPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment of the Cattaraugus County Circuit in favor of plaintiffs in an action brought to recover the value of shade trees alleged to have been destroyed by gas which defendant had negligently allowed to escape from its mains. *Affirmed.*

The facts are stated in the opinion.
Messrs. Carey, Rumsey, & Hastings,
for appellant:

Defendant's main line was properly constructed. It was repaired whenever found necessary. It was carefully watched. Defendant had employees whose special duty it was to watch and repair. In other words, the defendant was guilty of no negligence in connection with the operation of this line.

Hunt v. Lowell Gaslight Co. 1 Allen, 843.

Defendant's lines extended through nearly all the streets in Olean, and were constructed through First street in 1831. It had a right so to do.

Milhou v. Sharp, 15 Barb. 210; *People v. Kerr*, 27 N. Y. 202.

Evans was permitted to state, under objection, the condition of trees between his place and Sullivan street, which extended a distance of 800 feet.

Sixth Avenue R. Co. v. Metropolitan Elec. R. Co. 56 Hun, 182.

Mr. Fred L. Eaton, for respondents:

The new trees that were reset were not involved in the general and total value of the real estate, as would be the case with trees of a number of years' growth, and to replace which would be practically impossible and their value would not be the measure of damages.

Whitbeck v. New York C. R. Co. 36 Barb. 644; *Dwight v. Elmira, C. & N. R. Co.* 132 N. Y. 199, 15 L. R. A. 612.

Gray, J., delivered the opinion of the court:

This action was brought to recover damages of the defendant for the injury caused to shade trees belonging to the plaintiff, by the escape of natural gas from a main or pipe laid along the street bounding his premises. The negligence charged is that the gas main was so carelessly laid, constructed, and maintained as to permit the escape of the gas in large quantities and to cause the death of the trees. Upon the trial it appeared that there were three large maple trees in front of the premises, of a diameter 30 L. R. A.

ranging from 12 to 16 inches, which shaded the west end of the plaintiff's house and plot.

Plaintiff testified that after he commenced to reside upon the premises in question, the defendant constructed this new line for the purpose of conveying natural gas, and that, thereafter, there was a perceptible and constant escape of gas in large quantities, until the pipes were taken up and calked. He described the decay and death of his grass and trees in successive years, during the time, and how, after the calking of the gas line, he reset trees, which lived and grew.

He also testified to the effect of natural gas upon the surrounding earth in depriving it of moisture. Other witnesses corroborated him with respect to the leakage of gas, the death of trees and vegetation during the time, and the dry condition of the soil near the places where the leakages were perceptible. As against this evidence the defendant sought to show that the leaks were insignificant; that the dryness of the earth about them was confined to a small area and that the plaintiff's branch pipe and lamp post were out of repair and permitted the escape of gas. The defendant gave evidence that its line was properly constructed and kept in repair and that it had not been negligent in connection with the operation of its business. Without commenting at length upon the evidence, we feel constrained to hold that whatever the doubt which arises in the mind, as to the certainty of the loss of the shade trees being due to the leakage of gas from the defendant's main, there was enough in the facts and circumstances of the case to support the verdict which the jury rendered. It may not be altogether satisfactory; but we cannot say, as matter of law, that the injury to the plaintiff's place was not due to the causes described. The evidence was conflicting upon that question, as it was upon the condition of defendant's pipes, and permitted of opposing inferences by the jury. Their verdict cannot be said to rest upon mere surmise; for they had facts testified to, which, if they believed, would account for plaintiff's loss of his trees as he charged it to be. If we could see that the verdict could only have been reached by conjecture, we should not hesitate to reverse the judgment, upon the exception of defendant to the refusal to direct a verdict in its favor. The evidence rises to a higher level than that of speculation. The coincidence of the decay and death of vegetation with the existence of the leakage of a large amount of gas, after the laying of the new main and until its recalking, and the fact of a healthful growth after the recalking, could be regarded by the jury, in view of all the evidence, as leading to the conclusion that the effect of the natural gas escaping in the earth and in the atmosphere was to cause the occurrences complained of.

Doubtless the defendant was lawfully in the street; but it was bound to use its rights and to conduct its operations so as not to inflict injury upon neighboring property. If we admit the possibility of an inference from the evidence that the injury to plaintiff's property was from the causes alleged, there

is no difficulty in sustaining the recovery upon the principle of law above alluded to.

The appellant says that errors were committed upon the trial, for which the judgment should be reversed. The plaintiff was permitted to testify as to the condition of trees upon the street beyond his place, after the construction of the defendant's gas line. The objection, now insisted upon, was after the answer of the witness and went to the materiality of the evidence; but, overlooking the question of practice, we have no doubt of the admissibility of the evidence. The issue turned upon the question of whether the escaping gas would account for the injury to plaintiff's trees, and any evidence showing or tending to show that trees in the immediate vicinity were similarly and simultaneously affected was competent. The two points for the jury to be convinced upon were: Was natural gas carelessly suffered to escape from the gas main? and, Was it the procuring cause of the destruction of vitality in vegetation? Whatever testimony bore upon these questions was admissible and tended to elucidate the matter for consideration.

The witness was asked to state the value of the trees in question. The objection was as to the competency of the witness to testify on that subject and as to the materiality of the evidence "at this stage of the case." The argument now is that the evidence was incompetent on the question of the damage. That is true, and the rule in such a case as this is the difference between the value of the land before and after the injury. This rule was lately examined in the light of the authorities by the second division of this court, in *Dwight v. Elmira, C. & N. R. Co.* 182 N. Y. 199, 15 L. R. A. 612, and was there approved of. The court in that case held it applicable to the case of a loss of shade or of fruit trees, and held the principle of recovery to be the damage to the realty, if any, occasioned by the removal of the trees. But the objection argued was not based upon that ground; nor was it in the slightest degree suggested. The witness, with a remarkable appreciation of the rule which governed his case, did not, at first, answer as interrogated; but responded that he would consider his place worth \$1,500 more than it is; obviously having in mind its value with the trees as they were. When again requested to give the value of the trees, no objection was made, and then he answered responsively to the question. Subsequently, witnesses competent to speak upon the subject gave evidence as to the value of the plaintiff's lands before the decay or death of the trees and as to its value upon the assumption of the trees being decayed or dead; thus conforming the case to the proper rule, and the trial judge also so charged.

We see no justification for interfering with the recovery, and the judgment of the General Term should be affirmed, with costs.

All concur, except Haight, J., not sitting.

30 L. R. A.

Daniel SCHMEER, Admr., etc., of Daniel Schmeer, Jr., Deceased, Appt.,
v.

GASLIGHT COMPANY of Syracuse, Impleaded, etc., Resp't

(147 N. Y. 529.)

1. A gas company before turning on, or permitting to be turned on, gas for the benefit of tenants in an apartment house who have applied for it, must use reasonable precautions to ascertain that the pipes in the building are in such condition that the gas will not flow out into the apartments of tenants who have not applied for it, to their injury.

2. The question is for the jury whether or not a gas company, before permitting gas to be turned on for the benefit of some of the tenants of an apartment house, used reasonable precautions to ascertain that no harm would thereby result to other tenants who had not applied for it by the gas escaping into their rooms.

3. Notice of intention to turn on the gas, and request to inspect the condition of the pipes in an apartment house, cannot be insisted upon by a gas company as a prerequisite to its duty to make such inspection if it has adopted the custom of permitting any one to turn the gas into a building after plans of the piping have been furnished to it, and has provided a meter.

4. A gas company cannot deny its liability for injuries resulting from failure to use reasonable precautions before turning gas into an apartment building to see that injury should not result from the escape of gas into the rooms of tenants not applying for it, on the ground that it had no right to enter upon the premises for the purpose of making an inspection.

5. The duty imposed on a gas company, of supplying gas to applicants, includes the duty, when the proper connections have been made and a meter furnished, of turning on the gas when applied to for that purpose.

6. A gas company cannot be held liable for the act of a stranger in turning gas into the pipes of a building without its knowledge or request.

7. Whether or not it is negligence for a boy eighteen years old to take a lighted candle to search for a leak in gas pipes is a question for the jury, to be considered in the light of all the circumstances of the case.

(November 23, 1895.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Onondaga County Circuit dismissing the complaint in an action brought to recover for the alleged negligent killing of plaintiff's intestate. *Reversed.*

Statement by Peckham, J.:

This action is brought to recover damages for the death of plaintiff's son from an ex-

NOTE.—For note as to the liability for negligence in the escape and explosion of gas, see *Ohio Gas Fuel Co. v. Andrews* (Ohio) 29 L. R. A. 337.

plosion of gas in the building in which the plaintiff had an apartment, such explosion having occurred, as is alleged, by reason of the negligence of the defendants in permitting the gas to flow into the building without first properly testing the pipes. The answer denied any negligence on the part of the company, and set up as a further defense the contributory negligence of the deceased. The plaintiff was nonsuited at the trial, and the general term affirmed the nonsuit, and the plaintiff appeals here. The defendant is a manufacturer of gas in the city of Syracuse, and furnishes the same to all inhabitants of the city desirous of using it. The gas is supplied in the usual way, by means of mains laid underground in the streets, and connecting by means of service pipes with the different structures in which the gas is consumed. The company lays and owns the street mains and the service pipe therefrom to the inside of the cellar or basement of the buildings to be supplied. The service pipe is left by the company unconnected with the piping in a building, and the gas is prevented from flowing into it by means of a stopcock placed in the service pipe a short distance inside the curb at the side of the street. It has been the custom of this company to permit this service pipe to be connected with the piping in a building by the owner thereof as soon as he has made application to the company to become a consumer of the gas and after it has supplied him with a meter, and such connection has been customarily made by a gas fitter employed for that purpose by the owner, and without giving any notice thereof to the company. In the spring of 1889 one George Young had completed the erection of a three-story brick building on the west side of North Salina street, in the city of Syracuse. The building was divided into stores on the ground floor, and into separate and independent apartments or flats above. There was one double and one single store, and there were three flats upon each of the floors above the stores. The double store had been rented by the owner to a firm named Vinney & Krause, while the single store had been rented to the plaintiff for a confectionery shop, and the plaintiff had also rented one of the flats in the second story for his family. Two of the flats on the third floor, and immediately above the flat occupied by the plaintiff, were occupied by the families of two women, — Mrs. Ripple and Mrs. Bordner. The plaintiff moved into the building April 19, 1889, and the other tenants were moving in about the same time. The accident occurred that same evening. The whole building was equipped with gas pipes, but so arranged that each store and flat could be supplied with gas through a separate and independent meter.

Upon the application of the owner, made about the 29th of March, 1889, the company put in the service pipe, extending into the cellar of the building through the cellar wall. The gas was excluded by means of the stopcock near the curb at the sidewalk. On the 10th of April one Steingriebe, who occupied one of the three flats on the third story, applied for a meter for his flat by sign-

ing an order book at the office of the company. Vinney & Krause, the tenants of the double store, had also, and about the same time, applied for a meter. The meters had in both cases been refused by the company until proper plans of the piping were furnished. These plans were subsequently furnished and the meters were then delivered. The gas was subsequently turned on by one of the gas fitters or his employee and without notice to, or knowledge on the part of, the gas company. It had been the practice of the company for many years in Syracuse to accept and rely upon these plans, when furnished, the same as if they were a certificate by the gas fitter or plumber putting in the piping that such piping was then complete, tested, and ready to receive gas, the company itself not making any examination. It did not itself connect the meters with the piping in a house, nor itself, and directly through its own agents and employees, see to the turning on of the gas from the street mains, through the service pipe, into the building. Those who applied for the meters engaged such persons as they chose to do this work. After the meters had been supplied to this building, they were connected with the service pipe by the employees of the owner or tenants, who engaged them for the purpose. There was customarily no objection made by defendant to the turning on of the gas from the street main after the person wishing to use the gas had applied for the same to defendant and been furnished by it with a meter. The defendant, by furnishing the meter, thereby consented to the turning on of the gas by any one. In this case the defendant relied on the certificate spoken of as to the condition of the pipes. In truth, the piping in the upper hallways had not been properly attended to before the gas was let into the building by one of the employees of the plumber or gas fitter who was engaged to attach the meter to the service pipe by one of the tenants. The ends of the pipes in the third-story hallway had not been plugged, and hence the moment the gas was turned on in the street it went, in addition to the store where it was wanted, up through the other pipes into the hallway of the third story, and escaped therefrom into that hall. The only opening at which the gas could escape was in the hallway. The hallway was also the only means of access which the tenants had to their respective flats from the street entrance. The two women tenants had not applied to the company to be furnished with gas, and did not intend to use the same in their apartments. They were using oil for illuminating purposes. After the gas had been turned on from the street on the evening in question by some one not in any way connected with the company, and some time between half after 8 and 9 o'clock, the smell of gas became noticeable in the hallway mentioned. The plaintiff's son, a young man about eighteen years of age, was in the apartment hired by his father, reading, when he heard the voices of the women, and, going out into the second-story hallway, asked them what was the matter. There was then no smell of gas in the plaintiff's apartment.

The boy was told of the escaping gas somewhere, and so he went upstairs to the third story, and said he would try and discover the location of the leak, and stop it until morning, and proposed to take a lamp. Mrs. Bordner, one of the tenants, said she thought a lamp would be dangerous, to which the boy assented, and then said he would take a candle, as he had seen plumbers use a candle to find a leak. He therefore procured one, and had it lighted, and went to a pipe in the side wall in the third story, and applied the flame to the cap of the pipe and around it, and said: "That is all right." Walking to the end of the hall, he had partly got upon a barrel lying there, when an explosion occurred, which injured the boy so that he soon thereafter died. Gas fitters do in fact use torches and candles upon some occasions in testing or searching for leaks in gas pipes. Believing that the gas company had been guilty of negligence in causing the death of plaintiff's intestate under the circumstances herein stated, the plaintiff brought this action to recover damages on account thereof.

Mr. Louis Marshall, for appellant:

The court should have submitted to the jury the question as to whether the defendant was negligent in suffering gas to be turned into a new building, which, as it was aware, was divided into different dwellings, occupied by different tenants, part of whom only desired to use such gas, without satisfying itself, by an inspection of the premises, or otherwise, that its gas could be safely admitted into the building, or without adopting and insisting upon obedience to rules with respect thereto which would have properly regulated the introduction of gas under such circumstances.

The defendant had the power to make prudent regulations relative to the business conducted by it.

8 Rev. Stat. 8th ed. pp. 2080, 2081, §§ 6-8; *Ferguson v. Metropolitan Gaslight Co.* 87 How. Pr. 189.

The gas which caused the explosion was the defendant's property at the time of the explosion.

8 Am. & Eng. Enc. Law, title, *Gas Companies*, p. 1287; *Reg. v. White*, 20 Eng. L. & Eq. 585; *Queen v. Firth*, L. R. 10 C. C. 173.

The invasion of defendant's gas into the premises of Mrs. Ripple and Mrs. Bordner constituted a trespass.

Van Loven v. Lyke, 1 N. Y. 515, 49 Am. Dec. 846; *Hoy v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Marsh v. Hand*, 120 N. Y. 819; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L. R. A. 711; *Ellis v. Loftus Iron Co.* L. R. 10 C. P. Div. 10.

If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbors, he does so at his peril; and if it does escape and causes damage he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

Rylands v. Fletcher, L. R. 8 H. L. Cas. 330.

It is not necessary to support the plaintiff's right to recover, to impose upon the defendant any obligation other than that of exercising 30 L. R. A.

reasonable care in the management of its dangerous property.

Dixon v. Belle, 5 Maule & S. 198; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Crownhurst v. Amersham Burial Board*, L. R. 4 Exch. Div. 5; *Firth v. Bowling Iron Co.* L. R. 8 C. P. Div. 254; *Henry v. Dennis*, 98 Ind. 452; *Smith*, Neg. p. 109.

Gas companies are bound to exercise the very greatest care, for they are using a material difficult to manage, and of a very dangerous character in many ways, for it is at once explosive and poisonous, and, not unreasonably, these companies are bound in heavy penalties by their acts to exercise the greatest care, and even to become in some sense insurers.

Hipkins v. Birmingham & S. Gaslight Co. 6 Hurlst. & N. 250; *Blenkiron v. Great Central Gas Consumers Co.* 2 Fost. & F. 440; *Moss v. Hastings & St. L. Gas Co.* 4 Fost. & F. 324; *Burrows v. March Gas & O. Co.* L. R. 5 Exch. 67, L. R. 7 Exch. 96, 41 L. J. Exch. 46; *Lannen v. Albany Gas Light Co.* 46 Barb. 264, affirmed, 44 N. Y. 459; *Parry v. Smith*, L. R. 4 C. P. Div. 325, 48 L. J. C. P. 781; *Butcher v. Providence Gas Co.* 12 R. I. 149, 84 Am. Rep. 626; *Pollock, Torts*, *411, 413; *Chisholm v. Atlanta Gaslight Co.* 57 Ga. 28; *Kinnaird v. Standard Oil Co.* 89 Ky. 468, 7 L. R. A. 451; *Kennedy v. Ryall*, 67 N. Y. 379.

The failure to promulgate and enforce rules calculated to avoid the occurrence of accidents like that now considered, presented a state of facts which warranted a finding of negligence.

Abel v. Delaware & H. Canal Co. 108 N. Y. 681, 128 N. Y. 662; *Sheehan v. New York C. & H. R. R. Co.* 91 N. Y. 882; *Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 582; *Warn v. New York C. & H. R. R. Co.* 80 Hun, 71; *Coppins v. New York C. & H. R. R. Co.* 122 N. Y. 557; *Whittaker v. Delaware & H. Canal Co.* 126 N. Y. 544.

Whether the deceased was, under all the circumstances, guilty of contributory negligence, was also a question for the jury.

Ribels v. Philadelphia, 105 Pa. 41; *Nichols v. Brush & D. Mfg. Co.* 58 Hun, 137, affirmed, 117 N. Y. 646; *Lee v. Troy Citizens' Gaslight Co.* 98 N. Y. 117; *Lanigan v. New York Gaslight Co.* 71 N. Y. 80; *Bartlett v. Boston Gaslight Co.* 122 Mass. 209.

Mr. Edwin Nottingham, for respondent:

The mere implied permission to plumbers and gas fitters acting under the direction and control of owners and occupants of buildings, to turn on respondent's gas to the same, cannot possibly create the relation of agency between the respondent and the plumber or gas fitter, or owner or occupant.

Flint v. Gloucester Gaslight Co. 3 Allen, 343; *Fisher v. Schiller Lodge*, 50 Iowa, 459.

The respondent discharged its full duty when it confined its gas to its own receptacles, and prevented its escape therefrom to the injury of others, at the same time allowing consumers to take the gas from its receptacles into their own as they had occasion to use it.

The statute required the respondent to put in the service pipe and supply gas to this building.

Laws 1859, chap. 811, § 6; *Meters v. Metropolitan Gaslight Co.* 14 N. Y. Week. Dig. 522.

The intestate was guilty of negligence which contributed to his death, and it must be so held as a matter of law.

Langan v. New York Gaslight Co. 71 N. Y. 29; *Cummins v. Syracuse*, 100 N. Y. 687; *Wendell v. New York O. & H. R. R. Co.* 91 N. Y. 421; *Hins v. Starin*, 46 Hun. 527; *Pruell v. New York O. & H. R. R. Co.* 109 N. Y. 613; *Young v. New York, L. E. & W. R. Co.* 107 N. Y. 501; *Williams v. Delaware, L. & W. R. Co.* 116 N. Y. 629; *Splitter v. State*, 108 N. Y. 206; *Donnelly v. Brooklyn City R. Co.* 109 N. Y. 17; *Smith v. New York O. & H. R. R. Co.* 88 Hun. 38; *Beck v. East River Ferry Co.* 6 Robt. 88; *Davenport v. Brooklyn City R. Co.* 100 N. Y. 632; *Flood v. Buffalo, N. Y. & P. R. Co.* 23 N. Y. Week. Dig. 501; *Motel v. Sixth Ave. R. Co.* 2 How. Pr. N. S. 30; *Robertson v. New York*, 7 Misc. 645; *Wisniewski v. Lake Shore & M. S. R. Co.* 124 N. Y. 420.

Peckham, J., delivered the opinion of the court:

We think it was error to nonsuit the plaintiff upon this proof. There was, in our judgment, a question for the jury to determine; the question being whether, upon all the evidence, the defendant company had been guilty of negligence which caused the death of the deceased youth. A portion of the gas which escaped through the pipes in the third-story hall found its way into the premises of the women tenants, and occasioned them annoyance from its odor. The deceased, upon hearing of the difficulty, and in order to aid the two women in its removal, endeavored to find the location of the leak; for the purpose of stopping it with some temporary means until the next day. He was acting in their behalf, and for their benefit, although the means he used were his own. The women were not consumers of the gas, and had made no application to the company to be supplied with it, and its presence in the hall and in their apartments was most obnoxious to them, and, if continued, might, of course, soon have become very dangerous. The question which should have been left to the jury was whether the company had failed to use such reasonable precautions as might properly be exacted of it before turning on the gas, or permitting it to be turned on by some third person. The company, in some respects, occupied the position of a public corporation. It was by statute bound to furnish gas upon the written application of the owner or occupant of any building or premises within 100 feet of any main laid down by it, subject to such just and proper regulations as it might adopt as a means of securing payment for its gas and safety in its supply. It manufactured and furnished an agent for illuminating purposes which might become a most dangerous one, liable to explode, and to injure human beings and property. While this gas remained on the premises of the manufacturer, or while it was being conducted through its own pipes to different parts of the city, there can be no doubt that the company was bound to exercise vigilance to prevent injury to third parties from the dangerous qualities of the gas. The ques-

tion is where its responsibility ended. The claim is made on its behalf here that such responsibility had certainly determined before this explosion occurred. It is urged that it had no responsibility for putting the piping in the house, as it was done by third parties, under the employment of the owner; that it had no charge of such piping after it was fitted in the building; that the gas was turned on by third parties, without consultation with, or knowledge on the part of, the officers of the company, which simply was accustomed to, and in this case did, permit any one to turn on the gas after plans had been submitted to it, and a meter had been provided by it upon application.

These circumstances might furnish a good answer to the company as against any claim of the owner of the building who had applied for a meter, or any tenant who had so applied. The case of *Flint v. Gloucester Gaslight Co.* 8 Allen, 843, does not go far enough to save the defendant from any possible liability in this case. There the plaintiff was himself the owner of the building, and had employed and paid one Thomas to put gas pipes therein, connected with the service pipe laid by the defendant, and to put up and arrange the fixtures and burners necessary for using gas in some of the rooms. This man, having put the fixtures in the building, himself turned on the gas, and the explosion soon thereafter took place. The plaintiff claimed that Thomas in turning on the gas was the agent of the defendant, while the defendant claimed that it had simply been cognizant of a custom on the part of Thomas or other gas fitters to turn on the gas when they had completed their piping, and that defendant had simply permitted it, but had in no sense employed Thomas, or any one else, to do it. The defendant requested the court to charge that this mere permission was not sufficient to make Thomas its agent, if it had never assumed to furnish or interfere with the pipes or fixtures inside the building. The court declined to give such instruction, and it was held error. It was a case of an application for gas by the owner of the building. We are here not dealing with the case of an owner or of a tenant who had made application for a meter, and who might be said to have asserted by that act the proper condition of the piping, and to have thereby waived any further examination. Here is the case of an injury to a third person, arising from an explosion in the third-story hall, caused by the escape of the gas from pipes situated in that story, and not properly capped, by reason of which the escaping gas penetrated into the apartments of nonconsumers, and who had made no application for such gas.

Was there any negligent failure on the part of the defendant company to do what was reasonably prudent for the purpose of insuring safety to those women, and to those who were roused by them to make efforts to discover the source of the leak? The company surely had no right to intentionally pour out its manufactured gas upon the tenants who had not applied for it. Some care was due from it when supplying those who

did apply, to see that those who did not should be protected from the undesired element. The defendant urges that it would be most unreasonable to impose upon it the duty of knowing when gas was to be turned on in every building in the city, where it was to be used, and to inspect the piping immediately prior to the turning on of the gas. It is asserted such a duty would be almost impossible of performance, and that every reasonable requirement is met by the obligation to inspect upon notice and request. But the company, by the adoption of the custom already spoken of in regard to the delivery of the plans of the piping to it, entirely did away with the necessity of notifying it, and left it to the discretion of the owner or applicant at what time or by whom the gas might be turned on. It has by its own act relieved itself, so far as it could, of any obligation to make inspection before the gas shall be turned on. We do not see the impracticability of inspection, as is alleged by defendant, or its great expense. If when a meter should be applied for in an apartment house like this, in order to take the defendant's gas, the defendant should, at the time of sending it, send a proper inspector to inspect the piping, there would not be much difficulty in that case. The inspection here spoken of would not include the examination of pipes under floors, or covered by plastering. No ripping up of work already done in the way of flooring and of lath and plastering could reasonably be required. A fair examination of the piping which was disclosed, and the ends of tubes coming out into the open spaces, through which the gas might penetrate into other quarters than where it was applied for, would certainly be all that could ever be reasonably called for. We do not say that even this must be done as a legal proposition. It is a question for the jury upon the issue of negligence.

The suggestion that the company had no right to enter upon the premises for that purpose we do not regard as well founded. It might properly refuse to permit the gas to be turned on in a case of separate stores and flats like that here presented, until some reasonable examination of the piping had been made in the other portions of the building, where gas had not been applied for, such as would lead to the belief that the piping in that other portion was in proper condition. We do not say that the company was bound, as matter of law, to make this examination by its own agents, or that a failure to make it, and a reliance on the certificate implied from the delivery of plans, was negligence; but we say that, whether such reliance was or was not negligent was, under the circumstances of this case, a matter for the jury to decide. Having adopted the practice of relying upon the plans when delivered as equivalent to a certificate that the piping was in good condition, and thereafter permitting any one to turn on the gas, the propriety of that custom must go to the jury upon the question of negligence.

The defendant, after the delivery of the plans, and having thus obtained a general knowledge of the character of the building,

must have known of the separate stores and apartments, and that separate meters were required. The agents of the defendant saw that by the plans the pipes were placed so as to distribute the gas to other portions of the building than those from which application had been so far made. Was it or not a reasonable matter to ask of the defendant that, before permitting its gas to be turned into the building for the purpose of supplying those who had applied for it the company should, through its own servants, make some examination of the state of the piping leading to the other quarters, to the end that it might say, with reasonable certainty, such piping was in proper condition to hold the gas, and not to let it escape upon the premises of those who had not applied for and did not want it? Or had the company done all that could reasonably have been required of it by entering into the understanding as to the plans, and that their delivery should be regarded as equivalent to a certificate? This presents, we think, a fair question of fact, and not one of law.

The defendant also urges that it was not its duty to turn on the gas, but it was only obliged to allow it to be turned on, and therefore it ought not to be held liable for the act of a stranger. In this we think it entirely misapprehends its duty. It is obliged to supply the gas to applicants. When they have done what is necessary to make a connection, with its consent, with the mains of the defendant, and have applied for and obtained the meter to measure their supply, we are clearly of the opinion that, in order to fulfil its duty to supply gas, the defendant is under the obligation, when applied to, of turning it on so that the supply may be given. Certainly it ought not to be held liable for the act of a stranger in turning on the gas without its knowledge or request. We do not permit any liability to be founded upon that fact. If liable at all, it must be for its own neglect (if the jury shall so find) in failing to make any inspection, and in adopting a custom which, when carried out, permitted the turning on of the gas by any one at any time after the delivery of a meter by the company. This is the extent of defendant's liability. We do not think the principle of the case of *Rylands v. Fletcher*, L. R. 8 H. L. 330, applies here. The defendant is not an insurer. In the English case the defendant was held liable, at all events, for the damage done to his neighbor's mines by reason of an overflow from water which the defendant had accumulated on his own land.

Here the defendant is engaged in manufacturing and selling an article which has become so universally used for illuminating purposes as to be regarded almost as an essential of city life. Having manufactured it, the law compels the company to furnish it to an owner or occupant on certain terms. It is bound, not only in the fulfilment of the purpose of its existence, but by affirmative provisions of law, to deliver the gas into the buildings of others. In making that delivery it is not an insurer, but is simply bound (in such a case as this), to that degree of care

which the nature of the article it deals in, and the consequences to be apprehended from an accident, reasonably call for. Nor do we assume to say that when once the piping, in cases similar to this, has been fairly and properly examined previous to turning on the gas (if such examination by defendant's servants is called for at all), that thereafter there is a continuing liability on the part of the company to see to it that such piping is kept in proper condition. As the company has no control over the piping, does not put it in, and is not consulted about it, the principle upon which it might be held liable, in cases of this character, at the time of the first delivery of gas, if no precaution were taken at all, is simply that it would have the right to refuse to turn on, or permit others to turn on, the gas for the supply of the applicants until properly assured of the condition of the piping in other portions of the building. Having become assured of it, and the gas being on, it would not seem that the company ought further to be regarded as liable for the continuous good condition of the piping. Here we may justly say that to impose such a liability upon the defendant would clearly be unreasonable. It would render necessary the examination, at frequent intervals, of all the buildings in the city in which gas was used. This would be so oner-

ous as to be practically impossible of execution, because of the expense to the company. The law ought not to, and does not, exact an unreasonable amount of care from any one. Under the restrictions, however, as above stated, we think the question of defendant's negligence was for the jury.

The other ground of defense, as to the contributory negligence of the plaintiff's intestate, we do not think should be taken from the jury. Sometimes it is extremely dangerous to take a light to discover the location of a gas leak, and sometimes it is not, depending upon various circumstances; among others, upon the extent of the leak, the size of the inclosure where located, and the length of time the leak has existed. The plaintiff's intestate, a boy of eighteen, took the candle, with the statement that he had seen gas men take a candle to find a leak, and it is a fact that they do so upon some occasions. The whole case as to the contributory negligence of the plaintiff's intestate should be submitted to the proper judges of fact.

The judgment must be reversed, and a new trial granted, costs to abide the event.

O'Brien, Bartlett, and Haight, JJ., concur. **Finch and Gray, JJ.,** dissent. **Andrews, Ch. J.,** did not sit.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Lydia W. HARMON

v.

OLD COLONY RAILROAD COMPANY.

(.....Mass.....)

The impairment of the capacity of a married woman to perform labor can be considered as an element of the damages recoverable in an action by her for a personal injury where the statutes entitle her to make contracts on her own account and give her the right to her own earnings.

(January 2, 1896.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during trial of an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence which resulted in disallowance of damages for her loss of earning capacity. *Sustained.*

The facts are stated in the opinion.

Messrs. A. A. Strout and George E. Smith, for plaintiff:

The wife may sue and recover for such work and labor.

Burke v. Cole, 97 Mass. 118.

Therefore it seems to follow that the husband cannot.

The married woman is prohibited from suing her husband. Every other person is exposed to her legal attack. For every cause against any other person she stands as well as her unmarried sister.

She may recover for loss of earning capacity.

Jordan v. Middlesex R. Co. 138 Mass. 425.

Messrs. Benton & Choate, for defendant:

Upon marriage, the obligation to support the wife is imposed upon the husband so long as they shall live together. The legal presumption is that her services, and the comfort of her society, are of a worth to him equal to all the obligations which the law imposes upon him because of the marital relation. The obligation to support is coextensive with the wife's obligation to render service.

Randall v. Randall, 87 Mich. 563.

The statute is in derogation of the common law, and its effect is not to be extended by implication.

Lord v. Parker, 8 Allen, 127; *Edwards v. Stevens*, 8 Allen, 815; *Brookings v. White*, 49 Me. 479; 2 Bishop, Married Women, § 23.

By the statutes of 1855 a married woman was authorized to make contracts with reference to her real and personal property. Under this authority she could give a note for land purchased by her.

Chapman v. Foster, 6 Allen, 186.

NOTE.—In connection with the above case as to recovery for loss of earnings of a married woman, see *Citizens' Street R. Co. v. Twiname* (Ind.) 7 L. 80 L. R. A.

R. A. 352; *Blaechinska v. Howard Mission & Home for Little Wanderers* (N. Y.) 15 L. R. A. 215—the latter of which is opposed to the present case.

But she could not give a note for a debt of her husband to a third person.

Athol Mach. Co. v. Fuller, 107 Mass. 487.

This statute would not seem to make her earnings while living with her husband her property.

See *Seits v. Mitchell*, 94 U. S. 580, 24 L. ed. 179.

A suit by a husband for loss of service, to be maintainable, must be founded upon the loss and deprivation of a legal right; but, if the plaintiff's contention be correct, a complete defense has been furnished by the legislature to all such actions, because, by making the wife a free agent to contract, it has taken from the husband utterly the right to interfere with the right to perform her contracts and require her services at home. But the courts have recently recognized the right to maintain such actions.

Sullivan v. Lowell & D. Street R. Co. 163 Mass. 536.

No legislation has relieved the husband of any of the obligation of support which was placed upon him by the common law. He is still bound to furnish his wife with food, clothing, nursing, and medicine, and the other necessities and comforts of life.

Livingston v. Hammond, 162 Mass. 375.

Some of the results which might follow from the construction which must be placed upon this section if the plaintiff's contention is correct are suggested in *Schindel v. Schindel*, 12 Md. 108, and in *Cole v. Van Riper*, 44 Ill. 58.

No suit by a husband could be maintained for enticement away or harboring his wife, and possibly none for her seduction. Certainly no damages could be recovered for loss of services or companionship consequent on such seduction. It would make services rendered to husband or children proper subject for compensation, though no suit could be maintained.

Grant v. Green, 41 Iowa, 88; *Douglas v. Gausman*, 68 Ill. 170; Pub. Stat. chap. 147, § 7.

Statutes of very similar purport in other states have been passed upon, and it has been held that the husband has not been deprived of his rights.

Mewhirter v. Hatten, 42 Iowa, 288, 20 Am. Rep. 618; *Tuttle v. Chicago, R. I. & P. R. Co.* 42 Iowa, 518; *Filer v. New York C. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327; *Beau v. Kiah*, 6 Thomp. & C. 464; *Seits v. Mitchell*, 94 U. S. 580, 24 L. ed. 179.

If no statute has operated to transfer to the wife an independent right to her own services when executory, then it must be true that no arrangement between the parties can effect that result.

Woodbeck v. Havens, 42 Barb. 66; *Elliott v. Bentley*, 17 Wis. 592.

No such gift could be made *in futuro* by the husband to the wife.

Glenn v. Johnson, 85 U. S. 18 Wall. 477, 21 L. ed. 856; Pub. Stat. chap. 147, § 8.

Allen, J., delivered the opinion of the court:

The general question arising in this case is whether, in an action brought by a married woman to recover damages for a personal injury, the impairment of her capacity to perform labor can be considered as an element of

the damages. By Stat. 1846, chap. 209, § 1, it was enacted that "in all cases where married women shall hereafter by their own labor earn wages, payment may be made to them for the same." This was followed by Stat. 1855, chap. 804, § 7: "Any married woman may carry on any trade or business and perform any labor or services on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name; and she may sue and be sued as if sole in regard to her trade, business, labor, services, and earnings; and her property acquired by her trade, business, and service, and the proceeds thereof, may be taken on any execution against her."

By Stat. 1857, chap. 249, § 6, it was provided that a husband should not be bound by his wife's contracts in respect to her separate property or to her trade.

The rights of married women in respect to their labor are thus defined in Gen. Stat. chap. 109:

Sec. 1: "The property, both real and personal, which any married woman now owns as her sole and separate property, that which comes to her by descent, devise, bequest, gift, or grant, that which she acquires by her trade, business, labor, or services carried on or performed on her sole and separate account, . . . shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

Sec. 8: "A married woman may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services, on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor and earnings, in the same manner as if she were sole."

Sec. 5: "The contracts made by a married woman in respect to her separate property, trade, business, labor, or services shall not be binding on her husband, nor render him or his property liable therefor; but she and her separate property shall be liable for such contracts in the same manner as if she were sole."

Sec. 6: "Payment may be made to a married woman for wages earned by her labor," etc.

By Stat. 1862, chap. 198, amended by Stat. 1881, chap. 64, § 1, a married woman doing business on her separate account must record a certificate in the town or city clerk's office setting forth various particulars, or her husband may file such certificate. In case of failure to do so, her property will not be protected against his creditors, and he will be liable on her contracts.

By Stat. 1874, chap. 184, § 1, "a married woman may . . . make contracts, oral and written, sealed and unsealed, in the same manner as if she were sole, and all work and labor performed by her for others than her husband and children shall, unless there is an

express agreement on her part to the contrary, be presumed to be on her separate account." And by section 8 "a married woman may sue and be sued in the same manner and to the same extent as if she were sole, but nothing herein contained shall authorize suits between husband and wife."

This enumeration of statutes shows the growth of the legislation on this particular subject, and the foregoing provisions are now embodied in a somewhat compressed form in Pub. Stat. chap. 147.

By virtue of this legislation, a married woman becomes, in the view of the law, a distinct and independent person from her husband, not only in respect to her right to own property, but also in respect to her right to use her time for the purpose of earning money on her sole and separate account. She may perform labor, and is entitled to her wages or earnings. If she complies with the statutory requirements as to recording a certificate, she may carry on any trade or business on her sole and separate account, and take the profits, if profits there are, as her separate property. Her right to enter into contracts, to earn money, to engage in performing labor or service, to enter into trade on her own account, is inconsistent with the view that her capacity to labor belongs exclusively to her husband. He can appropriate neither her earnings nor her time. Her right to employ her time for the earning of money on her own account is as complete as his, subject to the requirement of recording a certificate in case she enters into trade. This may interfere with his right to and enjoyment of her society, companionship and services. But this is a consequence which the legislature must be deemed to have foreseen and intended. His right, in these respects, is now made subordinate to her right to employ her time in the care and management of her property, and in the earning of money by performing labor or by carrying on a trade or business. So far as the statutes have given to her a right to act independently of him, so far his rights and control in respect to her are necessarily abridged. He can no longer compel her to work for him during such time as she may choose to perform labor on her sole and separate account. By the common law the husband was bound to

support his wife, and therefore was entitled to her services. By the statutes, which modify the common law, his right to her services is abridged, though his obligation to support her remains.

It is urged in argument that she may contract to devote her whole time to work which is to be performed away from his home, and which, perhaps, may require her absence for ten years, thus amounting to a desertion which would be in violation of her matrimonial duty. But the possibility of extreme cases should not conclusively determine the construction of statutes, nor do we now decide whether the statutes would permit such action on her part against his consent. To a certain limited extent—as, for example, in fixing the domicile, and in being responsible, under ordinary circumstances, for its orderly management—the husband is still the head of the family. But in some particulars a married woman is now independent of her husband's control. In the case now before us the impairment of the plaintiff's capacity to labor was an element which might be considered by the jury in the estimate of her damages. In respect to this, as with other elements of damages, no close approximation to mathematical accuracy can in all cases be reached. In some instances the right of a married woman to perform labor for others may have no money value. How much, if anything, should be allowed on this ground, must be left to the jury to determine, under the circumstances of each particular case. The radical nature of the change effected by the legislation of this state in the legal condition of married women is illustrated in numerous decisions, of which *Jordan v. Middlesex R. Co.* 138 Mass. 425, most nearly resembles the present case. But see also *Parker v. Simonds*, 1 Allen, 258; *Ames v. Foster*, 8 Allen, 541; *Plumer v. Lord*, 5 Allen, 480; *Chapman v. Foster*, 6 Allen, 136; *Stewart v. Jenkins*, Id. 300; *Chapman v. Briggs*, 11 Allen, 546; *Burke v. Cole*, 97 Mass. 118; *Snow v. Sheldon*, 126 Mass. 332, 80 Am. Rep. 684; *Read v. Stewart*, 129 Mass. 407; *Pacific Nat. Bank v. Windram*, 133 Mass. 173; *Butler v. Ives*, 139 Mass. 202; *Pinney v. Globe Nat. Bank*, 150 Mass. 574, 6 L. R. A. 379.

Exceptions sustained.

NEW YORK COURT OF APPEALS.

SPRINGFIELD FIRE & MARINE INSURANCE COMPANY, *Respl.*,

v.

Village of KEESEVILLE, *Appt.*

(143 N. Y. 46.)

1. A municipal corporation is not liable for damages caused by fire in consequence of its negligent failure to maintain sufficient waterworks.

NOTE.—For liability for loss of property by fire because of failure of water supply, see note to *Howsmon v. Trenton Water Co.* (Mo.) 23 L. R. A. 146.

For water rates as taxes, see note to *Wagner v. Rock Island* (Ill.) 21 L. R. A. 519.

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quence of its negligent failure to maintain sufficient waterworks.

2. The maintenance of municipal waterworks is in no sense a private business for negligence in which the corporation will be held liable, but is an exercise of governmental power for the public good appertaining to the corporation in its political character.

3. The imposition of water rents by a municipal corporation for the use of water does not show that the waterworks system is operated by the corporation in its private corporate character, but is only a mode of taxation and part of the general scheme of raising revenue to carry on the work of government.

(December 19, 1895.)

APPEAL by defendant from an interlocutory judgment of the General Term of the Supreme Court, Third Department, reversing a judgment of a Special Term for Essex County which sustained a demurrer to the complaint in an action brought to hold defendant liable for the amount which plaintiff had been compelled to pay by reason of the destruction of a house by fire in consequence of defendant's alleged negligence. *Reversed.*

Statement by Gray, J. :

The complaint sets forth that the plaintiff is a Massachusetts corporation, and that the defendant is a village organized under the provisions of chapter 291 of the Laws of the state of New York, passed in 1870, and the amendments thereto; that the plaintiff carried on the business of fire insurance within the limits of the defendant, and for the privilege of so doing, and of having the protection of the waterworks and fire department and appliances of defendant, had paid an annual tax to the defendant; that the defendant had a system of waterworks and fire appliances which were maintained by taxes levied upon all its taxable inhabitants, including plaintiff and other insurance companies, and by water rents paid by such inhabitants. The complaint then proceeds to set forth the insurance by the plaintiff of property of one Emily E. Brewer, for a percentage less than for like property outside the limits of the water and fire protection, and the destruction by fire thereof, in consequence whereof the plaintiff had paid to her, under its contract of insurance, \$4,450. The complaint then sets forth the assignment to plaintiff by Emily E. Brewer of all claims and damages against the defendant, by reason of said fire and damages, and alleges that "at the time of the aforesaid fire, the defendant had wrongfully and negligently allowed and caused its said waterworks, pumps, pipes, and fire appliances to become and be out of repair, broken and weakened, stopped with mud and other foreign objects, and unfit for use, to such extent that water could not be thrown or put upon said dwelling house to extinguish the fire therein; that when the hose was laid and opened, and ready to throw water upon the fire in said house, said fire was very slight, and had done very little damage; that if said fire appliances and waterworks had been in proper working order, said fire would and could have been extinguished without damaging said house to exceed \$300; that at the time of said fire, and for several years previous thereto, the defendant, under and in pursuance of the powers granted it by the laws of the state of New York, had assumed to maintain waterworks and fire appliances and a fire department for the purpose, among other things, of protecting the property of the inhabitants of defendant against loss by fire, of all which plaintiff and its assignor had notice, and in reliance thereon said assignor paid taxes to defendant to maintain the same, and plaintiff paid taxes to defendant for said purpose, and insured property at reduced rates as aforesaid; . . . that

plaintiff's aforesaid loss of \$4,450, to the extent of at least \$4,150 was caused solely by the negligence and wrongful and unlawful acts of defendant in failing to keep its waterworks and fire appliances in proper working order, and in failing to employ competent men to manage and care for the same." The complaint then demanded judgment for the said sum of \$4,150. The defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. At special term the demurrer was sustained and judgment went for the defendant, dismissing the complaint; but, upon appeal to the general term, that court reversed the judgment, and overruled the defendant's demurrer. From the general term judgment the defendant has appealed to this court; the general term having certified the question as one of sufficient importance to render the decision of this court desirable before proceeding further.

Messrs. McLaughlin & Rowe, for appellant:

A municipal corporation cannot be made liable (in the absence of a statute giving the remedy) for an injury arising from the negligent use of its property from which it receives, in its corporate capacity, no special benefit; or from a negligent use of its property by its officers not acting as agents or servants of the corporation but as public officers whose duties are defined by law.

Edgerly v. Concord, 62 N. H. 8; *Thayer v. Boston*, 19 Pick. 511, 81 Am. Dec. 157; *Hafford v. New Bedford*, 16 Gray, 297; *Hill v. Boston*, 123 Mass. 844, 28 Am. Rep. 882; *Barbour v. Ellsworth*, 67 Me. 294; *Jewett v. New Haven*, 88 Conn. 868, 9 Am. Rep. 882; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Davis v. Montgomery*, 51 Ala. 189, 28 Am. Rep. 545; *Cooley, Torts*, 620, 621; 2 Dill. Mun. Corp. §§ 949-951, 953-955; *Woolbridge v. New York*, 49 How. Pr. 67; *Smith v. Rochester*, 76 N. Y. 506; *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468; *O'Meara v. New York*, 1 Daly, 425; *Hayes v. Oshkosh*, 38 Wis. 814, 14 Am. Rep. 760.

It was discretionary with the defendant whether it would construct a system of waterworks, and having constructed it, whether it would maintain it or allow it to fall into disuse.

Wainwright v. Queens County Water Co. 78 Hun, 152; *Mendel v. Wheeling*, 28 W. Va. 238; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 168; *Vanhorn v. Des Moines*, 68 Iowa, 447, 50 Am. Rep. 750; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; *Tainter v. Worcester*, 123 Mass. 811, 25 Am. Rep. 90; *Edgerly v. Concord*, 62 N. H. 8; *Jewett v. New Haven*, 88 Conn. 868, 9 Am. Rep. 882; *Torbush v. Norwich*, 88 Conn. 225, 9 Am. Rep. 895; *Grant v. Erie*, 69 Pa. 420, 8 Am. Rep. 272; *Black v. Columbia*, 19 S. C. 412, 45 Am. Rep. 785; *Heller v. Sedalia*, 58 Mo. 159, 14 Am. Rep. 444; *Hayes v. Oshkosh*, 38 Wis. 814, 14 Am. Rep. 760; *Kelley v. Milwaukee*, 18 Wis. 88; *Davis v. Montgomery*, 51 Ala. 139, 28 Am. Rep. 545; *Faulkner v. Aurora*, 85 Ind. 180; *Howard v. San Francisco*, 51 Cal. 52; *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Smith v. Roch-*

enter, 76 N. Y. 513; *Welsh v. Rutland*, 58 Vt. 228, 48 Am. Rep. 762; 2 Dill. Mun. Corp. 3d ed. 976; Shearm. & Redf. Neg. 4th ed. § 265.

Water companies which contract with the public authorities to furnish water sufficient in quantity and pressure to extinguish fires are not liable to property owners for damages resulting from failure to keep their contract.

22 Alb. L. J. 124; *House v. Houston Waterworks Co.* (Tex.) 22 S. W. 277; *Davis v. Clinton Waterworks Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Becker v. Keokuk Waterworks*, 79 Iowa, 419; *Fowler v. Athens City Waterworks Co.* 83 Ga. 219; *Fonten v. Lookout Waterworks Co.* 3 Lea, 42; *Ferris v. Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 38 Am. Rep. 1; *Eaton v. Fairbury Waterworks Co.* 87 Neb. 546, 21 L. R. A. 653; *Housmon v. Trenton Water Co.* 119 Mo. 304, 28 L. R. A. 146.

Mr. A. W. Boynton, for respondent:

To establish a defense based on exemption from liability for damages resulting from its own wrong, defendant must invoke and show law that is irresistibly clear to that end.

United States v. Fisher, 6 U. S. 2 Cranch, 353, 2 L. ed. 304; *Cogswell v. New York, N. H. & H. R. Co.* 103 N. Y. 10; *Bohan v. Port Jervis Gaslight Co.* 123 N. Y. 18, 9 L. R. A. 711.

If the defendant was a private person or corporation there would be no question of its liability under the facts admitted by the demurrer.

Connecticut F. Ins. Co. v. Erie R. Co. 73 N. Y. 399, 29 Am. Rep. 171; *Home Ins. Co. v. Western Transp. Co.* 38 How. Pr. 102.

No good reason exists for not applying the rule laid down in *New York v. Bailey*, 2 Denio, 444, holding the municipality liable on the same grounds as an individual or other corporation.

The defendant had authority of law to maintain waterworks for protection against fire, and to sell water from them, etc.

Laws 1875, chap. 181, § 4; Laws 1879, chap. 129, as amended by Laws 1881, chap. 175, and Laws 1883, chap. 225; Laws 1885, chap. 211.

It cannot justly be held that defendant was exercising its sovereign, or judicial, or discretionary powers, wherein it escapes all liability through deference to the ancient fiction that, "the King can do no wrong."

Lloyd v. New York, 5 N. Y. 374, 55 Am. Dec. 347; *Beach*, Pub. Corp. § 1140.

The powers granted to defendant imply the duty on the part of defendant to execute the powers; because the interests of the public and third persons are at stake.

Hutson v. New York, 9 N. Y. 163, 59 Am. Dec. 526; *Requa v. Rochester*, 45 N. Y. 129, 6 Am. Rep. 62; *New York v. Furze*, 8 Hill, 612; *People v. Meakim*, 133 N. Y. 214; *People v. Otsego County Supra*, 51 N. Y. 401; *People v. Livingston County Supra*, 68 N. Y. 114; *Hagadorn v. Raux*, 72 N. Y. 583; *People v. Niagara County Supra*, 49 Hun, 32; *Gilmore v. Utica*, 131 N. Y. 568; *Res v. Barlow*, 2 Salk. 609; *Cooley*, Const. Lim. pp. 248, 249; *Nelson v. New York*, 63 N. Y. 544; *Kramrath v. Albany*, 127 N. Y. 581; *Hill v. New York*, 139 N. Y. 505.

Even if we grant that the defendant was un-
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der no obligation, originally, to provide waterworks for the protection of its inhabitants and others against fire, yet, having assumed to exercise its legal right so to do, it became bound not to act negligently in the care and maintenance of the same, and not to employ incompetent servants.

McCarthy v. Syracuse, 46 N. Y. 196; *Danaher v. Brooklyn*, 119 N. Y. 253, 7 L. R. A. 592; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316; *Hutson v. New York*, 9 N. Y. 163, 59 Am. Dec. 526; *Conrad v. Ithaca*, 16 N. Y. 158; *Burton v. Syracuse*, 37 Barb. 292; *Hitchins v. Frostburg*, 68 Md. 100; *Seifert v. Brooklyn*, 101 N. Y. 136, 54 Am. Rep. 664; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352. See opinion of Finch, J., in *Chia v. Syracuse*, 95 N. Y. 87; *Jenney v. Brooklyn*, 120 N. Y. 167.

The courts have held municipal corporations liable for neglect to maintain public works in good repair.

Moody v. New York, 43 Barb. 282; *Hyatt v. Rondout*, 44 Barb. 385; *Barton v. Syracuse*, 36 N. Y. 54; *Davenport v. Ruckman*, 37 N. Y. 568; *Weesman v. Brooklyn*, 40 N. Y. S. R. 700.

Employment of incompetent servants to care for public works is negligence.

Lloyd v. New York, 5 N. Y. 371, 55 Am. Dec. 347.

The defendant, by accepting its organization and powers from the state, thereby becomes bound to the state to exercise those powers and the duties arising therefrom without negligence.

Conrad v. Ithaca, 16 N. Y. 158; *Nelson v. Canisteo*, 100 N. Y. 89; *Cain v. Syracuse*, 95 N. Y. 83.

And third parties may have their action for damages arising from neglect of defendant to perform those duties.

Robinson v. Chamberlain, 84 N. Y. 389, 90 Am. Dec. 718; *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 648; *Johnson v. Belden*, 47 N. Y. 130; *Little v. Banks*, 85 N. Y. 263.

The true rule for the government of this case is, that the wrongdoer is liable in every instance for the damages that he causes by his negligence.

Stock v. Boston, 149 Mass. 410; *Ehrgott v. New York*, 96 N. Y. 231, 43 Am. Rep. 622; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

The contention of the defendant that to hold a municipal corporation liable in a case like this might be disastrous financially, cannot be considered serious argument or entitled to have weight.

Belts v. Yonkers, 74 Hun, 75.

Gray, J., delivered the opinion of the court:

The learned justice who spoke for the general term, in a very elaborate and interesting opinion, proceeded, very correctly, as I think, upon the assumption that the negligence charged against the defendant in the complaint related entirely to its waterworks system. In the view which we take of the matter, it is of comparatively little consequence whether the plaintiff bases its right of action upon negligence with respect to the fire department as such, or to the water department as such. But the fair reading of the

complaint undoubtedly warrants the assumption of the learned justice at general term. If I correctly apprehend the reasoning which led the general term to the conclusion that there was a municipal liability upon an admission of the facts set forth in the complaint, it rests, in the main, upon two theories. In the first place, it is held that, by the voluntary assumption on the part of the defendant of the power conferred by statute to construct and maintain waterworks, it became responsible for the proper exercise of such power, and that such responsibility is necessarily demanded in the interest of an efficient public service, and the inhabitants, who have contributed to the maintenance of such a public work, have a right to hold the defendant to the exercise of reasonable care and diligence and to a liability for a failure to do so. In the next place it is held, while not deeming that the defendant had engaged in a private corporate business, conducted for its own benefit, and not for the general public, nevertheless that the defendant having agreed to erect and take charge of the public work and enterprise for the public within its boundaries, if there is a failure to exercise reasonable care and diligence in maintaining it, there has been a breach of an implied contract, for which, if injury results, an action will lie. Holding these views, the learned general term felt compelled, because of the admission by the defendant, through its demurrer, of the allegations of wrongful and neglectful conduct in relation to the maintenance of its waterworks, to hold that the plaintiff made out a good cause of action.

The proposition that such a liability rests upon a municipal corporation, as is asserted here, is somewhat startling, and I think the learned general term justices have misapprehended the nature of the responsibility which devolved upon the defendant in connection with its maintenance of a waterworks system, as well as the character of the power which it was authorized to exercise in relation thereto. I might remark, in the same spirit of criticism which was assumed by the learned justice at general term, that while the efficiency of the public service would be promoted by holding municipal corporations to the exercise of reasonable care and diligence in the performance of municipal duties, and to a liability for injury resulting from a failure in such exercise, the application of that doctrine to such a case as this might, and probably would, be highly disastrous to municipal governments. A little reflection will show that a multitude of actions would be encouraged, by fire insurance companies, as by individuals, and that cases have arisen, and may still arise, where an extensive conflagration might bankrupt the municipality, if it could be rendered liable for the damages or losses sustained. The distinction between the public and private powers conferred upon municipal corporations, although the line of demarcation at times may be difficult to ascertain, is generally clear enough. It has been frequently the subject of judicial discussion, and, among the numerous cases, it is sufficient to refer to

Bailey v. New York, 8 Hill, 581; *Lloyd v. New York*, 5 N. Y. 369, 55 Am. Dec. 347; and *Maximilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468. The opinion in *Darlington v. New York*, 81 N. Y. 164, 88 Am. Dec. 248, is also instructive upon the subject. When we find that the power conferred has relation to public purposes and is for the public good, it is to be classified as governmental in its nature, and it appertains to the corporation in its political character. But when it relates to the accomplishment of private corporate purposes, in which the public is only indirectly concerned, it is private in its nature and the municipal corporation, in respect to its exercise, is regarded as a legal individual. In the former case, the corporation is exempt from all liability, whether for nonuser or misuser; while in the latter case, it may be held to that degree of responsibility which would attach to an ordinary private corporation. Then the investiture of municipal corporations by the legislature with administrative powers may be of two kinds. It may confer powers, and enjoin their performance upon the corporation as a duty; or it may create new powers, to be exercised as governmental adjuncts, and make their assumption optional with the corporation. Where a duty specifically enjoined upon the corporation, as such, has been wholly neglected by its agents, and an injury to an individual arises in consequence of the neglect, the corporation will be held responsible. *New York v. Purze*, 8 Hill, 612, 619. So, in *McCarthy v. Syracuse*, 46 N. Y. 194, it was held that, where a duty of a ministerial character is imposed by law upon the corporation, a negligent omission to perform that duty creates a liability for damages sustained. Such responsibility, however, would not attach to the corporation where it has voluntarily assumed powers authorized by the legislature under some general provision respecting municipalities throughout the state, and permissive in their nature; and at this point I touch one of the theories upon which the general term decision seems to rest. In such a case—and I speak, of course, of legislative acts which are general in their nature and scope—the assumption by the municipal corporation is of a further function of self, or local, government, and such a power is discretionary in its exercise and carries with it no consequent liability for nonuser or misuser. In the legislature reside the power and force of government, confided to it by the people under constitutional restrictions. In the creation of municipal corporations, subordinate commonwealths are made, upon which certain limited and prescribed political powers are conferred and which enjoy the benefits of local self-government. *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202. When, in addition to those general powers which are prescribed upon the creation of a municipal corporation, general statutes permit the assumption of further powers as a means of benefiting the portion of the public in the particular locality, they invest the corporation availing itself of the permission with just so much more governmental power. Just as the general powers

deposited with the various municipalities are exercised by them in a quasi sovereign capacity, so would any added powers designed for the general public good, though optional with the corporation as to their assumption, and in their exercise and performance local, be exercised. They are not special, as being designed for and granted to a particular municipality; for they are applicable to every part of the body politic where municipal government exists. Such powers, in legal contemplation, appertain to the municipal corporation as such, and may be adopted as a part of the governmental system.

The acts under which the defendant was authorized to construct and maintain a system of waterworks constitute a general law applicable to all incorporated villages in the state. They impose no duty, and, when availed of, the task undertaken is discretionary in its character. The grant of power must be regarded as exclusively for public purposes, and as belonging to the municipal corporation, when assumed, in its public, political, or municipal character. In *Bailey v. New York*, 3 Hill, 531, to which reference is made in the opinion below, the city of New York, at a very early day, was authorized by special legislation to engage in the work of supplying its citizens with water and to acquire lands and water rights for the purpose, and as it is clear from the reading of the opinion of Chief Justice Nelson, the city was regarded in the light of any other private company, because of the special franchises conferred. Assuming that we could regard the doctrine of that case as authoritative at the present day, as to which there has been and might be some question (see *Darlington v. New York*, *supra*), the decision is inapplicable to the present case. In *Hunt v. New York*, 109 N. Y. 134, the case turned upon the performance by the city of the duty cast upon it to keep its streets in a safe condition for travel. In *Cain v. Syracuse*, 95 N. Y. 83, the discussion was as to the nature of the duty imposed upon the defendant by the power in its charter to pass ordinances, among other things, for the razing of buildings which had become dangerous by reason of fire. The failure of the common council to pass a resolution in respect to the building in question was not deemed to be a neglect of a duty. It was a discretionary matter. Nothing was decided in that case, which controls the decision of the present case, or which affects the discussion materially.

Nor can we assent to the view that the defendant sustains such an implied contractual relation to the public within its boundaries, with respect to the construction of this public work, as to be responsible for a failure to exercise reasonable care and diligence in respect to its maintenance. If the views which I have somewhat briefly expressed are correct, the defendant exercised a function which, like all governmental functions, was purely discretionary. What it undertook to do, when availing itself of the privilege of the general act, was to provide for the local convenience of its inhabitants.

The industry of the defendant's counsel has

collated a great number of decisions, by the courts of other states, which indicate a very general view that the powers conferred by the law of the state upon its municipal corporations to establish waterworks and fire departments are, in their nature, legislative and governmental. From them I may select one or two. In *Edgerty v. Concord*, 63 N. H. 8, it was said by the court: "As a part of the governmental machinery of the state, municipal corporations legislate and provide for the customary local conveniences of the people, and in exercising these discretionary functions the corporations are not called upon to respond in damages to individuals either for omissions to act or for the mode of exercising powers conferred on them for public purposes and to be exercised at discretion for the public good. For injuries arising from the corporation's failure to exercise its public, legislative, and police powers, and for the manner of executing those powers, there is no remedy against the municipality, nor can an action be maintained for damages resulting from the failure of its officers to discharge properly and effectually their official duties." In *Thintor v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90, it was said by the court: "The protection of all the buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger; and cities and towns are therefore authorized by general laws to provide and maintain fire engines, etc., to supply water for the extinguishment of fires. . . . The city did not, by accepting the statute, and building its works under it, enter into any contract with, or assume any liability to, the owners of property to furnish means or water for the extinguishment of fires upon which an action can be maintained." In *Mazmilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468, the reasoning of the opinion permits a clear inference that this defendant did not, by accepting the provisions of the statutes, assume a duty of the kind which arises from the grant of a special power. Judge Folger uses this language, in his discussion of the two kinds of duties which are imposed upon a municipal corporation: "The former" (referring to the case of a grant of a special power) "is not held by the municipality as one of the political divisions of the state." Again he says: "Where the power is intrusted to it as one of the political divisions of the state, and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser nor for misuser by the public agents;" citing *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302.

This defendant, precisely, is intrusted with the power to maintain its waterworks, because it is one of the political subdivisions of the state to which the general act has reference in its general grant of power or privilege.

Nor does the fact that water rents are paid by the inhabitants of the defendant affect the question. This fact is made use of to show

the private corporate character of the waterworks system, and the suggestion is that profit or benefits accrue to the defendant whereby the corporate undertaking is affected with a private interest. But that is an incorrect notion. The imposition of waterrents is but a mode of taxation, and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government. If profits accrue over the expense of the maintenance of the system, they go to benefit the public by lessening the general burden of taxation.

The fallacy, as it seems to me, which affects the argument that the municipal corporation can be made liable for the nonuser or misuser of its power, consists in that it fails to appreciate the true nature of the function which the corporation performs. It adds to its political machinery for the purpose of benefitting and of protecting its inhabitants. There is nothing connected with the work which is not of a governmental and public nature. It is in no sense a private business, and the authority to construct the works was given to it by the legislature, not at its own particular instance or application, but because it was one of the political subdivisions

of the state, and, as such, was entitled to exercise it. How could it justly be said that the maintenance of the waterworks system, any more than of a fire department, was a matter of private corporate interest? Is it not for all the inhabitants and for their good and protection? No interest was designed to be subserved other than that of adding to the powers of a community carrying on a local government. If that is true, the alternative is that, being for public purposes, and for the general welfare and protection, the defendant assumed a governmental function, and comes under the sanction of the rule which exempts government from suits by citizens. Further elaboration of the subject is quite possible, but the views expressed seem sufficient to justify the conclusion that the determination reached by the general term was erroneous.

The order and judgment appealed from should be reversed, and the judgment entered at the special term should be affirmed, with costs.

All concur; **Bartlett, J.**, upon grounds stated in the opinion, and also upon the further ground that this court decided the principle here involved in *Hughes v. Monroe County*, 147 N. Y. 49.

WASHINGTON SUPREME COURT.

Henry P. ISAACS, *Resp't.*,
v.

George H. BARBER, *App'l.*

(10 Wash. 124.)

1. Judicial notice will be taken by the supreme court of Washington that at least that portion of the state east of the Cascade mountains

was included within the territory where the customary law of miners was in force.

2. The right of prior appropriation of waters existed as part of the laws and customs of that portion of the state of Washington east of the Cascade mountains, prior to the act of Congress on that subject.

3. The right of prior appropriation of waters according to the customary law of

NOTE.—*Right of prior appropriation of water.*

- I. Right at common law.
- II. Right under special statutes or customs.
 - a. Mill acts.
 - b. Customs.
 1. General doctrine in mining states.
 2. Source of right of appropriation.
 3. Against whom available.
 4. Extent and limitation of right.
 5. For what purpose appropriation permissible.
 6. Who may be an appropriator.
 7. What is an appropriation and when complete.
 8. Determination of priority.
 9. Interference with and protection of right.
 10. Second appropriation.
 11. Riparian rights.
 12. Statutes affecting.
 13. Transmission of right.
 - c. Act of Congress of 1886.
 - d. Statutes abolishing riparian rights.

I. Right at common law.

There was a strong tendency on the part of some of the judges in earlier times to recognize a right to obtain title to water by prior appropriation or occupancy, and at one time it seemed as though that doctrine would be established, but the later cases

have all, with possibly one exception, been the other way, so that now no such right is recognized. In the earlier cases the following decisions and dicta appear:

Where the owner of a mill gave the proprietor above a license to draw water from the stream, and subsequently directed him to cease doing so, and brought an action for his refusal to cease, the court held that the action could not be maintained because the right to the water had been abandoned, but in the course of the opinion the court says, by the law of England the person who first appropriates any part of the water flowing through his land to his own use has the right to the use of so much as he appropriates against any other. *Liggins v. Inge*, 7 Bing. 682, 5 Moore & P. 712.

In *Williams v. Morland*, 3 Barn. & C. 913, 4 Dowl. & R. 583, the action was for injuring plaintiff's banks by the manner in which the water was caused to flow past them, but the jury found that the banks were not injured and the court held that therefore the action was not sustained. But *Bayley, J.*, said: "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is coextensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the

mining regions was not created but merely recognized by the act of Congress of 1866.

4. **A grant of government lands** is subject to a prior appropriation of waters made according to the customary law of the locality, although the act of Congress on the subject had not then been passed.

5. **The operation of a flouring mill** is one of the purposes for which water can be appropriated under the customary law of mining regions, adopted by the act of Congress of 1866.

(Stiles, J., dissents from proposition 5.)

(November 17, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Walla Walla County in favor of plaintiff in an action

true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has acquired a right to use for some beneficial purpose."

In *Canham v. Fisk*, 2 Crompt. & J. 126, 2 Tyrw. 155, it was held that if land with water running through it is granted, the grantee acquires a right to the water which the grantor holding the upper tenement cannot cut off. But Bayley, J., said, if a man find water running through his land, he may appropriate it and thus acquire a title to the water.

In an action for injury caused by backing water onto plaintiff's mill-wheel Holroyd, J., discussed the question as though it was governed by the rule of prior appropriation, saying the defendant had no right to use the water after the erection of plaintiff's mill in a different manner than it had been accustomed to be used before; for at all events by that act the plaintiff appropriated to himself the water flowing in that particular way. *Saunders v. Newman*, 1 Barn. & Ald. 258.

But in some of those early cases rulings which are apparently in favor of the doctrine of appropriation are in fact merely in favor of protecting what is now known as riparian rights.

Thus, in *Rutland v. Bowler*, Palmer, 230, it was held that the owner of a mill could sue for diverting the stream from its ancient course although his mill in connection with which he used the water was new.

So, in *Bealey v. Shaw*, 6 East, 208, 2 Smith, 321, where, after a lower proprietor had appropriated the surplus of the water left by prior mill owners, the latter undertook to enlarge their works so as to take more of the water to the detriment of the lower proprietor, Le Blanc, J., said: "The true rule is that after the erection of works and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterward takes what remains of the water before unappropriated, the first-mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do it afterwards." And at the argument the case of *Prescott v. Phillips* (1798) was cited to the effect that nothing short of twenty years' undisturbed possession of water diverted from the natural channel or raised by a weir would give a person an adverse right against those whose land lay lower down the stream and to whom it was injurious.

So, if a riparian proprietor has appropriated the water to a beneficial use, he may recover damages for injuries inflicted upon him in respect to such use. *Holker v. Porritt*, L. R. 10 Exch. 50, 44 L. J. Exch. 52, 33 L. T. N. S. 125, 23 Week. Rep. 400, 30 L. R. A.

brought to enjoin defendant from interfering with a dam which raised a water power for the propelling of complainant's mill. *Affirmed*.

The facts are stated in the opinion.

Messrs. Thomas H. Brents, Wallington Clark, and M. M. Godman, for appellant.

From the very nature of the right derivable from prior appropriation it is limited to such portion or quantity as may have been actually taken while the riparian lands were public lands of the United States and before the rights of others had attached to them, and appropriated to a useful purpose, and exists no longer than while this water is needfully, unwastefully and beneficially applied.

Perego v. McKinnick, 79 Cal. 573; *Atchison v. Peterson*, 87 U. S. 20 Wall. 514, 22 L. ed.

In *Frankum v. Earl Falmouth*, 6 Car. & P. 523, in which the plaintiff claimed the water right as the owner of the mill, the court said if water has been accustomed to flow along a channel from time immemorial, and it has been unappropriated, the first owner of land on both sides of it who appropriates it without doing injury to any one either above or below him acquires such a right by his appropriation that while he may not have enjoyed his appropriation for twenty years he may maintain an action against any owner of the lands above him who wrongfully diverts the water from its ancient channel. But in that case it was held that the plaintiff should have claimed the right in respect of the land, and not in respect of his mill. It will be observed that the doctrine is merely that of riparian rights.

The present English doctrine.

When the question came squarely before the court for decision, however, the doctrine of prior appropriation was repudiated.

In *Mason v. Hill*, 5 Barn. & Ad. 1, 2 Nev. & M. 747 (1838), defendant contended that the right to flowing water was *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose has a good title to it against all the world including the proprietor of the land below; there is no right of action against him unless such proprietor has already applied the stream to some useful purpose also with which the diversion interferes; and in the default of his having done so, may altogether deprive him of the benefit of the water. The court said the position that the first occupant of running water for a beneficial purpose has a good title to it is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. But it is a very different question whether he can take away from the owner of the land below one of its natural advantages which is capable of being applied to profitable purposes, and deprive him of it altogether by intercepting him in its application to a useful purpose. The Roman law considered running water, not as a *bonum vacans* in which any one might acquire a property, but as public or common in this sense only that all might drink it or apply it to the necessary purposes of supporting life, and that no one has any property in the water itself except in that portion which he might have abstracted from the stream and of which he had the possession; and during the time of such possession only. The court adds: "We think no other interpretation ought to be put upon the passage in Blackstone, and that the *dicta* in which water is said to be *publici juris* are not to be understood in any other sense." And the conclusion is

416; *Huston v. Bybee*, 17 Or. 140, 2 L. R. A. 568; *Barrous v. Fox*, 98 Cal. 63; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554.

After the rights of others have attached, the appropriator cannot enlarge his ditch or dam and thus increase his original appropriation.

Nevada Water Co. v. Powell, 34 Cal. 118, 91 Am. Dec. 686; *Loddell v. Simpson*, 2 Nev. 278, 90 Am. Dec. 587; *Higgins v. Barker*, 42 Cal. 285; *Kelly v. Natoma Water Co.* 6 Cal. 108.

No pretense is made in the case at bar of the existence, at any time, of any such local law or custom as is recognized by the act of 1866. None is pleaded; none is proved; none is found by either referee or court; and in the absence of such pleading and proof the court must apply the common law, which had been expressly

adopted by our legislature and which gave no such right, as the only rule of decision governing the case.

Luz v. Haggin, 69 Cal. 387; *Esmond v. Chew*, 15 Cal. 137; *Lewis v. McClure*, 8 Or. 273; *Titchcomb v. Kirk*, 51 Cal. 238; *Atchison v. Peterson*, 87 U. S. 20 Wall 511, 23 L. ed. 415; *Jennison v. Kirk*, 98 U. S. 458, 25 L. ed. 241; *Broder v. Natoma Water & M. Co.* 101 U. S. 274, 25 L. ed. 790; *Sturr v. Beck*, 133 U. S. 552, 33 L. ed. 765; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

The issuance of the government's patent to Artemus Dodge on April 1, 1865, and before the passage of the act for the recognition and preservation of these dormant rights, carried the title to the land, with the riparian right to

that the plaintiff is entitled to recover in respect of the abstraction of the water by the defendant for the use of the mill for which it had been appropriated before it had been put to use by plaintiff. And the same result had been reached upon the motion for a new trial in the same case. *Mason v. Hill*, 8 Barn. & Ad. 304.

In *Wood v. Waud*, 3 Exch. 748, 18 L. J. Exch. 306, 13 Jur. 472, the court says that the principles which regulate the law as to natural streams were placed on their right footing in *Mason v. Hill*, *supra*.

Flowing water is *publici juris*, not in the sense that it is *bonum vacans* to which the first occupant can acquire an exclusive right, but that it is public and common in this sense only that all may reasonably use it who have a right of access to it; that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession; and that during the time of his possession only. *Embrey v. Owen*, 6 Exch. 355, 30 L. J. Exch. 412, 15 Jur. 633. And the same statement is repeated in *Chasemere v. Richards*, 2 Hurist. & N. 106.

In *Sampson v. Hoddinott*, 1 C. B. N. S. 611, 26 L. J. C. P. 148, 8 Jur. N. S. 243 (1837), it is said, all persons on the margin of a flowing stream have by nature certain rights to use the water of the stream whether they exercise these rights or not, and they may begin to exercise them whenever they will. By usage they may acquire the right to use the water in a manner not justified by their natural rights; but such acquired right has no operation against the natural rights of the land owner higher up the stream unless the usage by which it was acquired affected the use which he himself made of the stream, or his power to use it so as to raise the presumption of a grant and to render the tenements above a servient tenement.

No proprietor can have a right to use the water to the prejudice of other proprietors. *Wright v. Howard*, 1 Sim. & Stu. 190.

The American doctrine.

The doctrine finally adopted in England has been generally adhered to in this country.

Priority of occupancy of the flowing water of the river creates no right unless the appropriation be for a period which the law deems a presumption of right. *Tyler v. Wilkinson*, 4 Mason, 397.

The mere erection of a dam and mill does not, apart from the length of the occupation, give exclusive right which will enable the owner to maintain an action against a person erecting a mill higher up, which results in diverting the water in part from his mill. *Platt v. Johnson*, 15 Johns. 213, 8 Am. Dec. 223.

And the principle of that case was followed in *Merritt v. Brinkerhoff*, 17 Johns. 319, 8 Am. Dec. 30 L. R. A.

404; *Palmer v. Mulligan*, 3 Cal. 307, 2 Am. Dec. 270; *Thomas v. Brackney*, 17 Barb. 654.

One who erects a mill or dam upon a stream does not by mere priority of occupation acquire such exclusive right to the stream as to enable him to maintain an action against a person erecting a mill and dam above, by which the water is partly diverted and he is thereby injured. *Hoy v. Sterrett*, 2 Watts, 327, 27 Am. Dec. 313; *Hartsall v. Sill*, 12 Pa. 243; *Whaler v. Ahl*, 29 Pa. 98.

An upper riparian proprietor cannot divert water from a stream for manufacturing purposes without restoring it to the stream if the result is to damage a lower proprietor. *Weiss v. Oregon Iron & S. Co.* 13 Or. 496.

The priority of a particular new application or artificial use of water does not create a right to that use. *Pugh v. Wheeler*, 2 Dev. & B. L. 55.

Twenty years' adverse possession of a diverted watercourse is indispensably necessary to defeat the rights of the owner of the ancient channel. *Campbell v. Smith*, 8 N. J. L. 172, 14 Am. Dec. 400.

In the absence of the statute no right will be acquired by the erection of a dam. *Bearse v. Perry*, 117 Mass. 211.

As between riparian proprietors, priority of appropriation of the water of a running stream which is common to all for the driving of machinery gives one no superior right unless it has been continued for such a length of time and under such circumstances as would be required to establish rights by prescription. *Dumont v. Kellogg*, 29 Mich. 420, 18 Am. Rep. 102.

Priority of use of the water of a stream by a riparian proprietor gives him no exclusive right. *Bliss v. Kennedy*, 43 Ill. 67.

A settler on public land by erecting a mill thereon acquires no right to flow water back on other public land without an express grant of the right from the government. *Wilcoxon v. McGhee*, 13 Ill. 381.

In *Evans v. Merriweather*, 4 Ill. 492, 38 Am. Dec. 107, the court quotes with approval the doctrine of *Tyler v. Wilkinson*, *supra*, that mere priority of appropriation of running water without consent or grant confers no exclusive right.

The first appropriation of a mill site gives no right to flow the land of a neighbor, whether he has a mill or not. *Stout v. McAdams*, 3 Ill. 67, 38 Am. Dec. 441.

One riparian owner cannot appropriate a specific portion of the water of a stream to his own use to the exclusion of those below him. *Plumleigh v. Dawson*, 6 Ill. 544, 41 Am. Dec. 190.

Priority of appropriation of the water of a stream confers no exclusive right to the use of it. *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 265.

If two persons own land where there is but one mill privilege neither can acquire an absolute right

the water as an incident thereto, and effectually cut off all supposed counter rights.

Union Mill & M. Co. v. Ferris, 2 Sawy. 176; *Union Mill & M. Co. v. Dangberg*, Id. 450; *Vansickle v. Haines*, 7 Nev. 249; *Luz v. Haggin*, 69 Cal. 389; *Sturr v. Beck*, 188 U. S. 551, 33 L. ed. 765; *Jennison v. Kirk*, 98 U. S. 460, 25 L. ed. 243.

Messrs. B. L. Sharpstein, J. L. Sharpstein, and D. J. Crowley, for respondent:

The right of appropriation existed before the passage of the act of Congress of 1866, and was a valid subsisting right recognized by the courts and customs, and respondent's appropriation having been had before the issuance of the patent, it could not be thereby cut off. The act of Congress was a recognition of a pre-existing right.

to the water by the prior erection of a mill. *Bailey v. Rust*, 15 Me. 440.

Running water is not susceptible of an appropriation which will justify the diversion or unreasonable detention of it. *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

Prior appropriation for a mill will not give the proprietor a right to throw the water back on an upper proprietor. *Hendrick v. Cook*, 4 Ga. 241.

Prior appropriation of the water in a stream for the use of the mill will not give the owner a right to have the water of the stream flow in a particular way. *Keeney & Wood Mfg. Co. v. Union Mfg. Co.* 39 Conn. 578; *Parker v. Hotchkiss*, 25 Conn. 321.

No riparian proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has acquired the right to use the water in some peculiar manner and differently from what he would be entitled to do as a mere riparian owner, which he may do by an uninterrupted enjoyment for such a length of time as would afford a conclusive presumption of a grant. *Wadsworth v. Tillotson*, 15 Conn. 366, 36 Am. Dec. 391.

But the right may be acquired by a use long enough to raise the presumption of a grant. *Williams v. Wadsworth*, 51 Conn. 277.

To gain a right to the use of water in a stream which shall discommode a riparian owner the use must be continued long enough to presume a grant. *Buddington v. Bradley*, 10 Conn. 213, 26 Am. Dec. 386.

Prior occupation of water for a period less than that required to presume a grant does not affect the rights of other proprietors on the same stream. *King v. Tiffany*, 9 Conn. 102.

A right to the special use of the water, as to run a mill, may be acquired by enjoyment of it for a period long enough to presume a grant so that the right cannot be interfered with by other proprietors on the stream either above or below. *Ingraham v. Hutchinson*, 2 Conn. 592.

In *Webb v. Portland Mfg. Co.* 3 Sumn. 189, the court quotes with apparent approval language from another case that running water is not susceptible to any appropriation which will justify the diversion or unreasonable detention of it.

No riparian proprietor has any property in the water, for, like the air, it cannot be appropriated as the exclusive property of any one; but each of them may simply use it while it passes along. *Rhodes v. Whitehead*, 27 Tex. 310, 84 Am. Dec. 631; *Fleming v. Davis*, 37 Tex. 173.

The prior occupancy of a mill site does not give the owner a right to control the flow of water to his mill as against one afterwards erecting a mill higher up the stream. *Martin v. Bigelow*, 2 Aik. (Vt.) 184, 16 Am. Dec. 606; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 324.

30 L. R. A.

Basey v. Gallagher, 87 U. S. 20 Wall. 670, 22 L. ed. 452; *Broder v. Natoma Water & M. Co.* 101 U. S. 276, 25 L. ed. 791; *Aitchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414; *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Hindman v. Risor*, 21 Or. 112; *Olmsted v. Loomis*, 9 N. Y. 423; *Barnes v. Sabron*, 10 Nev. 217; *Kirk v. Bartholomew*, 3 Idaho, 1085; *Jones v. Adams*, 19 Nev. 78; *Pom. Riparian Rights*, §§ 107-109; *Coffin v. Left Hand Ditch Co.* 6 Colo. 443.

Hoyt, J., delivered the opinion of the court:

This action was brought by respondent to restrain the defendant from interfering with a dam which had been erected for the purpose of diverting water from Mill creek into a race

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, it appeared that the upper proprietor on a stream was making such use of the stream as to foul the water and make it corrode plaintiff's machinery when he attempted to use it in his mill; the court said: "We know of no rule or principle of law by which such a mode of appropriation of a running stream, in the absence of any proof, of a paramount right or title, can be justified or excused as against a riparian owner of land on the same stream below."

Prior occupation gives no right. *Gilman v. Tilton*, 5 N. H. 231; *Odioune v. Lyford*, 9 N. H. 502, 33 Am. Dec. 397; *Cowles v. Kidder*, 24 N. H. 374, 57 Am. Dec. 287; *Norway Plains Co. v. Bradley*, 62 N. H. 84. But so long as there is no larger appropriation of water running through the land than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down. *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85.

As to the right of prior appropriation, that has regard to the quantum of water withdrawn from the stream common to all parties, and not to the quantum of flow. *McAlmont v. Whitaker*, 3 Hawle, 84, 23 Am. Dec. 102.

In *Strickler v. Todd*, 10 Serg. & R. 63, 13 Am. Dec. 649, the judge writing the opinion states that the doctrine of prior appropriation ought to be adopted in favor of the owners of mills.

And in a Kentucky case that doctrine seems to have been adopted contrary to all the other modern authority on the subject.

In *Tye v. Catching*, 78 Ky. 463, it seems to be decided without any discussion of the question that the right to use a stream for mill purposes can be acquired by occupancy, and that when once acquired a subsequent locator of a mill must take the stream as he finds it. For this doctrine, *Angell, Watercourses*, sections 180 and 360 are cited; but section 360 treats of special grants and reservations, and section 180 states the old doctrine of the common law, while the author goes on in the subsequent sections to state the doctrine of the later English and American cases to the contrary.

II. Right under special statutes or customs.

a. Mill acts.

There are some cases from Maine and Massachusetts which have sometimes been regarded as favoring the right of prior appropriation. But they were decided under mill acts and have no force except as interpreting the language of and rights acquired under such acts.

Thus, by statute in Maine no dam shall be erected to the injury of any mill lawfully existing either above or below it on the same stream. *Thomas v. Hill*, 81 Me. 252; *Wentworth v. Poor*, 86 Me. 243; *Lincoln v. Chadbourne*, 56 Me. 197.

And by appropriating the water of a stream to

or flume which led to his flouring mill. Defendant justified his action under a claim of the right to have the waters flow past his place, situated on said creek, between the point where the water was diverted and respondent's mill. Respondent claimed the right to divert the water, and founded such claim upon several distinct grounds. The cause was tried before a referee, who reported the testimony, with his findings of fact and law. Such findings were set aside by the superior court, and new ones made as the foundation for the decree which was entered. Defendant, not being satisfied with such decree, prosecutes this appeal, and asks for a reversal, for the reason that the findings of fact were not warranted by the proofs, and also because the facts found did not warrant the conclusions of law founded

thereon. We have carefully examined all the proofs, and although upon some points they are not as full as they should have been, we are not satisfied that they were insufficient to warrant every finding of fact made by the lower court. It follows that such findings must stand, and that, in the light thereof, the rights of the parties must be here determined.

It appears from such findings that the waters of Mill creek were, in the year 1861, diverted by plaintiff into his mill race, and conducted to his mill for use as a propelling power, to substantially the same extent as they are now diverted, conducted, and used. It, however, appears therefrom that there had been a slight increase in the amount of water diverted at certain seasons of the year and upon the fact of such increase that portion of the decree in

the use of a mill by constructing a milldam the owner may acquire a right to be protected although the water is not actually used for that purpose but merely held for that use when it suits the owner's convenience to so apply it. *Butman v. Hussey*, 12 Me. 407.

So, the Massachusetts statute provides that no dam shall be erected to the injury of another mill lawfully existing either above or below it on the same stream. *Smith v. Agawam Canal Co.* 2 Allen, 355.

The owner of a mill site who first occupies it by erecting a dam and mill will have a right to water sufficient to work his wheels if the privilege will afford it, notwithstanding he may by his occupation render useless the privilege of any one above or below him upon the same stream. *Hatch v. Dwight*, 17 Mass. 296, 9 Am. Dec. 146; *Cary v. Daniels*, 8 Met. 476, 41 Am. Dec. 532; *Whitney v. Eames*, 11 Met. 519; *Fuller v. Chicopee Mfg. Co.* 16 Gray, 44; *Pratt v. Lamsom*, 2 Allen, 286; *Lowell v. Boston*, 111 Mass. 465, 15 Am. Rep. 99.

When one proprietor upon the banks of a river has in fact appropriated the water the proprietor below is in so far restricted in his right to appropriate that he cannot erect a mill on his own land to flow back the water to the destruction of the mill already erected by authority of law. This priority of possession necessarily arises from the nature of the appropriation. When two men have equal right to appropriate, and where the actual appropriation of one necessarily excludes all others, the first in time is the first in right. But the mere erection of a mill will not prevent other persons from erecting their mills above on the stream and running them in the natural way, although the result will be that the water does not come down the stream in its ancient manner and cannot be so successfully utilized by the lower owner as it was before. *Gould v. Boston Duck Co.* 18 Gray, 442.

In *Storm v. Manchaug Co.* 18 Allen, 10, the court in considering the right of an upper proprietor to dig a ditch on his own land to prevent the flooding of it by a dam of a lower proprietor in process of erection said the priority of right secured by a priority of occupation has always been determined by the express language of the statute. Before the Revised statutes, if an upper proprietor was building a mill he was held to have so far appropriated the water privilege that the lower proprietors could not erect a new dam or raise an old one to his injury. *Bigelow v. Newell*, 10 Pick. 348. By a slight and perhaps unintentional change of phraseology introduced into those statutes, it was held that the law was changed and nothing but an existing mill could prevent a lower proprietor from putting a milldam upon his own land, although the effect of it might be to destroy an upper privilege

which its owner had previously begun to occupy. *Baird v. Wells*, 22 Pick. 312.

The erection of a milldam will not prevent the upper owner from erecting a dam on his own land for the purpose of a fish pond although the effect will be to prevent the milldam from flowing the water onto the land of the upper proprietor. *Wood v. Edea*, 2 Allen, 573.

b. Customs.

1. General doctrine in mining states.

In the western section of the United States, where search for precious metals was one of the chief industries of the early settlers, the common-law abandonment of the doctrine of appropriation of water was not followed.

In *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414, it is said that by the custom which has obtained among miners in the Pacific states and territories where mining for the precious metals is done on the public lands of the United States, the first appropriator of waters in the streams on such lands for mining purposes is held to have a better right than others to use the waters. The first appropriator who subjects the property to use or takes the necessary steps for that purpose is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day after the discovery of gold, found to be inapplicable or applicable in a very limited extent to the necessities of miners, and inadequate to their protection. The government being the sole proprietor of all the public lands whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The doctrine of right of prior appropriation was recognized by legislation of Congress in 1866.

And the general rule there has been to recognize and protect rights in water acquired by prior appropriation. *Stein Canal Co. v. Kern Island Irrigation Canal Co.* 59 Cal. 583; *Frey v. Lowden*, 70 Cal. 550; *Wixson v. Devine*, 67 Cal. 841, 80 Cal. 385; *Watterson v. Raldunbehere*, 101 Cal. 107; *Wells v. Mantes*, 99 Cal. 583; *Nephi Irrigation Co. v. Jenkins*, 8 Utah, 369; *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.* 3 Colo. App. 255; *People v. Downer*, 19 Colo. 585; *Geertson v. Barraok*, 2 Idaho, 1066; *Kirk v. Bartholomew*, Id. 1067; *Fabian v. Collins*, 2 Mont. 510; *Wold v. May*, 10 Wash. 157.

2. Source of right of appropriation.

The only source of this right of appropriation seems to be in the fact that the settlers themselves who went into those states asserted and acquiesced

favor of the appellant is largely based. We are not satisfied that the fact of such increase was established by the proofs, but, the plaintiff not having appealed, we are not called upon to investigate as to that portion of the decree adverse to him. It further appears from the findings that, at the time the water was so diverted by the plaintiff, all of the land, on both sides of the creek, from the place of its diversion to a point below the land owned by the defendant, was a part of the public domain, and that it so remained until 1863, at which time the tract of which defendant's land is a portion was entered and purchased at private cash sale by one Artemus Dodge, who, in 1865, received a patent therefor. It further appears that said Dodge, prior to such entry, gave the plaintiff oral permission to conduct the water across the tract of land, and that George J. Dodge, to whom he deeded it, exe-

cuted to plaintiff a written instrument, in the shape of a lease, formally conferring the right to so conduct the water by means of the race and flume as then constructed for the period of ninety-nine years; that the operation of the mill, and the source of its power, and the means by which it was diverted from and conducted to the mill were open and notorious, and known to every one in the vicinity, including said Artemus Dodge and those holding under him, including the defendant; and that no complaint was ever made in reference thereto until the year 1895. Upon these material facts, among others, found by the court, respondent contends that, as between himself and the defendant, he is entitled to the use of the water for the purpose of propelling his mill to the extent to which he had used it from the time of its original diversion. He makes this contention for the reasons: First,

in it so that from the custom which began in that way it came to be recognized as law.

The fact early manifested itself that the mines could not be successfully worked without a proprietorship in waters, and it was recognized and maintained. To protect those who by their enterprise, industry, and capital had constructed canals and races, carried water for miles into parts of the country which must have otherwise remained unfruitful and undeveloped it was held that the first appropriator acquired a special property in the waters thus appropriated and as a necessary consequence of such property might invoke all local remedies for its enjoyment or defense. *Hoffman v. Stone*, 7 Cal. 46.

By a universal sense of propriety and necessity there is a right of miners to be protected in the possession of their selected localities, and of those who by prior appropriation have taken the waters from their natural beds and by creating artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers and without which the most important interests of the mineral region would remain without development. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 118.

For eighteen years from 1848 to 1866, the regulations and customs of miners as enforced and molded by the courts and sanctioned by the legislation of the states, constituted the law governing property in mines and the water on the public mineral lands. *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240.

In determining controversies between claimants the court proceeds upon the presumption of a grant from the government to the first appropriator. *Coryell v. Cain*, 16 Cal. 567.

In *Hill v. Newman*, 5 Cal. 445, 63 Am. Dec. 140, it is stated that the right to water existed upon the ground of prior location upon the land or prior appropriation and use of the water.

In *Conner v. Weaver*, 8 Cal. 543, 65 Am. Dec. 528, the court says that in the decisions that it had made upon the subject of private rights in the public domain it had applied simply to principles of the common law. It states that it has recognized the right of individuals to appropriate water, to divert it from its natural channel where no riparian rights intervened, and to be protected in its use against all subsequent efforts to divert or injure it.

In *Schilling v. Rominger*, 4 Colo. 100, the court said: "That the first appropriator of the water of a natural stream has a prior right to such water to the extent of the appropriation is a doctrine that we must hold applicable in all cases respecting the diversion of water for the purpose of irrigation."

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Statutes recognizing right.

In most of the states in which the custom obtained, statutes were passed recognizing and regulating the right.

The Texas statute provides for the appropriation of unappropriated water in streams in the arid portions of the state for irrigation purposes. *McGhee Irrigating Ditch Co. v. Hudson* (Tex.) 21 S. W. 175.

But this law cannot operate on the right of riparian proprietors then existing but is intended to operate only on land of which the state had the title. *McGhee Irrigating Ditch Co. v. Hudson*, 85 Tex. 587.

2. Against whom available.

The doctrine of riparian rights is founded upon the individual rights of landed proprietors upon the stream. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 118.

So, where the title to all the land was in the government, and there were no individual proprietors, there was no reason to prevent the adoption of some other system if the government agreed to permit it. But when the government granted rights to individuals in land formerly belonging to it, the question immediately arose whether such grantees obtained all the common-law riparian rights in streams flowing through the property or whether they took subject to the rights of those whom the government had permitted to appropriate water rights upon its domain. This question has led to some difference of opinion and cannot be regarded as fully settled yet in all its branches, except in states where the doctrine of riparian rights is not recognized it is settled that an appropriation of water is not good against prior riparian rights.

The right to mine cannot override the right of one who has previously appropriated the water to a stated individual use. *Tartar v. Spring Creek Water & M. Co.* 5 Cal. 397.

There was a subsequent decision holding that the rights of one who has taken up public land for agricultural purposes must give way, under the California statutes, to the rights of miners. *Clark v. Duval*, 15 Cal. 86.

But this was not applied to water rights.

In *Wixon v. Bear River & A. Water Co.* 24 Cal. 367, 85 Am. Dec. 69, the controversy was between the owner of an orchard which had been planted on the banks of a stream and one claiming the water for mining purposes, and the court held that the miner must use the water so as not to injure the orchard, saying the requested instructions are founded upon the theory that in the mineral districts of the state the rights of miners and persons

that he is the owner of the water for the purpose of running his mill by reason of his prior appropriation thereof; second, that the grantors of the land, by the giving of the permission to construct the flume, and the making of the lease, as above stated, and by standing by and seeing money expended by virtue of such permission and lease, estopped themselves, and those holding under them, from interfering with such flume, or the diversion of the water to effect which it was constructed; and, third, that there had been such open, continuous, and adverse user as to give title by prescription. The first claim is met by the appellant by two principal propositions: One, that it was not shown that any right to prior appropriation existed as a part of the law or local customs of the locality; the other, that if the court could take judicial notice of the existence of such customs, or so find from the facts

proved, they had no force as against the defendant, for the reason that the grantor through whom he claims by mesne conveyance acquired title to the land by grant from the government prior to the passage of the act of Congress of July 26, 1866.

If the first proposition is determined adversely to appellant, he substantially concedes that the plaintiff would have been entitled to the use of the water appropriated in 1861 if the grant of the land of which his was a part had not been made by the government until after the passage of said act. Each of these propositions raises questions of the utmost importance, and we have given them such careful consideration as our opportunities would allow, and have come to the conclusion that this state, or at least that portion of it east of the Cascade mountains, was included within the territory where the right to prior appro-

owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character regardless of the time or modes of other acquisitions; thus annihilating the doctrine of priority in all cases where the controversy is between the miner or ditch owner and one who claims the exercise of any other kind of right or the ownership of any other kind of industry. To such a doctrine we are unable to subscribe.

And in *Rupley v. Welch*, 23 Cal. 458, where a person had constructed a reservoir to hold the water flowing down a ravine for the purpose of procuring water to irrigate his garden, the court held that this water could not be subsequently taken for mining purposes.

An appropriator cannot acquire a right to any use of the waters of a stream to the prejudice of a riparian owner except under the statute of limitations. *Vernon Irrigation Co. v. Los Angeles*, 108 Cal. 237.

Where no riparian rights have attached, it is equally well settled that an appropriator of water acquires a good title which he can defend against riparian rights which are subsequently acquired.

Where the stream is subject only to the rights of the government the first appropriator acquires a title to all the water he appropriates and uses as against all even subsequent grantees from the government. *Kaler v. Campbell*, 18 Or. 598.

The right to running water on the public lands of the United States can be acquired by prior appropriation as against persons not having the title of the government. *Bassey v. Gallagher*, 37 U. S. 20 Wall. 678, 22 L. ed. 452.

The appropriator acquires a right against all persons excepting previous appropriators. *Himes v. Johnson*, 61 Cal. 259.

The owner of a canal in the mineral region on the public domain constructed for the purpose of supplying water to miners has the right to divert the water of a stream from its natural channel as against the claims of those who, subsequent to the diversion, take up land upon the banks of the stream for mining purposes. *Irwin v. Phillips*, 5 Cal. 140, 63 Am. Dec. 118.

The person first appropriating water on the public land is deemed to have the title as against all the world except the United States and persons claiming under them, to the extent that he thus appropriates it before the rights of others attach. *Yankee Jim's Union Water Co. v. Crary*, 25 Cal. 504, 85 Am. Dec. 145 (1864); *American Co. v. Bradford*, 27 Cal. 280.

The right of the appropriator is entitled to protection as well after the patent has issued to a third person for the land over which the natural stream flows as when such land is a part of the public do-

main; and it is immaterial whether or not it is mentioned in the patent and expressly excluded from the grant. *Coffin v. Left Hand Ditch Co.* 6 Colo. 448.

A prior appropriator of the water of a stream all of which he claims, uses, and needs for irrigation, has a right to the whole as against a patentee of land through which the stream flows, though no custom to that effect is shown. *Drake v. Earhart*, 2 Idaho, 716.

One who obtains title from the government cannot insist on his riparian rights as against the title of one who acquired a right to appropriate the water under a custom to which he agreed. *Thorpe v. Tenem Ditch Co.* 1 Wash. 566.

In *Pope v. Kinman*, 54 Cal. 3, plaintiffs were owners of a Mexican grant patented in 1872. Defendants and their predecessors appropriated all the water of a creek flowing through it in 1856, and had used the water exclusively ever since and claimed the right to exclusive use to the water; the action was to quiet plaintiff's title against this claim. The court says the patent issued in June, 1872, and the action was commenced in May, 1877, and therefore the defendants can claim nothing as against the owners of the ranch by reason of the lapse of time since their alleged appropriation of the water. Of course the presumption is that plaintiffs had been in possession of the ranch since the grant from the Mexican government, and therefore in order to obtain title by appropriation it must have been under such circumstances that the title would be protected by the statute of limitations.

If the right to appropriate water on the public land is claimed and exercised until the statutory period of limitations has run, the right cannot be disturbed by one succeeding to the rights of the government. *Tolman v. Casey*, 15 Or. 83.

The effect of a government patent upon the rights of a prior appropriator has been a question of some difficulty, but since the passage of the acts of Congress of 1866 and 1870, that question must be considered as settled by legislation the construction of which will be found *infra*, c. *Act of Congress of 1866*.

In *Thorp v. Freed*, 1 Mont. 651, the court was divided in opinion as to the right to gain title to water by appropriation for irrigation purposes as against persons who subsequently become riparian owners of the land under grant from the government.

In Nevada it was first held that the right of an appropriator is subordinate to that of a subsequent patentee from the government in cases where the patent was issued prior to the act of 1866. *Van Sickle v. Haines*, 7 Nev. 249.

priation of water for mining and other beneficial purposes was recognized by the courts and the lawmaking power, and that such right was established by a custom so universal that courts must take judicial notice thereof. We therefore hold that the right to prior appropriation, as recognized by said act of Congress, existed as a part of the laws and customs of the locality. Such holding compels a consideration of the second proposition above suggested.

It is argued by appellant that, by absolute grant of the land before the passage of said act of Congress, the title passed with such riparian rights as were recognized by the common law of England, and that such rights, having become vested before its passage, could not be affected thereby. If the right to appropriate water from streams upon the public domain is

derived from the passage of the act in question, and if, before that time, such acts of appropriation were, as against the government of the United States, trespasses upon the public domain, it is clear that this contention must be sustained. But, in our opinion, such was not the fact. The United States, as the owner of nearly all the lands in the locality where such use of the water was required, had the power to establish such rights in relation to its appropriation and use as it saw fit; and to the extent that it recognized such rights the common law in relation thereto was modified or abrogated. That this could be done by direct act of Congress is not disputed by appellant, and we think it could also be done by such action on the part of the government as clearly disclosed its intention, though not evidenced by act of

But that case was subsequently overruled. See *infra*, c. *Act of Congress of 1886*.

The rights of one who settled upon the public land prior to the appropriation, but did not receive his patent until after that event, have been the subject of much discussion. And the courts have been very evenly divided in opinion.

In an early California case, *Crandall v. Woods*, 8 Cal. 136, the court says: "The only question involved in this case is whether a party who locates upon and appropriates public lands belonging to the government is entitled to the use of streams naturally flowing through such lands as against persons subsequently appropriating and using the waters of said streams. If the rule laid down in *Irwin v. Phillips* is correct as to the location of water ditches for mining purposes, and priority is to determine the rights of respective parties, it is difficult to see why the rule should not apply to all other cases where land or water has been appropriated. An appropriation of land carries with it all water on the land or the usufruct in the water, and one who appropriates the land will be held to have appropriated the water of the stream flowing over it as an incident to the soil as against those who subsequently attempt to divert it from its natural channel for their own purposes.

But afterwards it was held that until a pre-emptor has proved up his claim and paid for his land a water right may be acquired against him by a prior appropriator. *Farley v. Spring Valley Min. & I. Co.* 58 Cal. 142.

So, the rights of a pre-emptor on the public land date from the issuance of a patent, and if a notice of an appropriation of water has been given prior to that time it will be superior to that of the patentee. *Osgood v. El Dorado Water & D. G. Min. Co.* 56 Cal. 571.

So, in *Ellis v. Pomeroy Imp. Co.* 1 Wash. 572, although there are other grounds of decision, such as estoppel and a question of contemporaneous appropriation, the court holds that a settler on the public land is subject to the rights acquired by third persons by appropriation of water at any time before he makes final proof and acquires the government title, unless in the mean time he has made an actual appropriation of water himself. And the doctrine of that case was followed in *Geddis v. Parrish*, 1 Wash. 587.

But that question has been settled the other way by the Supreme Court of the United States.

A homestead entry on a tract of land through which runs a stream of water is an appropriation of the riparian rights belonging thereto which cannot be displaced by a subsequent entry of a water right upon the same stream. *Sturr v. Beck*, 138 U. S. 541, 33 L. ed. 761.

And the same doctrine had been held in the lower court. *Sturr v. Beck*, 6 Dak. 71.

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Sturr v. Beck, was followed in *Faul v. Cooke*, 19 Or. 455, and *Cole v. Logan*, 24 Or. 304.

Appropriation of water by one who has settled on the public land with the intention of acquiring title to the land is effective from its date, although he does not acquire the title for some time afterwards. *Elliot v. Whitmore*, 8 Utah, 253.

4. Extent and Limitation of right.

The interest acquired by the prior location of water is not a property in the water as such. *McDonald v. Askew*, 29 Cal. 200; *Eddy v. Simpson*, 3 Cal. 249 (1853); *Kidd v. Laird*, 15 Cal. 161, 76 Am. Dec. 472.

But the right to the use of water for irrigating purposes is a right of property. *Cash v. Thornton*, 8 Colo. App. 475.

Prior appropriators of water are entitled to have the same flow uninterruptedly in quantity and without permanent or unreasonable deterioration in quality. *Cushman v. Highland Ditch Co.* 3 Colo. App. 487.

A subsequent appropriator cannot diminish the quantity or deteriorate the quality of water to which the prior appropriator is entitled. *Junkans v. Bergin*, 67 Cal. 267.

A prior appropriator for mining purposes has a right to have the water flow down above the point of his appropriation without interruption or diminution in quantity. *Phoenix Water Co. v. Fletcher*, 28 Cal. 481; *Natoma Water & M. Co. v. McCoy*, Id. 490.

The first appropriator is entitled to all the water to the extent of his appropriation. *Hillman v. Hardwick*, 2 Idaho, 993.

While the title of the public or the state to the unappropriated waters of the streams can only be divested as to the portions thereof segregated and appropriated to beneficial uses, when this has been legally done the appropriator becomes the proprietor of the water appropriated and diverted, or of the use thereof, which is the same thing; and so long as the beneficial use is continued the water remains the subject of exclusive ownership and control and is the property of the appropriator in every legal aspect. *Wyatt v. Larimer & W. Irrigation Co.* 1 Colo. App. 480.

The first appropriator of water has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of his appropriation. *Butte Canal & D. Co. v. Vaughn*, 11 Cal. 143, 79 Am. Dec. 769.

If the owner of a ditch is entitled to all the water flowing in the stream where his ditch starts, claimants lower down cannot complain of his action in enlarging his ditch. *James v. Williams*, 31 Cal. 211.

The first appropriator is entitled to use enough

Congress, and that such modification or abrogation would have force as against the grant of the government, though not expressly embodied in the instrument or legislation by which the grant was made. If the action of the government was of such a nature as to evidence its intent to inaugurate such a modified system as to rights to waters upon the public domain, it was of such a nature as to convey notice to all persons interested of that fact. If from such action such intent could be presumed, it must be because it had substantially the same effect as direct legislation by Congress; and, since every one must take notice of such legislation, they must likewise take notice of a practice having the force thereof.

The material question, therefore, is as to whether or not, prior to the act of 1866, the

practice in the locality referred to of appropriating the waters of running streams by means of their diversion for mining and other beneficial uses had been so sanctioned by the practice of the government that it had become lawful. It is not necessary for us to enter into any extended discussion as to this question, nor to enlarge upon the situation of the localities in which the custom of so diverting waters prevailed, nor to speak of the absolute necessity of such customs, for the reason that the Supreme Court of the United States has ably discussed and fully decided the question. And such question is a Federal one, upon which such decision is controlling in the courts of the states, as well as in those of the United States. A reference to a few cases will establish the above-stated conclusions as to the position of

of the water to protect his flume from injury during the process of construction. *Weaver v. Conger*, 10 Cal. 223.

The first appropriator of water on public land has the prior right to its use to the extent in amount and time of his first appropriation, and possibly to the extent to which he was at that time preparing to appropriate it. *Lehi Irrigation Co. v. Moyle*, 4 Utah, 327.

A sale of the upper section of the ditch under a mechanic's lien will give the purchaser a right to use and consume all the water flowing into the ditch at its head. *Reynolds v. Hosmer*, 51 Cal. 305.

The first appropriator is entitled to the amount of water which his ditch indicates that he intended to take, and is not limited to what he actually did take, unless he continues to take the smaller quantity so long as to indicate that he only intends to take that amount. *White v. Todd's Valley Water Co.*, 8 Cal. 443, 68 Am. Dec. 385.

An appropriation from a stream includes the water when it is flowing in its tributaries. *Low v. Schaffer*, 24 Or. 232; *Low v. Risor*, 25 Or. 551 (1894).

In the absence of legislation to the contrary, the right to water acquired by the priority of the appropriation thereof is not in any way dependent upon the location of its application to the beneficial use designed. The water may be carried over a water shed and used in the valley of another stream. *Coffin v. Left Hand Ditch Co.*, 6 Colo. 442.

In California there has been some fluctuation of opinion upon the question as to the right of the appropriator to protection against deterioration in the quality of the water.

It was at first held that the first appropriator of water for mining purposes is entitled to have the water flow so undiminished in quantity as to leave sufficient to fill his canal or ditch as it existed at the time of subsequent appropriations of the stream above him. But he cannot insist that the water shall reach him without deteriorating in quality. *Bear River & A. Water & M. Co. v. New York Min. Co.*, 8 Cal. 327, 68 Am. Dec. 325; *Hill v. King*, 8 Cal. 336; *Mokelumne Hill Canal & M. Co. v. Woodbury*, 10 Cal. 185.

But the court refused to extend the doctrine of the Bear River Case further in *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

And in *Hill v. Smith*, 27 Cal. 430, the right was claimed to dig in the bed of the stream above the head of plaintiff's ditch, and the result was that the water flowing in the ditch was fouled with sediment. The court says that the charge of the trial court which was favorable to defendant was based on the notion, which had become quite prevalent, that the rules of the common law touching water rights had been materially modified in the state upon the theory that they were inapplicable to the

conditions found to exist there. But the court says: "This notion is without any substantial foundation. Neither the miner nor the riparian proprietor can so use the water as to prejudice or injure the prior right to a like use by another. The question between miners is the same as between riparian proprietors. 'Is the plaintiff's use and enjoyment of the water for the purpose for which he claims it impaired by the acts of defendant?' " And that doctrine was adhered to upon a subsequent appeal in the same case. *Hill v. Smith*, 32 Cal. 160.

Limitation of right.

The right to water by prior appropriation is limited in every case in quantity and quality by the uses for which the appropriation is made. The appropriation does not confer such absolute right to the body of the water diverted that the owner can allow it after its diversion to run to waste and prevent others from using it for mining or other legitimate purposes; nor does it confer such a right that he can insist upon the flow of the water without deterioration in quality where such deterioration does not defeat or impair the uses to which the water is applied. *Atchison v. Peterson*, 27 U. S. 30 Wall. 507, 22 L. ed. 414.

The amount of water to which a party is entitled is limited to the amount actually applied to purposes of irrigation. *Simpson v. Williams*, 13 Nev. 432.

The quantity to which an appropriator is entitled is determined by the capacity of the headgate and ditches and the quantity of water required for the uses to which it is to be appropriated. *Carron v. Wood*, 10 Mont. 600.

In *Ophir Silver Min. Co. v. Carpenter*, 6 Nev. 393, it was agreed that the quantity of water appropriated was to be determined by the capacity of the ditch at its smallest point; that is at the point where the least water would flow through it.

The use is to be a reasonable one and so far as possible consistent with a use by others. *Last Chance Min. Co. v. Bunker Hill & S. Min. & C. Co.*, 49 Fed. Rep. 430.

As against a subsequent appropriator a prior one is limited to the amount of his appropriation made prior to the time the second one was made. *Salina Creek Irrigation Co. v. Salina Stock Co.*, 7 Utah, 455.

An appropriator cannot appropriate more water than is necessary to irrigate his land or hold it by possessory right or title to the exclusion of a subsequent bona fide appropriator. *Thomas v. Guiraud*, 6 Colo. 530.

The first appropriator is only entitled to as much water as is necessary to irrigate his land, and is bound to make a reasonable use of it. *Barnes v. Sabron*, 10 Nev. 217.

said supreme court upon this question. In *Atchison v. Peterson*, 87 U. S. 20 Wall. 507, 22 L. ed. 414, Mr. Justice Field, speaking for the court, made use of the following language: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands, for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the nec-

essary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of miners, and inadequate to their protection. . . . This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866." And in *Bassey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452, the court,

A prior appropriator may insist that the water remain in the stream from which he has a right of appropriation only so long as any useful quantity would reach his point of diversion, and, where it is shown that water used by a junior appropriator for a beneficial purpose would, if not so used by him, sink before reaching the point of diversion of the prior appropriator, the latter is not merely by reason of his prior claim entitled to an injunction to compel the junior appropriator to allow the water to remain in the stream. *Raymond v. Wimssette*, 12 Mont. 551.

An appropriator cannot after he has used sufficient of the water of the creek to supply his needs take the remaining water and instead of letting it pass down the creek for the benefit of subsequent appropriators sell it to other persons to be conveyed away from the creek and consumed. *Creek v. Roseman Waterworks Co.*, 15 Mont. 121.

One who has constructed a ditch without filing a map or plat of the area of intended use as required by statute will not be permitted to increase the scope of the ditch to the detriment of intervening appropriators, although the enlarged ditch is necessary to give him all the water which will be required to properly cultivate the land for which the appropriation was made. *Taughenbaugh v. Clark* (Colo.) 40 Pac. 153.

He who attempts to appropriate water does so at his peril. He must see to it that no legal right of prior appropriators or other persons is in any way interfered with by his acts. He cannot lessen the quantity of water, seriously impair its quality, or impede its natural flow, to the detriment of others who have acquired legal rights therein superior to his. *Larimer County Reservoir Co. v. People*, 8 Colo. 614.

The appropriator may be compelled to repair leaks in his ditch and flumes so that he will not divert more water than he adapts to a beneficial use. *Barrows v. Fox* (Cal.) 30 Pac. 768.

But the appropriator cannot be compelled to transport his water in pipes so as to prevent waste. If he appropriated the water by means of open ditches he may continue to do so although by such means a portion of the water is wasted. *Barrows v. Fox*, 38 Cal. 53.

Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location, and if others have prior to that time decreased the quantity or quality of the water flowing in the stream the locator cannot complain. *Conrad v. Arrowhead Hot Springs Hotel Co.*, 108 Cal. 399.

The water does not become the personal property of the appropriator until it reaches his ditch, and he cannot maintain an action for the value of the water in case it is diverted before it reaches his ditch. *Parks Canal & M. Co. v. Hoyt*, 57 Cal. 44.

If the first appropriator only takes a part of the water flowing in the stream another may afterwards appropriate the remainder, and if the first appropriates the water only during certain hours

of the day or certain days of the week another may take it during the remaining time. *Smith v. O'Hara*, 43 Cal. 871; *Barnes v. Sabron*, 10 Nev. 217.

The difference in the policy adopted in California and Colorado is the cause for some difference in opinion as to the rights of the appropriator above the head of his ditch.

In California it is held that an appropriator's rights begin at the head of his ditch, and he cannot enter upon the land of a riparian proprietor to tap streams to increase his supply. It is only when the riparian proprietor prevents the water from flowing to the head of his ditch by an interference with the course of nature that the appropriator can complain. *Last Chance Water Ditch Co. v. Heilbron*, 88 Cal. 1.

Although in a prior case it had been held that an appropriator has a right as against a subsequent purchaser from the United States to go upon the latter's land and remove obstructions in the bed of the stream so as to cause its waters to flow in their natural channel to the point of diversion. *Ware v. Walker*, 70 Cal. 591.

While in Colorado it is held that the appropriator has the right to enter the bed of the stream above his ditch and remove sediment or obstruction which may have changed or obstructed the course of the current so as to prevent it from entering his ditch. But the most reasonable mode of effecting the object must be adopted, and it must be done in such a manner as to occasion as little damage as possible to the owner of the adjoining premises. *Crisman v. Heiderer*, 5 Colo. 582.

5. For what purpose appropriation permissible.

In *Bassey v. Gallagher*, 87 U. S. 20 Wall. 670, 22 L. ed. 452, the court says it has been held generally that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour and saw mills and to irrigate lands for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. This right to water, like the right to prior occupancy of mining grounds or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive the whole neighborhood or community of its use, and vest an absolute monopoly in a single individual.

Water may be appropriated on the public land for mining, milling, or agricultural purposes, and the rights of riparian owners when they attach are subject to rights thus acquired. *Speake v. Hamilton*, 21 Or. 3.

Water may be acquired for irrigation purposes. *Barnes v. Sabron*, 10 Nev. 217.

Water may be appropriated for agricultural purposes. *Ison v. Nelson Min. Co.* 47 Fed. Rep. 199.

Water may be appropriated for mill purposes. *Ortman v. Dixon*, 13 Cal. 33; *McKinney v. Smith*, 23 Cal. 374.

speaking by the same learned jurist, referring to the case of *Ashtion v. Peterson*, *supra*, stated that, among other things, it was held in that case "that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable, or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection." And further on in the same case, after having reviewed several other decisions of the supreme court, and speaking of the act of Congress in question, the following language was used: "It is very evident that Congress intended, al-

though the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition." And in *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 818, and in *Jennison v. Kirk*, 98 U. S. 458, 25 L. ed. 240, the doctrine that said act did not create the rights therein referred to, but was simply in affirmation thereof, is distinctly recognized. And in *Broder v. Natoma Water & M. Co.*, 101 U. S. 274, 25 L. ed. 790, the court, speaking by that distinguished judge, Mr. Justice Miller,

Water cannot be diverted for the purposes of speculation. *Combs v. Agricultural Ditch Co.* 17 Colo. 146.

The owner of land has no right to construct a reservoir on it for the storage of water which he puts to no beneficial use merely in the hope of having it used by a ditch company in the future. *Beaver Brook Reservoir & C. Co. v. St. Vrain Reservoir & F. Co.* (Colo.) 40 Pac. 1066.

6. Who may be an appropriator.

An alien may acquire and hold a water right as against all except the state. *Quigley v. Birdseye*, 11 Mont. 439.

An Indian may gain a title to water by appropriation. *Lobdell v. Hall*, 8 Nev. 507.

One who has no possessory right or interest in land for which he is to use water cannot make a valid appropriation of it for that land. *Tucker v. Jones*, 8 Mont. 225.

One of several tenants in common who own a water right, upon the abandonment of it for mining purposes and the turning of the water into the original channel may recapture and use the same water for other beneficial and lawful purposes of his own as against all except persons claiming rights as his cotenants. *Meagher v. Hardenbrook*, 11 Mont. 385.

The fact that the appropriator is also a riparian owner does not prevent him from claiming his rights as an appropriator. *Healy v. Woodruff*, 97 Cal. 464.

7. What is an appropriation and when complete.

The method of procedure under local statutes for the perfecting of a right of appropriation will not be stated here. This note will deal merely with the general principles applicable to the right, and the local methods of procedure will be reserved for a future note.

One who in California desires to appropriate the waters of a stream upon the vacant and unappropriated lands of the United States for a useful purpose may do so by the construction of a ditch or other medium of conduit and actually appropriating the water and conducting it to some point where it can be utilized in fulfillment of such useful purpose; and by so doing he acquires as against the subsequent appropriators and riparian proprietors acquiring title from the United States subsequent to such appropriation the right to the quantity of the water thus appropriated and an easement or right of way into and over the public land traversed by his ditch or conduit as constructed and used for such purposes. If one animated by a like desire to appropriate water under like circumstances finds a ditch already constructed to hand, takes peaceable possession thereof, and appropriates the water for a like or similar useful purpose, he thereby acquires a like right as against all the world except the true owner or those holding through or under him. *Utt v. Frey*, 106 Cal. 592.

To effect the appropriation, any gulch, dry ravine, or depression in the land, may be used as a

part of the ditch for conducting the water, and so make the lower portion of the same channel from which the water is taken. *Simmons v. Winters*, 21 Or. 35.

In *McPhail v. Forney* (Wyo.) 35 Pac. 773, it is said it is just as necessary to the creation and preservation of a water right to provide means for the continual diversion of the water from its natural channel and for conducting it to the place where it is applied to some beneficial purpose as it is to apply it to the beneficial purpose.

A mere appropriation of a mill site is not an appropriation of water enough to run the mill. *Robinson v. Imperial Silver Min. Co.* 5 Nev. 44.

Turning water out of the stream does not give a title to it if it is not used for a beneficial purpose. *Dick v. Caldwell*, 14 Nev. 167.

To establish a right under a custom as provided by the act of 1866 the claimant must allege and prove the existence of such custom. *Lewis v. McClure*, 8 Or. 273.

Mere declaration of intention to appropriate water is not sufficient to give a title to it. *Columbia Min. Co. v. Holter*, 1 Mont. 293.

The true test of the appropriation of water is the successful application thereof to the beneficial use designed. *Cash v. Thornton*, 3 Colo. App. 475.

The water must be applied within a reasonable time to some beneficial use. *Colorado Land & W. Co. v. Rocky Ford Canal, R. L. Loan & T. Co.* 3 Colo. App. 545.

The construction of a ditch for drainage purposes gives no right to the water. *Thomas v. Guiraud*, 6 Colo. 580; *Maeris v. Bicknell*, 7 Cal. 281, 68 Am. Dec. 257; *McKinney v. Smith*, 21 Cal. 374.

But if the ditch is constructed to convey water for mining purposes it seems that it will not defeat the right if it was also used as a drain. *Marius v. Bicknell*, 10 Cal. 217.

The depression formed in part by the bed of a stream may be utilized as a reservoir to hold the water and prevent it from going to waste. *Larimer County Reservoir Co. v. People*, 3 Colo. 614.

A mere diversion of water is not an appropriation. *Combs v. Agricultural Ditch Co.* 17 Colo. 146.

An excessive appropriation of water cannot be regarded as a diversion to a beneficial use. *Ibid.*

A diversion under promise of use in the future is not sufficient to sustain the right. *Fort Morgan Land & C. Co. v. South Platte Ditch Co.* 13 Colo. 1.

A valid appropriation of water may be made from a canyon, notwithstanding it is not a running stream and the water comes entirely from the rain fall of the surrounding hills. *Denver, T. & Ft. W. R. Co. v. Dotson*, 20 Colo. 304.

The Colorado Constitution does not apply to the use made by an owner of one estate upon the different parts thereof so as to give, after division of the estate, the priority of the right to use to one portion over another. *Bloom v. West*, 3 Colo. App. 212.

A municipal corporation may acquire the right to all the waters of a river by claiming them and having its claim recognized by persons owning

seems to have put this question fully to rest. He made use of the following pertinent language: "It is the established doctrine of this court that rights of miners who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act

of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument." Then follows a citation of the cases to which we have referred. This language and that of the other cases would seem to make it unnecessary that anything

land along the river, although for a considerable time it does not consume nearly all of the water. *Fellz v. Los Angeles*, 58 Cal. 73; *Elms v. Los Angeles*, *Id.* 80.

The claim must be for some useful or beneficial purpose or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer. *Weaver v. Bureka Lake Co.* 15 Cal. 371.

Appropriation is the intent to take accompanied by some open physical manifestation of the intent and for some valuable use. *McDonald v. Bear River & A. Water & M. Co.* 18 Cal. 232.

The appropriation may be made by two or more acting together. *Kimbell v. Gearhart*, 12 Cal. 27.

Possession of mining claims on a running stream carries the right to the use of the water flowing in the natural channel of the stream as against all except claims which were antecedently acquired. *Lehigh Co. v. Independent Ditch Co.* 8 Cal. 323.

The true test of appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same or making such application is immaterial, the construction of ditches is not necessary. It will be sufficient to merely construct a dam if by that means the water can be made to flow where it is needed. *Thomas v. Guiraud*, 6 Colo. 530.

Application to some beneficial use is necessary to complete an appropriation. *Farmers' High Line Canal & R. Co. v. Southworth*, 18 Colo. 111, 4 L. R. A. 767; *Simmons v. Winters*, 21 Or. 35.

Construction of ditch.

The right to take the water relates back to the beginning of work upon the ditch. *Woolman v. Garringer*, 1 Mont. 535.

The time when the appropriator's right begins is when he begins work on his dam and ditch if the work is prosecuted to completion and utilization of the water for beneficial use with reasonable diligence. *Irwin v. Strait*, 18 Nev. 498.

Reasonable time is allowed to complete an appropriation of water, and whether or not reasonable diligence has been used depends upon all the circumstances of the case, but, matters which will excuse delay must be incident to the enterprise and not to the person, such as lack of capital or illness of the appropriator. *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550.

That all the water which was appropriated cannot be used at that time by the appropriator will not put his right down to what he actually uses in favor of a subsequent appropriator if the amount appropriated was not greater than could be profitably used on his land and he intends as rapidly as possible to make use of the whole of it. *Kleinschmidt v. Greiser*, 14 Mont. 484.

If after doing part of the work necessary to make a water supply available for use operations are suspended for an unreasonable time, the rights of the appropriator will be abandoned, although the work is stopped because of lack of money and time. *Keeney v. Carillo*, 2 N. M. 430.

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The suspending of work on a ditch for a year and a month is not an abandonment if there was no intention of abandoning the claim. *Atchison v. Peterson*, 1 Mont. 561.

A delay of two years in completing a ditch, accompanied by the fact that the appropriator does not need the water or intend to utilize it at present, is a virtual abandonment of the right. *Bell v. Lamborn*, 18 Colo. 345, 20 L. R. A. 241.

Water appropriated for future needs must be utilized within a reasonable time in order to maintain the claim to it. *Hindman v. Rizer*, 21 Or. 112.

Lack of means is not a sufficient excuse for delay in prosecuting work upon a ditch to its completion. *Cole v. Logan*, 24 Or. 304.

Appropriators of water for irrigation purposes after conducting water to the point of intended use have a reasonable time in which to apply it to the use intended. They may add to the acreage of land cultivated from year to year, and make application of the water thereto for irrigation as their necessities demand until they have put to a beneficial use the entire amount originally diverted by them. *Conant v. Jones* (Idaho) 32 Pac. 250.

So long as the settler does not abandon, but continues in good faith to prosecute the construction of a ditch and the application of water to his land as rapidly as his demands and circumstances will permit, he should be held to be within the limit of a reasonable time. *Taugenbaugh v. Clark* (Colo.) 40 Pac. 153.

Loss of right.

The general right of abandonment of a water right is treated in a note to *Hewitt v. Story*, ante, 355.

If a person appropriating water fails to make a beneficial use of it within a reasonable time, whereby he forfeits his rights, he may afterwards regain them by another appropriation if intervening rights have not been acquired. *Beaver Brook Reservoir & C. Co. v. St. Vrain Reservoir & F. Co.* (Colo.) 40 Pac. 1066.

Upon abandonment of the construction of a proposed canal without intention of resuming, all incipient rights lapse and revert to the public and are not thereafter capable of being sold or transferred. *Colorado Land & W. Co. v. Rocky Ford Canal, H. L. Loan & T. Co.* 8 Colo. App. 543.

A prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another. *Barkley v. Tieleke*, 3 Mont. 59.

If water from an artificial channel has been discharged into a natural channel and abandoned it cannot be afterwards diverted from the natural channel so as to prevent a lower riparian owner from enjoying its use. *Schulz v. Sweeny*, 19 Nev. 359.

If one who assisted in constructing a ditch abandons his lands before using any of the water, a third person who takes up the same land and uses water from the ditch five or six years afterwards will not gain the right which he abandoned. *Burham v. Freeman*, 11 Colo. 602.

If a particular owner of a water right abandons

further should be said to show that, in the opinion of the said supreme court, the government had, by its acquiescence or consent, so recognized acts of this nature on the public domain as to make them lawful, and a basis of right which the government and its grantees must respect. It is true, as suggested by the supreme court of California in *Lux v. Hagglin*, 69 Cal. 235, that the exact question involved in the case at bar was not involved in any of the cases above cited; but the positive language used therein, and the emphasis of the proposition that the right was not created

by the act of 1866, but simply recognized and continued, is sufficient to clearly show that such rights would have been protected as well before the passage of that act as after. If it was a right which it was worth while for the court to talk about, it was a vested right; and if a vested right and of such a nature that every one must take notice thereof, it would not be taken away by any grant made thereafter, for the reason that the courts would construe such grant as though the right had been in express terms excepted from its force.

It has been held by all of the courts that

it but returns and occupies it before it is appropriated by any other person, he regains the right which he lost by his abandonment. *Tucker v. Jones*, 8 Mont. 325.

8. Determination of priority.

Possession or actual appropriation must be the test of priority in all claims to the use of water whenever such claims are not dependent on ownership of the land through which the water flows. *Kelly v. Natoma Water Co.* 6 Cal. 105.

As between appropriators of water on the public land the first in time is the first in right. *Keeney v. Carillo*, 2 N. M. 480.

The quantity of water actually appropriated by a person at the date claimed therefor, and not the carrying capacity of his ditch ten or twelve years afterwards, should be the basis of the decree adjudging his priority. *Greer v. Heiser*, 16 Colo. 303.

9. Interference with and protection of right.

The rights of a prior appropriator from a stream cannot be impaired by a subsequent appropriation of water from the tributaries. *Strickler v. Colorado Springs*, 16 Colo. 31.

The rights of prior appropriators cannot be impaired for the purpose of supplying water for domestic purposes to later comers. *Armstrong v. Larimer County Ditch Co.* 1 Colo. App. 49.

When a person has acquired a prior right to the water of a natural stream by valid appropriation thereof to a beneficial use, another person cannot justify an interference with such prior right by merely showing that he is wholly dependent upon the same water supply. *Roberts v. Arthur*, 15 Colo. 455.

The corrupting of water flowing in a private ditch of an appropriator is a nuisance. *Crane v. Winsor*; 2 Utah, 243.

Proof of prior appropriation establishes the better right to the water. *Humphreys v. McCall*, 9 Cal. 50, 70 Am. Dec. 681.

An appropriator is entitled to damages if another ditch is subsequently constructed further up the stream in such a way as to interfere with the flow of water to his ditch. *Coker v. Simpson*, 7 Cal. 340.

Interference with the prior right may be enjoined. *Tuolumne Water Co. v. Chapman*, 8 Cal. 302.

To entitle a subsequent appropriator to enjoin use by the prior appropriator for a purpose for which the appropriation was not made the diversion must be continuing; a temporary diversion is not sufficient. *Ball v. Kehl*, 37 Cal. 545.

A prior appropriator cannot enjoin a riparian owner from interfering with his dam and using the water of the stream unless he is actually damaged by such action. *Perego v. McKissick*, 79 Cal. 572.

Where different persons separately appropriate the waters of a stream and are severally using the same under certain regulations as to the time and manner of such use, they are tenants in common, and each of them may maintain an action to enjoin a trespasser from diverting any portion of the 30 L. R. A.

water thus appropriated. *Lytle Creek Water Co. v. Perdew*, 65 Cal. 447.

So long as a prior appropriator can obtain all the water to which he is entitled, he cannot complain of the use which other persons are making of the stream. *Saint v. Guerrero*, 17 Colo. 448.

During the process of constructing the dam and before it is in condition to make use of the water the owner cannot maintain an action against a third person for diversion of the water. *Nevada County & S. Canal Co. v. Kidd*, 37 Cal. 312.

While the appropriator's ditch is so far out of repair that it will not carry water, he cannot enjoin the construction of a reservoir upon the stream above the head of the ditch the effect of which will be to interrupt the flow of water to his ditch. *Bear River & A. Water & M. Co. v. Bolea*, 24 Cal. 350.

10. Second appropriation.

A lower appropriator on the stream is entitled to have the water flow to him subject only to a reasonable diminution and deterioration by its necessary use upon the upper claims. The prior appropriator being compelled to use it in a reasonable manner and then return it to the stream. *Alder Gulch Consol. Min. Co. v. Hayes*, 6 Mont. 31. See also *supra*, b, 4. *Extent and limitation of right.*

II. Riparian rights.

In most of the states in which the doctrine of prior appropriation has been applied, the common-law doctrine of riparian rights has also been enforced.

In Oregon the right to water by prior appropriation for mining and irrigating lands has not been adopted or applied except as the parties have acquired their rights under the United States act of 1866. *Simmons v. Winters*, 21 Or. 35.

In *Lux v. Hagglin*, 69 Cal. 450, the court devotes many pages to the discussion of the question of rights of appropriators, and holds that in California, at least since the passage of the act of 1860, the common-law rule of riparian rights, and not that of prior appropriation, is the law as to all rights that have vested, and that it applies also to persons who have settled upon and made their first payments for state lands.

A riparian proprietor may restrain the diversion of water from the stream by one who has turned water from a foreign source into the stream, unless the latter shows that he has not taken from the stream more water than he turned in. *Wilcox v. Hauch*, 64 Cal. 451.

That a riparian proprietor is also an appropriator does not deprive him of his riparian rights, but he may use the water as such in addition to his rights as an appropriator. *Van Bibber v. Hilton*, 84 Cal. 535.

A prior appropriator cannot insist on claiming his right as an appropriator to all water which his needs require, and also to have the natural amount of water flow in the bed of the stream under his right as a riparian proprietor. *Low v. Schaffer*, 24 Or. 239.

have considered this question that, after the passage of said act, all grants must be construed in connection with the rights therein provided for, and such rights protected as above stated. There is no provision in the act for the protection of the rights therein recognized; and, if they existed before as well as after its passage, they were excepted from grants made after their inception before such passage the same as after. It is only because of their existence as rights of which every one must take notice that they are held to modify

grants thereafter made. And, if rights under the statute thus modify grants, rights of the same nature established by acquiescence should also be held to modify such grants made after their acquisition. There are decisions by the courts of some of the states which directly sustain the contention of the appellant, and go to the full extent of holding that, where the grant took effect before the passage of the act in question, the rights acquired by the custom of the locality were lost, unless expressly reserved by the terms of the grant. The princi-

In Nevada it is held that a mere possessor of public land has no riparian rights in the streams running through it. *Lake v. Tolles*, 8 Nev. 286.

So, a settler on public land as such can claim no riparian rights in the streams running through the land. *Covington v. Becker*, 5 Nev. 281.

12. Statutes affecting.

The Montana statutes requiring the recording of claims do not forfeit claims acquired before its passage which are not recorded according to its provisions. *Salazar v. Smart*, 12 Mont. 305.

13. Transmission of right.

See also note on change of use appended to case of *McGuire v. Brown* (Cal.) *ante*, 384.

The right to the water may be sold verbally and transferred with the possessory right to the land. *Hindman v. Risor*, 21 Or. 112.

Where a person having no title to land appropriates water for its cultivation his appropriation does not become appurtenant to the land so as to inure to the benefit of one who subsequently purchases the land from the true owner. *Smith v. Logan*, 18 Nev. 149.

If one in possession of land fails to connect his interest with that of the original appropriators of the water, his own appropriation must be considered as the inception of his right. *Chiatovich v. Davis*, 17 Nev. 183.

c. Act of Congress of 1866.

In 1866 Congress passed an act recognizing and confirming rights acquired by appropriation of water under local customs, and this act was extended by another passed in 1870. Those acts have settled some questions which were before unsettled but there has been considerable conflict in opinion as to the proper construction of those acts.

The object of the act of 1866 was to give the sanction of the United States, the proprietor of the lands, to possessory rights which had previously rested solely on the local customs, laws, and decisions of the courts, and to prevent such rights from being lost by a sale of the lands. *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240.

Grantees of the United States subsequent to the passage of the act of 1866 will take subject to an existing right of a third person to have a water ditch run through the land. *Broder v. Natoma Water Co.* 50 Cal. 621.

A patent acquired from the government after the act of 1870 is subject to water rights previously acquired. *Barnes v. Sabron*, 10 Nev. 217.

One who made a homestead settlement on land subsequent to the passage of the act of 1866 takes subject to the water rights of another person who appropriated the water prior to his settlement. *South Yuba Water & M. Co. v. Rosa*, 80 Cal. 333.

As against a pre-emptioner who settled on the land after the passage of the act of 1866 the sole question is whether a right to divert and use the water had vested and accrued before the right to purchase the land became a vested right. *DeNeocoebe v. Curtis*, 80 Cal. 397; *Burrows v. Burrows*, 82 Cal. 564.

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The rights of a patentee from the government under a patent issued subsequent to the passage of the act of 1866 are subordinate to those of an appropriator whose rights had been perfected before the patentee had located on the land. *Ramell v. Irish*, 98 Cal. 214.

An appropriator of water acquires a right superior to that of one who subsequently acquires title to the land from the government. *Judkins v. Elliott* (Cal.) 12 Pac. 116.

An appropriation of water on open, unsurveyed, and unappropriated government land will give a right which will be superior to that of one who subsequently acquires title to the lands from the government. *Faulkner v. Rondoni*, 104 Cal. 140.

The act of 1866 applies to rights acquired after as well as before its passage. *Jacob v. Lorenz*, 98 Cal. 332.

The act of 1866 conferred rights to waters appropriated for agricultural purposes. *Cave v. Crafts*, 58 Cal. 135.

If before a person obtains his title from the government a third person has appropriated the right to take water from a stream flowing through the land at points both above and below the land of the patentee at his convenience, the latter cannot compel him to desist from diverting the water at the upper point and compel him to confine his appropriation to the lower one. *Hobart v. Wicks*, 15 Nev. 413.

The act of 1866 applied only to public lands of the United States and had no application to lands of individual owners as against them. An appropriation under that act conferred no right to divert water of streams flowing through their lands. *Curtis v. La Grande Hydraulic Water Co.* 20 Or. 34, 10 L. R. A. 494.

The right of an appropriator is superior to that of a subsequent purchaser of land on both sides of the stream. *Hill v. Lenormand* (Ariz.) 16 Pac. 293.

Rights acquired subsequent to a notice of appropriation are subject thereto. *Dyke v. Caldwell* (Ariz.) 18 Pac. 276.

The question which remains unsettled is as to the rights of one who had obtained a patent from the government prior to the passage of the act of 1866. If his settlement antedated the appropriation of the water the question is probably ruled by *Starr v. Beck*, 138 U. S. 541, 33 L. ed. 761.

So it has been held that an appropriator of water upon the public domain acquires, under the confirmatory acts of Congress, no rights superior to the riparian rights which have attached to land held at the time of the appropriation in private ownership. *Hargrave v. Cook*, 106 Cal. 72, *ante*, 390.

But if he settled after the appropriation and received his patent prior to the act of 1866, there is no finally authoritative decision upon his rights. In states which have wholly repudiated the doctrine of riparian rights the tendency is to subordinate him to the appropriator, while in jurisdictions where the doctrine of riparian rights obtains the tendency seems equally strong in his favor. The first case upon the question arose in Nevada,

pal case of this kind is that of *Vansickle v. Haines*, 7 Nev. 249, in which it was directly held as above stated, after careful consideration; and nearly or quite all the other cases upon the subject refer to this one, and found their decision largely upon its authority. It follows that, when this case was overruled by the court in which it was decided, the authority of all of the cases upon that side of the question was greatly lessened. In the case of *Jones v. Adams*, 19 Nev. 78, in which the case above referred to was overruled, the court care-

fully reviews the whole question, and founds its holding to the effect that the rights should be given effect against grants before the date of the act of 1866 as well as after, not only upon a well-considered course of reasoning, but also upon the fact that such was their understanding of the inevitable conclusion to be drawn from the language of the Supreme Court of the United States in the cases hereinbefore cited. Some of these decisions were founded upon the conditions which existed in a mining country, and related to the acqui-

-and the patentee's rights were held to be superior. *Vansickle v. Haines*, 7 Nev. 249.

But in a subsequent case it was held that the act of 1866 confirmed the rights of prior appropriators even as against persons who had prior to its passage obtained patents to lands over which the waters flowed. *Jones v. Adams*, 19 Nev. 78; *Jerrett v. Mahan*, 20 Nev. 89. Those cases expressly overruled that of *Vansickle v. Haines*, *supra*.

An appropriator can acquire no right as against the United States or its subsequent grantees unless there is a reservation in the grant, and the act of 1866 did not affect the rights of persons whose patents had been issued prior to its passage, but cut off all claims of persons whose patents issued after that time if no right had vested in the patentee before that time. *Union Mill & M. Co. v. Ferris*, 2 Sawy. 176.

But in *Union Mill & M. Co. v. Dangberg*, 2 Sawy. 460, the same court on considering the question directly held that one who had entered land under the homestead act prior to the passage of the act of 1866 was not affected by that act although he did not receive his patent until after its passage.

A claim to prior appropriation of water is not protected by the act of 1866 as against the owner of land which had previously been sold by a state under the pre-emption law of 1841. *Isou v. Nelson* Min. Co. 47 Fed. Rep. 199.

d. Statutes abolishing riparian rights.

In some of the states the doctrine of riparian rights has been completely overthrown and that of right by prior appropriation adopted in its stead.

In Colorado the right of prior appropriation has been the rule from the day of the earliest appropriation of water within the boundaries of the state, and is recognized and provided for by the Constitution. *Coffin v. Left Hand Ditch Co.* 6 Colo. 443.

The Colorado Constitution has to a large extent obliterated the doctrine of riparian rights and substituted in lieu thereof the doctrine of appropriation. *Oppenlander v. Left Hand Ditch Co.* 18 Colo. 142.

In *Wheeler v. Northern Colo. Irrigation Co.* 10 Colo. 582, it is said our Constitution dedicates all unappropriated water in the natural streams of the state "to the use of the people," the ownership thereof being vested in "the public." The same instrument guarantees in the strongest terms the right of diversion and appropriation for beneficial uses. With certain qualifications it recognizes and protects a prior right of user, acquired through priority of appropriation. After appropriation the title to this water, save, perhaps, as to the limited quantity that may actually be flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. But to constitute a legal appropriation, the water diverted must be applied within a reasonable time to a beneficial use. That is to say, the diversion ripens into a valid appropriation only when the water is utilized by the consumer.

A valid appropriation of water of a stream may be 30 L. R. A.

made for irrigation purposes to the exclusion of a riparian owner, though the lands to be irrigated are not located on the banks or in the neighborhood of the stream. *Hammond v. Rose*, 11 Colo. 624.

One who has made an appropriation of water for irrigation acquires a prior right thereto as against a riparian owner who obtained a patent from the United States after such appropriation, even before the act of 1870 amending the act of 1866, so as to provide that patents thereafter issued should be subject to vested or accrued water rights. *Ibid*.

A territorial grant of the right to use water from a stream is of no effect as against one who has actually appropriated the water to a beneficial use. *Platte Water Co. v. Northern Colo. Irrigation Co.* 12 Colo. 529.

The right of prior appropriation was the general well-regulated custom; hence the law prior to and at the time of the organization of the territory which was protected by the section of the organic act which said: "Nor shall any law be passed impairing the rights to private property." *Armstrong v. Larimer County Ditch Co.* 1 Colo. App. 49.

The water of natural streams in Colorado is the property of the public. *Fort Morgan Land & C. Co. v. South Platte Ditch Co.* 18 Colo. 1.

In *Clough v. Wing* (Ariz.) 17 Pac. 453, the court says that the right of appropriation for irrigation purposes is more ancient and universal than that of the riparian owner, and that in Arizona the riparian owner has no rights except so far as he has actually appropriated the water to a beneficial use, but must give way to the rights acquired by a prior appropriator.

In Utah the appropriation of water is open to all, and the legislature cannot pass an act which will put the waters of a part of the territory under the control of an irrigation company. *Munroe v. Ivie*, 2 Utah, 536.

In Utah the doctrine of riparian rights has never been recognized, and the statute ignoring the right of riparian proprietors at common law to have the water in a stream flow in quantity and quality as it was wont to do when he acquired title is valid. *Stowell v. Johnson*, 7 Utah, 215.

The doctrine of prior appropriation, and not the common-law doctrine of riparian rights, is in force in Nevada. And this will be the rule even as against persons who have acquired a private right of ownership to land on the banks of the river. *Reno Smelting, Mill, & R. Works v. Stevenson*, 20 Nev. 290, 4 L. R. A. 60.

In Idaho the first appropriator of water for a beneficial use acquires the prior right thereto. And when the right is once vested unless abandoned it must be protected and upheld. *Malad Valley Irrigating Co. v. Campbell*, 2 Idaho, 378.

In Montana the statute establishes the doctrine of prior appropriation of water for irrigation limiting the right to appropriate to persons owning land on the banks of the stream from which the same is taken, and also limiting the quantity of water he can appropriate to what is necessary to irrigate his land. *Thorp v. Woolman*, 1 Mont. 163.

H. P. F.

tion of mining interests, and the necessary water for the prosecution of the mining business, but enough appears to show that the same rule would apply as to the diversion of water for any other necessary and beneficial use. It does not follow, as has been well observed by Mr. Pomeroy, in his treatise on Riparian Rights, that the common law of England as to riparian rights has been abrogated in the localities affected by the cases above referred to, but only that it has been so far modified as to give the rights acquired by virtue of the customs of the country force.

The United States, as owner of all of the domain, including the waters in its running streams, could by its legislation as applied thereto, or such acquiescence and practice as should be given the force of legislation, change the rule of the common law so far as it thought necessary; but it would not follow therefrom that, if no rights had been acquired by virtue of the modification of the common-law rule until after the land had passed from the government, the common-law rule would be at all affected thereby. On the contrary, so soon as the government had parted with its title, its right to change the rule in reference to the rights and incidents growing out of the ownership of the land would be entirely determined, and its grantees would take his title burdened with all rights conferred by such action or consent on the part of the government. The government, while the owner of the land, allowed the streams to be changed by the diversion of a portion of their waters. This had the effect of modifying the right to have the water flow in its natural channel, except as to the portion not diverted at the time the title passed from the government, and it was only upon this portion that the common-law rule could apply. The government had changed the streams, as it had the right to do by virtue of its ownership of all the land through which they flowed, and while they were so changed, conveyed the land. It must follow that its grantees took title subject to the changed condition of the streams and to the rights growing out of such change. In the case at bar the right to the use of the water had been fully acquired while the land now owned by the defendant was held by the government, and its grant of the same thereafter was subject to such right. It follows that plaintiff is entitled, as against the defendant, to have such right protected by the courts.

The conclusion to which we have come as to this question makes it unnecessary for us to discuss the other grounds upon which plaintiff seeks to found his right to divert the water. Some criticism is made as to the form of

the decree, but we think it sufficient to substantially protect the rights of both parties to the action. There is not as exact a measurement of the water to which the plaintiff is entitled as there might have been, but the substance of the decree in that regard is to establish and protect him in the use of the water necessary to run his mill as at present constructed, and for that reason we think it sufficient.

The decree of the Superior Court will be in all things affirmed. The respondent will recover his costs on appeal.

Dunbar, Ch. J., and Scott, J., concur; Anders, J., not sitting, by reason of disqualification.

Stiles, J., concurring:

It will be found upon examination that all of the cases cited to sustain the doctrine of appropriation, upon which the foregoing decision is based, were either mining or irrigation cases, such as arose out of the necessities of the surroundings. Mines could not be worked or lands cultivated in the arid regions without diverting the waters of the streams; and, as the government's interest was that such enterprises be fostered while large areas of the public lands were still unsurveyed and not disposed of, the right to make permanent diversion of water was conceded prior to the act of 1866, as is held by the Federal Supreme Court. But this was the case of an ordinary flour mill, such as has been erected in every country over which the common law of England prevails. Every portion of the United States contains them, whether the country surrounding them be arid or not. West of the Cascade mountains they are as necessary and frequent as they are east of them, and there is no greater reason for conceding to them this right of permanent appropriation in one locality than in another. *Cessat ratio, cessat lex.* The peculiar circumstances demanding the concession made by the government not having existed for the support of this case of diversion, I hold that for it the concession cannot be admitted to have been made, and that the common-law rule should prevail. But in the case under consideration a sufficient reason existed for the judgment rendered in favor of the respondent, for the tract of land owned by appellant, at a point lower down on the stream than respondent's dam, is a part of the tract conveyed by the government to respondent's grantor; and when appellant received his conveyance the common grantor had for more than twenty years acquiesced in the appropriation made by respondent at a point upon his land. I therefore concur in the result.

RHODE ISLAND SUPREME COURT.

Charles F. BROWN and Wife

v.

William C. SMITH, Admr., etc., of Daniel Bosworth, Deceased.

(..... R. I.)

A woman who has been given the cus-

NOTE.—See, in connection with the above case, that of *Fulton v. Fulton* (Ohio) 20 L. R. A. 678.
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tody of minor children on obtaining a divorce cannot maintain an action at law against the estate of her deceased husband for their board.

(December 23, 1895.)

CERTIFICATION by the Common Pleas Division for the opinion of the Appellate Division of the Supreme Court of an action brought to recover the value of their board

from the father of minor children the custody of which had been awarded to the mother in a proceeding by her for a divorce. *Judgment for defendant.*

The facts are stated in the opinion.

Mearns, Page & Owen for plaintiffs.

Mr. B. M. Bosworth, for defendant:

In the absence of statutory enactment, a father is not required to remunerate one who may have furnished necessities or afforded relief to his minor children, unless an express promise to pay, or circumstances from which a promise may be implied, can be shown.

Gotts v. Clark, 78 Ill. 229; *Freeman v. Robinson*, 88 N. J. L. 888, 20 Am. Rep. 899; *Gordon v. Potter*, 17 Vt. 848; *French v. Benton*, 44 N. H. 28; *Raymond v. Loyl*, 10 Barb. 488.

A husband is not liable for support of a child, the custody of which is awarded to the mother, and which lives with her.

Hancock v. Merrick, 10 Cush. 41; *Brow v. Brightman*, 186 Mass. 187; *Johnson v. Onsted*, 74 Mich. 487; *Husband v. Husband*, 67 Ind. 588, 83 Am. Rep. 107; *Harris v. Harris*, 5 Kan. 46; *Finch v. Finch*, 23 Conn. 411; *Holt v. Holt*, 42 Ark. 495. See also *Plaster v. Plaster*, 68 Ill. 445.

Tillinghast, J., delivered the opinion of the court:

The agreed statement of facts in this case shows that Rebecca M. Brown, the real plaintiff, was formerly the wife of Daniel Bosworth, late of Warren, deceased, and by him had three children; that, prior to the death of said Bosworth, Mrs. Brown (then Mrs. Bosworth), upon her petition to the supreme court of this state, was divorced from said Daniel Bosworth, and the custody of the said three children of the marriage (they being minors) was awarded to her; that upon the death of said Daniel Bosworth, which occurred about three years after the divorce, the defendant was appointed administrator on his estate, and that after said appointment Mrs. Brown presented to him a claim for the board of said children, against the estate of Daniel Bosworth; that said administrator represented said estate insolvent, and thereupon, pursuant to law, commissioners were duly appointed to receive and examine the claims against said estate, and that said commissioners allowed the claim of Mrs. Brown for the board of said children; that, upon the filing of the report of said commissioners in the court of probate, the administrator, being dissatisfied with the allowance of said claim by the commissioners, gave notice thereof in the office of the clerk of the court of probate, and also to the plaintiffs, as provided by law, whereupon said claim was stricken out of said report by the court of probate; and that the plaintiffs thereupon, in accordance with the provisions of R. I. Pub. Stat. chap. 186, § 15, brought this suit to determine the validity of the claim of Mrs. Brown against said estate.

The only question presented for our decision, under this state of facts, is: Can a married woman, who has been granted a divorce and the custody of minor children, maintain an action at law against the estate of her deceased husband, for the board of said children? We think this question must be answered in the

negative. At the time when said divorce was granted, the supreme court had the authority, under R. I. Pub. Stat. chap. 167, § 28, as the appellate division now has (Judiciary Act, chap. 2, § 4), to regulate the custody, and provide for the education, maintenance, and support of the children of all persons by them divorced; to make all necessary orders and decrees concerning the same, and the same at any time to alter, amend, or annul, for sufficient cause, after notice to the parties interested therein. *Sammis v. Medbury*, 14 R. I. 214. This statute is presumably based upon the theory that the rights of the parties in a proceeding for divorce, as to the custody and support of the minor children of the marriage, can be best determined in connection with said proceeding, upon a full consideration of the circumstances and situation of the parties, instead of leaving such rights open to further, independent litigation. See *Husband v. Husband*, 67 Ind. 585, 83 Am. Rep. 107; *Buckminster v. Buckminster*, 88 Vt. 248, 88 Am. Dec. 652; *Chester v. Chester*, 17 Mo. App. 657. Whatever is decreed, therefore, regarding the custody of children, in a divorce proceeding, is conclusive of the rights of the parties until the decree is either modified or annulled. By virtue of the decree in the petition above referred to, said Rebecca M. Brown became entitled to the custody of said minor children, together with the right to their services, and defendant's intestate was thereby deprived of his common-law right thereto; and, being thus deprived of this right, he became absolved from the correspondent common-law obligation which previously rested upon him to support said children. In other words, the award of the children to the mother carried with it a transfer of parental duties as well as of parental rights. *Schouler, Dom. Rel.* 8d ed. § 387. As said in 2 *Bishop on Marriage & Divorce*, § 557: "The true legal principle applicable to cases of this kind seems to be that the right to the services of the children, and the obligation to maintain them, go together; and, if the assignment of the custody to the wife extends to depriving the father of his claim to their services, then he cannot be compelled to maintain them otherwise than in pursuance of some statutory regulation." In *Burritt v. Burritt*, 29 Barb. 130, the court says: "It would seem almost an oppressive exercise of power, first to withdraw the child wholly from the care, control, and influence of the father; to deprive him entirely of its presence, society, and aid; to put it entirely in the possession and control of the mother, with whom he is at variance; to allow that mother to support, educate, and maintain it in her own way, and agreeably to her own pleasure; and then to require from the husband an absolute and unquestioning compliance with all her demands for the means of its support, education, and maintenance." In short, the right of the father to the services and earnings of his minor children is founded upon the obligation which the law imposes upon him to nurture, support, and educate them; and it continues until their maturity, if they remain with him, when the law determines that they are capable of providing for themselves. But when the father is deprived of their custody and services, by a

decree which commits them to the custody of the mother, the duty to support them no longer exists, except as the court may direct, in pursuance of statutory authority. See *Gilley v. Gilley*, 79 Me. 292; *Brow v. Brightman*, 136 Mass. 187; *Johnson v. Onsted*, 74 Mich. 487; *Finch v. Finch*, 22 Conn. 411; *Harris v. Harris*, 5 Kan. 46; *Hall v. Green*, 87 Me. 122. See also R. I. Pub. Stat. chap. 71, §§ 5, 6.

Counsel for the plaintiff relies on the case of *Pretzinger v. Pretzinger*, 45 Ohio St. 452, which, while it fully sustains his position, and was rendered by a court whose decisions are entitled to very high respect and consideration, is nevertheless opposed to the preponderance of American authorities upon the question here presented. And, moreover, all the parental obligations of the father, so vigorously contended for by the court in that case, could have been enforced in connection with the divorce proceedings. In the states of Arkansas and Illinois there is, or at the time of the rendition of the decisions mentioned below there was, no statutory provision authorizing the court granting the divorce to subsequently modify its orders and decrees concerning the custody and support of the minor children of the marriage; and therefore the cases of *Holt v. Holt*, 42 Ark. 495, and *Plaster v. Plaster*, 53 Ill. 445, can hardly be considered authorities in support of the plaintiff's position. Moreover, the fact that, notwithstanding the very numerous cases of divorce granted in this state in which the custody of minor children has been awarded to the mother, no such action as the present has, to our knowledge, ever been instituted, indicates very strongly that the members of the bar never supposed that such an action could be maintained. If said Daniel Bosworth were still living, a change in the said decrees of divorce, in so far as it relates to the children, might, for cause shown, upon application of the petitioner therein, be made. But, said Bosworth being dead, no such change can now be made; and the plaintiff having been, presumably upon her own request, awarded the custody of said children, and no provision having been made in the decree for their support, or, so far as appears, even been asked for, she must be presumed to have assumed that duty upon herself, and is now without remedy. *Burritt v. Burritt*, *supra*. Again, as no express promise to pay for the board of said children is shown to have been made by defendant's intestate, and as the granting of the custody of said children to the mother negatives any implication of liability therefor on the part of the father, there is no evidence whatever upon which to base a judgment in favor of the plaintiff. *Johnson v. Onsted*, *supra*.

Judgment for the defendant for costs.

Thomas MILLER

v.

Robert McCARDELL.

(.....R. L.....)

A covenant by the lessor of a hotel

NOTE.—The construction of a covenant to "keep" premises in repair made in the above case seems to be in accordance with the authorities generally.

30 L. R. A.

"that he will keep . . . in good repair" the outside of the premises binds him to repair the roof so as to make the building habitable if it was out of repair at the time of the lease, and is not satisfied in such case by maintaining the premises in the same condition as when leased.

(December 5, 1895.)

APPPLICATION by defendant for new trial of an action brought to recover damages for breach of covenant to repair contained in a lease of a hotel in which there was a verdict for plaintiff. *Denied*.

The facts are stated in the opinion.

Messrs. E. D. Bassett and E. L. Mitchell, for defendant:

A covenant to repair implies only to restore or keep the premises in as good condition as when the covenant was made.

West v. Hart, 7 J. J. Marsh. 258; *Stults v. Locke*, 47 Md. 562; *Middlekauff v. Smith*, 1 Md. 829; *Ardesco Oil Co. v. Richardson*, 68 Pa. 162; *White v. Albany Railway*, 17 Hun, 98; *Ward v. Kelsey*, 38 N. Y. 82, 97 Am. Dec. 773; *Gutteridge v. Munyard*, 1 Moody & R. 334; *Belcher v. McIntosh*, 8 Car. & P. 723; *Yates v. Dunster*, 11 Exch. 15; *Harris v. Jones*, 1 Moody & R. 173; *Stanley v. Tonogood*, 3 Bing. N. C. 4; *Mantz v. Goring*, 4 Bing. N. C. 451; *Burdett v. Withers*, 7 Ad. & El. 186.

Messrs. Dennis J. Holland and John M. Brennan, for plaintiff:

In a covenant "to keep the premises in good repair" the covenantor is bound to put them in that condition, and he is not justified in keeping them in bad repair because he found them in that condition.

Proudfoot v. Hart, L. R. 25 Q. B. Div. 43 (1890); *Payne v. Haine*, 16 Mees. & W. 541; *Hexter v. Knox*, 68 N. Y. 561; *Myers v. Burns*, 35 N. Y. 272; *Cooke v. Cholmondeley*, 4 Drew. 326; 3 Parsons, Cont. 233.

Where the landlord has neglected to fulfil his covenant to repair, the tenant may recover, as damages for the breach, the value of the use of any portion of the premises during the time it was rendered untenable.

Hexter v. Knox, *supra*; *Cassidy v. Le Fevre*, 45 N. Y. 568; *Myers v. Burns*, 35 N. Y. 269.

Tillinghast, J., delivered the opinion of the court:

This action is brought to recover damages alleged to have been sustained by the plaintiff by reason of the breach, on the part of the defendant, of a certain covenant in a lease made by him. The record shows that on the 1st day of April, 1892, the defendant leased to the plaintiff the estate situated at the southeasterly corner of Mathewson and Washington streets, in the city of Providence, with the building thereon, known as the "St. George Hotel," for the term of three years, the defendant on his part covenanting "that he will keep the outside of said premises in good repair: provided, however, that he shall not be liable for any loss arising in said house by damage from the weather;" and the plaintiff covenanting on his part "that he

For a brief note on landlord's liability to make repairs, see also *Ward v. Fagin* (Mo.) 10 L. R. A. 147.

will keep the interior of said building in good repair, reasonable wear and tear alone excepted." At the trial of the case in the common pleas division the plaintiff offered proof that the roof of said building was out of repair to such an extent that it leaked very badly, causing the house to be frequently flooded with water, the plastering in several of the rooms to fall off, and the paper to peel off from the walls, thereby rendering said rooms uninhabitable, and causing serious damage thereto, and also to the furniture therein, and depriving the plaintiff of the use and benefit of quite a large part of said hotel, and also necessitating the frequent repair of the interior thereof by the plaintiff. Proof was also submitted that during the subsistence of said lease the plaintiff repeatedly requested the defendant to repair the roof and outside of said building, so as to prevent it from leaking; that the defendant repeatedly promised to make such repairs, and that he had on several occasions made some slight repairs thereon, but that they were ineffectual to stop the leaks from which the plaintiff was suffering. It further appeared in evidence that the roof and exterior of said building were out of repair at the time of the making of said lease. The court ruled that, in view of the provisions in the lease, the plaintiff could not recover for damages to his furniture contained in said building, caused by the defendant's neglect to keep the exterior thereof in repair, but that he could recover for the loss of the use and rental of such rooms in said building as were rendered untenable on account of said neglect to repair, and also for the expense to which he had been put in repairing the damages caused by the injury to the interior of said building through the defendant's neglect as aforesaid. The jury found in favor of the plaintiff, and awarded him damages in the sum of \$750. The defendant now petitions for a new trial on the grounds that the verdict was against the evidence and the weight thereof, and that the court erred in its rulings aforesaid.

The only contention which is urged at the trial of this petition on the part of the defendant is that the said covenant to repair was fully performed by him if he maintained the premises in the same condition and form as they were when the lease was given; or, in other words, that, as the exterior of the building was in bad repair when the plaintiff hired it, the defendant was under no obligation to put it in good repair during the subsistence of said lease. The covenants to repair in the lease in question were evidently intended to be reciprocal; that is to say, the lessor, in consideration of the covenant to keep the interior of the premises in good repair on the part of the lessee, covenanted on his part to keep the exterior of said premises in good repair. And while the covenant of the lessor may seem at first blush to be self-contradictory, and therefore nugatory, in that it provides that the lessor "shall not be liable for any loss arising in said house by damage from the weather," yet, taking both of said covenants together, as we are bound to do in construing the instrument,

it would be absurd to hold that the lessor is not equally bound to the performance of the one as is the lessee to the performance of the other. Indeed, the first duty to repair is evidently on the lessor, as it would be idle and useless to attempt to keep the interior of the premises in good repair so long as the exterior thereof is not in a condition to withstand the ordinary weather incident to our climate. Moreover, it is a well-settled rule, in the construction of covenants and other written instruments, that where there is doubt or ambiguity the construction should be most favorable to the party in whose favor the covenant is made, and most strongly against the party imposing such covenant upon himself. 4 Am. & Eng. Enc. Law, p. 470, note, and cases cited. Just what is meant by the proviso to the lessor's covenant aforesaid it is not easy to determine. But we think the common pleas division, in holding that it had the effect to exonerate the lessor from damage to the furniture of the lessee, caused by the leaky condition of the roof and other parts of the house, put quite as favorable a construction thereon as the defendant was entitled to, and hence that he has no reason to complain of said ruling.

That the lessor understood that the duty of keeping the exterior of said building in repair was devolved upon him under his said covenant is clearly apparent from his repeated promises aforesaid, and also from the actual repairs made by him. As to the contention of counsel for the defendant that the covenant to keep said premises in good repair is fully performed by keeping the same in as good condition as when leased, we have to say that if by this he means that a landlord who lets a building for the purposes of a dwelling house or hotel, the building at the time being in whole or in part uninhabitable by reason of its being out of repair, the lessor is under no obligation to put the same in repair, so as to make it inhabitable, we do not agree to such contention. A dwelling house or hotel is primarily made for people to live in, and is intended to protect them from the weather; and, in order to be habitable or tenantable, it must furnish such protection. And where one lets a house for people to live in, and agrees to keep it in good repair, he is bound by the dictates of common reason, as well as by those of common law, to both make it and keep it habitable,—that is, reasonably fit for the occupation of a tenant of the class which occupies it. If we allow the position taken by the defendant, as we understand it, to prevail, the result will practically be this: That, as the said hotel building was in bad repair when the plaintiff hired it, the defendant was bound by his said covenant to keep it in like bad repair during the subsistence of the lease; thus exactly reversing the express terms thereof. In *Payne v. Haine*, 16 Mees. & W. 543, which was a case where the tenant agreed to keep the premises, and at the expiration of the tenancy to deliver up the same, in good repair, Parke, B., in delivering the opinion of the court, said: "If, at the time of the demise, the premises were

old, and in bad repair, the lessee was bound to put them in good repair as old premises; for he cannot 'keep' them in good repair without putting them into it. He might have contracted to keep them in the state in which they were at the time of the demise. This is a contract to keep the premises in good repair as old premises, but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all show that the age and class of the premises let, with their general condition as to repair, may be estimated, in order to measure the extent of the repairs to be done. Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square, but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair; and in that state, with reference to their age and class, he was to deliver them up at the end of the term." To "keep in good repair," says Rolfe, B., in the same case, "presupposes the putting into it, and means that during the whole term the premises shall be in good repair." See also *Cooke v. Cholmondeley*, 4 Drew. 326; *Proudfoot v. Hart*, L. R. 25 Q. B. Div. 42. In *Myers v. Burns*,

85 N. Y. 269, the landlord covenanted to keep the hotel and premises in good, necessary repair at his own expense, and he was held liable thereunder to do what was necessary to enable the tenant to use the premises, although the defect had existed at the commencement of the lease. See also *White v. Albany Railway*, 17 Hun, 98; *Kelsey v. Ward*, 88 N. Y. 83; *Herter v. Knox*, 63 N. Y. 561; *Stewart v. Lanier House Co.* 75 Ga. 582. In *Taylor, Land. & T.* 8th ed. § 330, the author says: "A general covenant to repair, when made by the lessor, requires him, not only to keep the premises in good repair, but to put them in that condition, although the tenant may have entered. And if he neglects to make suitable repairs, after being thereunto required by the tenant, the latter may, after waiting a reasonable time, make such repairs himself, and recover the expense from his landlord; or he may at his option leave the premises unrepaired, and recover any damages he may have sustained from the landlord's default therein." See also *Cohen v. Habenicht*, 14 Rich. Eq. 81; *Gutteridge v. Munyard*, 1 Moody & R. 336; *Harris v. Jones*, Id. 178; *Mants v. Goring*, 4 Bing. N. C. 452; *Stanley v. Towgood*, 3 Bing. N. C. 4; *Wood, Land. & T.* § 370.

Petition for new trial denied, and dismissed.

MINNESOTA SUPREME COURT.

Cassius C. M. HOWE, *Respt.*

v.

MINNEAPOLIS, ST. PAUL, & SAULT
SAINTE MARIE RAILWAY COMPA-
NY, *Appl.*

(.....Minn.....)

- *1. The rule that it is negligence per se for one driving a team on a highway not to "look and listen" for trains when approaching a railway crossing is not, as a general rule, applicable to a mere passenger in a vehicle, who has no control over the driver or his management of the team.
2. The plaintiff was, at the invitation of the owner, riding in a wagon owned and driven by another. He had no control over the driver or his management of the team. There was no relation of master and servant or principal and agent between them; neither were they engaged in any joint enterprise. There was no evidence that the plaintiff knew that the driver was incompetent or not keeping a proper lookout for trains when approaching a railway crossing. *Held*, that plaintiff's negligence was a question for the jury, not—

*Headnotes by MITCHELL, J.

withstanding the fact that it appeared that if he had exercised the degree of vigilance in "looking and listening" required of one having the control and management of a team he would have discovered the approaching train in time to have avoided injury.

3. *Held*, also, that the verdict is not so disproportionate to the nature and extent of plaintiff's injuries as to justify this court in setting it aside as excessive.

(Collins, J., dissenting)

(July 10, 1896.)

A PPEAL by defendant from an order of the District Court for Hennepin County denying motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. M. B. Koon, with *Messrs. Alfred H. Bright and George B. Young*, for appellant;

The plaintiff was familiar with that crossing; he had passed there frequently at all times of the year and in all kinds of weather; he knew that as he approached the crossing the view was more and more open to the west.

NOTE.—In connection with the above case on the subject of contributory negligence of a person riding with another when injured at a railroad crossing, as distinguished from the imputed negligence of the driver, see also *Dean v. Pennsylvania R. Co.* (Pa.) 6 L. R. A. 143; *Cincinnati, I. St. L. & C. R. Co.* 80 L. R. A.

v. Howard (Ind.) 8 L. R. A. 593; *East Tennessee, V. & G. R. Co. v. Markens* (Ga.) 14 L. R. A. 231.

As to imputed negligence of driver, see *Mullen v. Owosso* (Mich.) 23 L. R. A. 693, and cases there cited in footnotes.

It was clearly negligence for him to rest his safety upon a look at 150 feet from the crossing under such conditions, even if it be assumed that the train was not visible when he reached that point.

Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165; *Abbott v. Chicago, M. & St. P. R. Co.* 30 Minn. 482; *Mantel v. Chicago, M. & St. P. R. Co.* 33 Minn. 63; *Rheinerv. Chicago, St. P. M. & O. R. Co.* 36 Minn. 170; *Harris v. Minneapolis & St. L. R. Co.* 37 Minn. 47; *Marty v. Chicago, St. P. M. & O. R. Co.* 38 Minn. 106; *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350.

We know of no rule of law that excuses one from the charge of negligence for not seeing a train simply because some part of it is obscured.

Mantel v. Chicago, M. & St. P. R. Co. 33 Minn. 62; *Freeman v. Duluth, S. S. & A. R. Co.* 74 Mich. 86, 3 L. R. A. 59.

Under such circumstances it must be held that the plaintiff either did not look, or that his look was careless.

Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165; *Miller v. Truesdale*, 56 Minn. 274; *Heininger v. Great Northern R. Co.* (Minn.) 61 N. W. 558.

If the plaintiff was gazing at smoke to the east as he testified, that was no excuse for his otherwise gross negligence.

Purl v. St. Louis, K. C. & N. R. Co. 72 Mo. 168.

It is not every diverting circumstance, even near by, which excuses men from the use of their senses when entering upon a railroad track.

Donaldson v. Milwaukee & St. P. R. Co. 21 Minn. 293; *Rogstad v. St. Paul, M. & M. R. Co.* 31 Minn. 208; *Abbott v. Chicago, M. & St. P. R. Co.* 30 Minn. 482; *Marty v. Chicago, St. P. M. & O. R. Co.* 38 Minn. 108; *Dekay v. Chicago, M. & St. P. R. Co.* 41 Minn. 178, 4 L. R. A. 632; *Heflinger v. Minneapolis, L. & M. R. Co.* 48 Minn. 503; *Magner v. Truesdale*, 58 Minn. 486; *Delaney v. Milwaukee & St. P. R. Co.* 58 Wis. 67; *Kearney v. Chicago, M. & St. P. R. Co.* 47 Wis. 144; *Olson v. Chicago, M. & St. P. R. Co.* 81 Wis. 41; *Gebhard v. Detroit, G. H. & M. R. Co.* 79 Mich. 586; *Guta v. Lake Shore & M. S. R. Co.* 81 Mich. 291; *Gardner v. Detroit, L. & N. R. Co.* 97 Mich. 240 (1893); *Butts v. St. Louis, I. M. & S. R. Co.* 98 Mo. 272; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068 (1893); *McKinney v. Chicago & N. W. R. Co.* 87 Wis. 282; *Greenwood v. Philadelphia, W. & B. R. Co.* 124 Pa. 572, 8 L. R. A. 44; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5; *Fletcher v. Fitchburg R. Co.* 149 Mass. 137, 8 L. R. A. 748; *Murray v. Pontchartrain R. Co.* 81 La. Ann. 490; *Baxter v. Troy & B. R. Co.* 41 N. Y. 502; *Baltimore & O. R. Co. v. Whitacre*, 85 Ohio St. 627; *Ormesbee v. Boston & P. R. Corp.* 14 R. I. 102, 51 Am. Rep. 854; *Smith v. Wabash R. Co.* (Ind.) 40 N. E. 270.

Plaintiff was bound to look and listen.

Hoag v. New York C. & H. R. R. Co. 111 N. Y. 199; *Brickell v. New York C. & H. R. R. Co.* 120 N. Y. 290; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Orecent Twp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 367; *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143; *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 30 L. R. A.

115; *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643; *Allyn v. Boston & A. R. Co.* 105 Mass. 77; *Beach*, Contrib. Neg. 2d ed. p. 143.

On petition for rehearing.

The issues as fixed by the decisions were not litigated, and were not submitted to the jury: the plaintiff is bound by the issues tendered by him, and determined adversely by this court.

Abbott v. Chicago, M. & St. P. R. Co. 30 Minn. 482; *Studley v. St. Paul & D. R. Co.* 43 Minn. 249; *Hamilton v. People*, 29 Mich. 192; *Powell v. Heister*, 45 Minn. 549; *Smith v. Pearson*, 44 Minn. 397; *Coburn v. Life Indemnity & I. Co.* 52 Minn. 424; *Bergh v. Sloan*, 53 Minn. 116; *Green v. St. Paul, M. & M. R. Co.* 55 Minn. 192; *Earl Fruit Co. v. Thurston Cold-storage & W. Co.* (Minn.) 62 N. W. 489; *Loudy v. Clarke*, 45 Minn. 477; *United States Nat. Bank v. First Nat. Bank*, 64 Fed. Rep. 985; *Birge v. Bock*, 44 Mo. App. 79; *Payne v. Chicago & A. R. Co.* (Mo.) 31 S. W. 885; *Fairbanks v. Long*, 91 Mo. 633; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 39 L. ed. 624; *New York, L. E. & W. R. Co. v. Estill*, 147 U. S. 591, 37 L. ed. 292; *Holmes v. Broidwood*, 82 Mo. 610; *Jandt v. Brook*, 88 Iowa, 633; *Moloney v. Chicago & N. W. R. Co.* (Iowa) 63 N. W. 690; *Pillars v. McConnell* (Ind.) 40 N. E. 689; *Minton v. Underwood Lumber Co.* 79 Wis. 646; *Powell*, Appellate Procedure, 182; *Sherard v. Richmond & D. R. Co.* 83 S. C. 467; *Nelson v. New York*, 181 N. Y. 4; *Dawson v. Schloss*, 98 Cal. 194; *Baughner v. Wilkins*, 16 Md. 85, 77 Am. Dec. 279; *Philadelphia, W. & B. R. Co. v. Harper*, 29 Md. 380; *Dennis v. Maxfield*, 10 Allen, 138.

The proposition that it was not the duty of the plaintiff to look for the train is not supported by the authorities.

Brown v. Milwaukee & St. P. R. Co. 22 Minn. 165; *Abbott v. Chicago, M. & St. P. R. Co.* 30 Minn. 482; *Studley v. St. Paul & D. R. Co.* 43 Minn. 249; *Rheinerv. Chicago, St. P. M. & O. R. Co.* 36 Minn. 170; *Rogstad v. St. Paul, M. & M. R. Co.* 31 Minn. 208; *Magner v. Truesdale*, 58 Minn. 486; *Heininger v. Great Northern R. Co.* (Minn.) 61 N. W. 558; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Hoag v. New York C. & H. R. R. Co.* 111 N. Y. 199; *Brickell v. New York C. & H. R. R. Co.* 120 N. Y. 290; *Orecent Twp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 367; *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143; *Holden v. Pennsylvania R. Co.* 169 Pa. 1; *Smith v. Maine C. R. Co.* 87 Me. 339; *Johnson v. Superior Rapid Transit R. Co.* (Wis.) 64 N. W. 753; *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643; *Allyn v. Boston & A. R. Co.* 105 Mass. 77; *Cincinnati, I. St. L. & C. R. Co. v. Howard*, 124 Ind. 280, 8 L. R. A. 593; *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 97; *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274; *Potter v. Flint & P. M. R. Co.* 62 Mich. 22; *Grostick v. Detroit, L. & N. R. Co.* 90 Mich. 598.

Mr. John W. Arctander, with Messrs. Welch & Welch, for respondent:

Can it under the circumstances be said as a matter of law, even if plaintiff himself was driving, that he was conclusively guilty of contributory negligence.

The facts do not show negligence as a matter of law.

Wright v. Cincinnati, N. O. & T. P. R. Co. 94 Ky. 114; *Grostick v. Detroit, L. & N. R. Co.* 90 Mich. 598; *Cleveland, C. C. & I. R. Co. v. Harrington*, 181 Ind. 426; *Kellogg v. New York C. & H. R. R. Co.* 79 N. Y. 73; *Greany v. Long Island R. Co.* 101 N. Y. 419; *Moore v. New York C. & H. R. R. Co.* 42 N. Y. S. R. 489; *Shaber v. St. Paul, M. & M. R. Co.* 28 Minn. 108; *Kelly v. St. Paul, M. & M. R. Co.* 29 Minn. 1; *Faber v. St. Paul, M. & M. R. Co.* 29 Minn. 465; *Loucks v. Chicago, M. & St. P. R. Co.* 31 Minn. 526; *Howard v. St. Paul, M. & M. R. Co.* 32 Minn. 214; *Ittis v. Chicago, M. & St. P. R. Co.* 40 Minn. 273; *Hendrickson v. Great Northern R. Co.* 49 Minn. 245, 16 L. R. A. 261; *Struck v. Chicago, M. & St. P. R. Co.* 58 Minn. 298.

A prudent man's attention may be diverted so that he will fail to look and listen, and it is proper to leave it to the jury to say whether it was negligence to so fail.

Shearn & Redf. Neg. § 90, p. 185, note; Barstow v. Berlin, 84 Wis. 357; *Buswell, Personal Injuries*, p. 246; *Continental Imp. Co. v. Stead*, 95 U. S. 161, 24 L. ed. 408; *Piper v. Chicago, M. & St. P. R. Co.* 77 Wis. 247; *Chicago, R. I. & P. R. Co. v. Dignan*, 56 Ill. 487; *Illinois Cent. R. Co. v. Nowicki*, 148 Ill. 29; *Weller v. Chicago, M. & St. P. R. Co.* 120 Mo. 635; *Grand Rapids & I. R. Co. v. Cox*, 8 Ind. App. 29.

Plaintiff was a passenger, not responsible for the driver's negligence, and it was not his duty to look or listen.

Little v. Hackett, 116 U. S. 366, 29 L. ed. 652; *Robinson v. New York U. & H. R. R. Co.* 66 N. Y. 11, 23 Am. Rep. 1; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Masterson v. New York C. & H. R. Co.* 84 N. Y. 247, 38 Am. Rep. 510; *McCallum v. Long Island R. Co.* 88 Hun. 569; *Bennett v. New Jersey R. & Transp. Co.* 36 N. J. L. 225, 18 Am. Rep. 435; *New York, L. E. & W. R. Co. v. Steimbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *O'Toole v. Pittsburgh & L. E. R. Co.* 158 Pa. 99, 22 L. R. A. 606; *Follman v. Mankato*, 85 Minn. 522; *Pitts v. New York, L. E. & W. R. Co.* 79 Hun. 546; *Crawford v. Delaware, L. & W. R. Co.* 22 Jones & S. 262.

Mitchell, J., delivered the opinion of the court:

This was an action to recover for personal injuries sustained by plaintiff in a collision between a farm wagon, on which he was riding, coming from the north, and one of defendant's trains coming from the west. The collision occurred about 10 o'clock in the morning of December 29, 1892, at the crossing of the Osseo road with defendant's main line near Minneapolis. The trial resulted in a verdict for the plaintiff for \$20,000 which the court, with plaintiff's consent, reduced to \$14,500. This appeal is from an order denying defendant's motion for a new trial. The negligence charged against the defendant was running its train at an unlawful and dangerous rate of speed and failing to give the required signals as it approached the crossing. It is not questioned but that the evidence was sufficient to justify the jury in 30 L. R. A.

finding that the defendant was guilty of negligence as alleged. Defendant's two contentions are, (1) that the verdict is excessive, and (2) that it conclusively appears that the plaintiff himself was guilty of contributory negligence in failing to look and listen for trains as he approached the crossing.

2. The verdict, even as it now stands, is large, but it is clearly not so disproportionate to the nature and extent of plaintiff's injuries as to warrant us in setting it aside as excessive. Plaintiff was a young man, in his best years, and his injuries are both serious and permanent, leaving him badly maimed and deformed for life. Indeed, it would be no exaggeration to say that the evidence would justify the conclusion that he is practically a physical wreck.

3. On the occasion in question, the plaintiff was riding with one Pomeroy, who owned and was driving the team and wagon. Pomeroy had overtaken him on the highway, and invited him to ride. The vehicle was a farm wagon with a box or rack nearly 8 feet high. The team was a gentle one, and, in approaching the crossing, was traveling at the rate of about 8 miles an hour. Plaintiff had no control over the team, or over Pomeroy in its management. There was no relation of master and servant or of principal and agent between them, nor were they engaged in any joint enterprise. Plaintiff was simply taking a gratuitous ride upon the invitation of the owner and driver of the team. Pomeroy, who was driving, and a young man named Wentworth, sat on a spring seat set on the bottom of the wagon box in the front left-hand corner, facing towards the west. Plaintiff, as they approached the crossing, was standing up near the center of the wagon on the right-hand side, and facing towards the team. The sight and hearing of all three were unimpaired. The road being bare of snow, the wagon made some noise, but not sufficient, as they testified, to interfere with their hearing. The morning was cold and frosty, with a light wind from the east. All three were familiar with the crossing, and plaintiff was aware of the fact that they were approaching it. There was no evidence that Pomeroy was not a competent driver. Neither was there any evidence that plaintiff knew or had reason to suppose that Pomeroy was not exercising proper care in looking and listening for approaching trains; certainly none that required a finding that he did. There were no exceptional circumstances that would have excused a traveler driving a team from looking for approaching trains. Neither did anything exceptional occur to divert the attention of one whose duty it would otherwise have been to look. Plaintiff's testimony, which was the only direct evidence of what he did, was that he did look to the west for approaching trains when he was about 225 feet from the crossing; that, seeing none, he turned and looked to the east, and, seeing none in that direction, he again looked to the west, when he was about 150 feet from the crossing; that, still seeing no train in that direction, he again looked to the east, when his attention was attracted to smoke, which he thought perhaps might come

from a locomotive, but which proved to be from the smokestack of a factory near Camden Place, that, becoming satisfied that this was not from a train, he turned around to again look to the west, when he was about 25 feet from the track, when he discovered the approaching train within from 100 to 150 feet of the crossing, and going at a rate of from 40 to 50 miles an hour; that just at this time the horses made a jump or "lunge" forward; that Pomeroy tried to check them, but could not; that he (plaintiff) made an effort to get hold of the lines, but failed, and in an instant the collision occurred, and the next thing he knew was when he regained consciousness in the hospital. It is quite apparent from the evidence that the horses were the first to discover the approach of the train, and that neither of the three men in the wagon discovered it until it was almost on the crossing, and the horses within a few feet of the railroad track, when, in their fright, they sprang forward on the track, almost immediately in front of the engine. The highest rate of speed of the train testified to was from 40 to 50 miles an hour. The evidence consists largely of measurements and experiments made by the witness as to the distances at which a train coming from the west could be seen from different points on the highway by a traveler coming from the north, also of photographs illustrative and explanatory of this evidence. It is impossible to state on paper, at least in any reasonable space, anything like the full probative force of the evidence. But a careful examination of it satisfies us that it amounts to a mathematical demonstration that had plaintiff, when at the distance of 150 feet from the crossing, looked west up the track for an approaching train, he would and must have seen the train, conceding that it was running at the highest rate of speed testified to; also, that the view westward up the track was unobstructed for so long a distance that if he had looked in this direction from any point within 150 feet of the crossing he would have seen the train. Hence, although he testifies that he did look at the distance of 150 feet, it must be considered as conclusively established that he did not look, at least with the vigilance required of one driving a team, notwithstanding the "fog and mist" attempted to be raised for the purpose of showing that he might have looked and not seen the train. Moreover, if he had been the driver of the team, even if he had looked at a distance of 150 feet, it would have been negligence for him not to look again, when, as in this case, there was nothing to prevent his doing so. The evidence conclusively established negligence on the part of Pomeroy; and if the same kind and degree of negligence in "looking and listening" was required of plaintiff, in the exercise of reasonable care, as was required of Pomeroy, the driver, then plaintiff was, as a matter of law, guilty of contributory negligence, and the verdict cannot be sustained.

Defendant's contention is that the rule requiring a traveler on a highway, on approaching a railroad crossing, to "look and listen," so as to avoid danger from an approaching train, is, to its full extent, as

applicable to one who is being carried in a vehicle owned and driven by another as it is to the driver, who has the control and management of the team, although the passenger has no control over the driver or the management of the team, and although no relation of principal or agent or master and servant exists between the two, so that the doctrine of *respondet superior* would apply, or although they are not engaged in a joint enterprise, so as to create a mutual responsibility for the acts of each other. We do not think that this is, or, on principle, ought to be, the law. Negligence means merely the want of ordinary or reasonable care according to circumstances. This court, in common with most courts, has held, as a matter of law, that reasonable care requires a traveler driving along a highway, when approaching a railroad crossing, to use his senses by looking and listening to discover and avoid danger from approaching trains. Under exceptional circumstances, there may be exceptions even to this rule. But the degree of care which an ordinarily prudent and cautious man usually exercises will depend somewhat upon the responsibility which is cast upon him. And it does not seem to us that, because reasonable care makes it the absolute duty of the person who has the control of the team and vehicle to look and listen, it necessarily follows that reasonable care imposes the same absolute duty upon one riding in the vehicle, but who is not intrusted with the control and management of the team, and has no control over the person who has. Of course, the fact that the passenger, who has no control over the team or driver, is not chargeable with the negligence of the driver, does not relieve him of the duty to exercise reasonable care to avoid danger. The fact that he is not responsible for the driver's negligence will not relieve him from responsibility for his own negligence. But the question is, What constitutes negligence, and what is the standard of reasonable care on the part of one situated as was this plaintiff? If plaintiff had known that Pomeroy was an incompetent driver, or had known or had reason to believe that he was not performing his duty by looking for approaching trains, and had nevertheless neglected to look for himself, he would undoubtedly have been guilty of negligence. Or if he had in some way actively participated in Pomeroy's negligence he would have been negligent. But that is not this case, or at least the evidence does not establish it. We think that it would hardly occur to a man of ordinary prudence, when riding as a passenger with a competent driver, whom he had no reason to suppose was neglecting his duty, that he was required, when approaching a railway crossing, to exercise the same degree of vigilance in looking and listening for approaching trains that he would if he himself had the control and management of the team. And our conclusion is that a court cannot hold, as a matter of law, that a passenger having no control over the team or its management is guilty of negligence merely because he does not exercise the same degree of vigilance in "looking and listening" on approach-

ing a railroad crossing which is required of the one having the control and management of the team. It is a matter of common knowledge that under ordinary circumstances passengers do largely rely on the driver, who has exclusive control and management of the team, exercising the required care when approaching a railway crossing, and we do not think that the courts are justified in adopting a hard and fast rule that they are guilty of negligence in doing so. Every case must depend largely upon its own particular facts.

The authorities on this precise point are not as numerous as might be expected. In many of the cases where the driver or person in charge was negligent, the injured passenger was within an inclosed carriage or car, and hence had no opportunity to look or listen for approaching trains. It is, however, a noticeable fact that in most of the cases which repudiate the doctrine of *Thorogood v. Bryan*, 8 C. B. 115, and hold that the negligence of the driver in failing to "look and listen" is not imputable to the passenger, it does not appear that the passenger himself looked and listened, and no suggestion is made that any such absolute duty devolved upon him. *Brickell v. New York C. & H. R. Co.* 120 N. Y. 290, seems to go as far towards sustaining defendant's contention as any case in the books. But the facts of that case were peculiar. The plaintiff and the driver both occupied the same seat in a top buggy. As it was snowing and blowing, they raised the top, which was all inclosed except the front. This, with the snow and wind, rendered it more difficult to either see or hear approaching trains. This condition of things was necessarily known to plaintiff, who knew of the crossing. The court held that the evidence failed to show that plaintiff himself was free from negligence, which, under the rule in that state, he is bound to prove as part of his cause of action. This was decisive of the case, but the court proceeded, and further held that the evidence affirmatively and conclusively proved the actual existence of negligence of both the driver and the plaintiff. Upon the facts, this might well have been held upon the ground that the plaintiff himself actively participated in the negligence, and what the court said beyond this was not necessary to the decision of the case. That the trial courts of that state do not understand this case as laying down any such absolute rule as is sometimes supposed is evident from *Crawford v. Delaware, L. & W. R. Co.* 22 Jones & S. 262. In that case the plaintiff sat on the back seat of a carriage, while her mistress sat on the front seat and drove. The plaintiff neither looked nor listened for approaching trains, and yet it was held that her negligence was a question for the jury. *Crescent Twp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 867, and *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143, are sometimes cited in support of the doctrine now contended for by the defendant. In the first of these cases the plaintiff himself actively participated and united in the negligent act. And in *O'Toole v. Pittsburgh & L. E. R. Co.* 80 L. R. A.

158 Pa. 99, 22 L. R. A. 606, the court says that in both of these cases "the decision was put on the ground that the negligence of the driver was apparent [to the plaintiff], and he was to some extent under the direction and control of the party injured." Some courts make a distinction between private conveyances and public conveyances operated by common carriers, but it seems to us that any distinction based on this ground alone is wholly indefensible on principle. Others seem to make the position of the passengers the test, holding, impliedly at least, that when he is seated away from the driver, by being separated from him by an inclosure, or by being inclosed in the carriage, is without opportunity to discover danger, or to inform the driver of it, the rule of "looking and listening" does not apply to the passenger, but that otherwise it does. The presence or absence of these circumstances may be, and usually would be, material evidence upon the question of the passenger's negligence, but to hold as a matter of law, and as a rule of universal or even general application, that in their absence the passenger is guilty of contributory negligence if he does not "look and listen," is in our opinion not justifiable upon either principle or reason. The circumstantial evidence in this case may tend quite strongly to prove that plaintiff, as well as the driver, was negligent, but that was a question of fact for the jury. A court would not be justified in holding that his negligence was conclusively established. If the court in its charge instructed the jury too strongly in defendant's favor on this question, it is not a matter of which it can complain.

Defendant's exceptions to the charge of the court are unavailing—First, because not seasonably taken before the jury retired; and, second, because they are, or at least most of them are, too general, being taken to parts of the charge involving two or more distinct propositions, some of which, at least, were unexceptionable, and the particular proposition objected to was not specified. We may, however, add that, while many of plaintiff's requests might have been properly refused on the ground that they were too long and involved to furnish much aid to the jury, yet we discover no prejudicial error in any of them. The assignments of error relating to the admission of evidence and to the refusal of the court to grant a new trial on the ground of newly discovered evidence are, in our opinion, all without merit.

Having arrived at the conclusion that plaintiff's contributory negligence was a question for the jury, and that the evidence was sufficient to justify the verdict, the result is that *the order appealed from must be affirmed.*

Collins, J., dissenting:

I dissent. I do not regard the verdict, as reduced by the court, as excessive, for the plaintiff was permanently and very seriously crippled. But I am of the opinion that it would be almost impossible to find a case, if this be not one, in which a court could say, as a matter of law, that the negligence of a plaintiff was conclusively established

by the evidence. When instructing the jury, the court charged explicitly that although plaintiff was riding in Pomeroy's wagon upon invitation, and had no control over the team or driver, the duty was upon him to exercise the same care when approaching the crossing, and to be as diligent as to coming trains, as if he was driving his own team; and to this positive instruction plaintiff's counsel took no exception. That the jury disregarded this statement of the law is evident, for it must be conceded that had plaintiff been driving he could not have recovered. I do not claim that the charge of the court below on this point was an accurate statement of the law which should have governed the plaintiff's case, but, in any event, plaintiff's counsel, when contending that the driver's palpable negligence should not be imputed to their client, requested that the jury be charged that if he was guilty of negligence or of want of ordinary care, which contributed to his injuries, he could not recover. That this proposition is abundantly supported by the authorities cannot be questioned. Beach, Contrib. Neg. ¶115, and citations; *Allyn v. Boston & A. R. Co.* 105 Mass. 77. See also other cases commented upon in the main opinion.

At the crossing in question, the defendant's tracks were on an embankment, or fill, 9 feet above the natural surface of the ground. This fill gradually decreased to the west, until it reached a cut about 1,450 feet from the crossing. For several hundred feet westerly, this cut was slight and not deep enough to conceal from view any part of a locomotive above the wheels. It was demonstrated to a certainty at the trial that when on the highway 170 feet north of the crossing the plaintiff and his companions could have seen a train, if they had looked, at any point within 1,500 feet. At 100 feet from the crossing the approaching train was plainly visible for more than 2,300 feet, and, as a matter of fact, when the plaintiff and his companions were 100 feet northerly of the crossing the train was within 1,500 feet thereof, upon the top of an embankment, and necessarily within plain sight of the most indifferent of travelers. The train was so noticeable that in the prevailing opinion it is stated, notwithstanding plaintiff's positive testimony that he did look and did not see, "that it must be considered as conclusively established" that plaintiff did not look for a coming train. If it is conclusively established by the evidence that the plaintiff did not even look for the train which he knew was due about that time, at a crossing with which he was thoroughly familiar, standing up as he was, and having much better opportunities for looking and listening than had his companions, who were sitting on a seat so low that little more than their heads appeared above the sides of the wagon box, it seems to me that there can be no escape from the conclusion that, as a matter of law, not only did he fail to exercise ordinary care and prudence, such as an ordinarily prudent man would observe, but that he was extremely careless and negligent. To excuse him under such circumstances, to absolve him from the charge of contributory

negligence, is to say that he who rides in a private carriage at the invitation of the driver may close his eyes to well-known and imminent dangers, and escape all responsibility if accident results, unless he be aware that the driver is reckless or unskillful, or unless the passenger actually aids in causing the accident. On the controlling facts, no difference can be pointed out between the case at bar and two of those mentioned in the principal opinion. *Crescent Trp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 867, and *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143, and, applying the rules there laid down the plaintiff here had no cause of action. Finally, I note what is said concerning these two cases in the later one of *O'Toole v. Pittsburgh & L. E. R. Co.* 158 Pa. 99, 23 L. R. A. 606, which was a case of collision between an electric and a steam car, and quoted in the main opinion, to the effect that in each of those cases the decision was put on the ground that the negligence of the driver was apparent, and he was to some extent under the direction or control of the party injured. If in either of the cases referred to in this remark there was anything said which suggested that the party injured had any control over the driver, or that he pretended to direct him in the slightest degree, or that such fact was patent in determining either case, I am unable to find it after a most careful reading of the opinions. And, especially with reference to the *Dean Case*, this can also be said of the assertion that both of the decisions were, in part, put on the ground that the driver's negligence was apparent to the passenger. As I read the Pennsylvania cases, they were decided against the parties injured solely and expressly upon the ground that the plaintiffs, riding by invitation, or gratuitously, had contributed to their own injuries by failing to exercise ordinary care and prudence when approaching a well-known place of danger; and this without the slightest regard to the presence of the elements mentioned in the *O'Toole Case*, or reference to such elements.

Rehearing denied.

ANOKA LUMBER COMPANY, and Albert C. Cobb, Assignee, etc., *Appt.*,

FIDELITY & CASUALTY COMPANY of New York, *Appt.*, and Claus Edward NELSON, Intervener, *Resp.*

(.....Minn.....)

*1. The Fidelity and Casualty Company of New York issued an employers' liability policy to the Anoka Lumber

*Headnotes by BUCK, J.

NOTE.—The rapidly increasing importance of the subject of insurance against employers' liabilities makes this case a valuable one.

This decision makes the beginning of what must become a considerable branch of the law of insurance, and is believed to be a pioneer case.

Company, containing this clause: "The assured, upon the occurrence of an accident, and upon the notice of any claim on account of an accident, shall give immediate notice in writing of such accident or claim, with the fullest information available, to the company, at its office in New York city, or to the agent, if any, who shall have countersigned this policy." *Held*, that the assured need not give such notice until an accident happens and a notice of a claim is made on account thereof.

2. The above-described policy also contained several provisions relating to its liability, among others: (1) that it insured against all liability on account of fatal or nonfatal injuries suffered by an employee; (2) that the company, at its own expense, would take upon itself the settlement of any loss and the control of any legal proceedings taken against the assured to enforce a claim for injuries to the assured employees; (3) that the assured should not settle with the injured employee without the consent of the insurance company; (4) that no action should be brought against the insurance company after the period in which an action might be brought by the employee against the employer, unless at such period there was a suit pending for such purpose, in which case an action might be brought, in respect to the claim involved in such suit, against the company, by the assured, within thirty days after judgment is rendered in such suit, and not later. *Held*, that this policy, by the terms of the instrument itself, was not merely one of indemnity against any act of the employee, but that, in case of an accident to him whereby he had a cause of action against the assured, the company would assume and pay the liability. *Held*, also, that the employee having, while so employed, sustained an injury whereby he recovered a judgment therefor against the assured employer for the sum of \$2,255.03, the insurance company was liable therefor upon an action against it, without the employer having first paid the judgment.

3. An employee was personally injured while his employer held an employers' liability policy, and, before the employee commenced an action against the employer to recover damages for such personal injuries, the employer made an assignment under the insolvency law. Gen. Laws 1881, chap. 148. Judgment was afterwards rendered in such action in favor of the employee against the employer for such personal injury; and, in an action upon the judgment by the assured employer against the insurance company, the employee garnished the latter company, and then intervened in the suit. *Held*, that the claim of the assured against the insurance company did not pass to the assignee by the assignment, and that the intervener is entitled to maintain his garnishee proceedings in the action to recover the amount of his judgment.

(December 23, 1895.)

A PPEALS by plaintiff Cobb and defendant Fidelity & Casualty Company from orders of the District Court for Hennepin County denying motions for a new trial after verdict for intervener in an action brought to recover the amount alleged to be due on an employers' liability insurance policy. *Affirmed*.

The facts are stated in the opinion.

Messrs. Cobb & Wheelwright for appellant Cobb.

Messrs. Keith, Evans, Thompson, & 30 L. R. A.

Fairchild, for Fidelity & Casualty Co., appellant:

There has been by the failure on the part of the assured to perform the provisions of the condition as to notice, a breach in the contract in a matter which, upon fair and reasonable construction of the contract, the parties must be deemed to have considered vital to its existence, and such breach has discharged the insurer from liability.

8 Am. & Eng. Enc. Law, title *Contracts*, p. 914.

The contract is one of indemnity only, and there can be no recovery under it in this action because the judgment of Nelson has not been paid by the assured.

1 May, Ins. §§ 1, 2; *Castellain v. Preston*, L. R. 11 Q. B. Div. 380; *Weller v. Eames*, 15 Minn. 461, 2 Am. Rep. 150; *Cutler v. Southern*, 1 Wms. Saund. 116; *Hous v. Freidheim*, 27 Minn. 294; *Houston v. Nord*, 39 Minn. 490; *Campbell v. Rotering*, 42 Minn. 115, 6 L. R. A. 278; *Bausman v. Credit Guarantees Co.* 47 Minn. 377; *American Bldg. & L. Asso. v. Stoneman*, 53 Minn. 212; *American Bldg. & L. Asso. v. Waleen*, 53 Minn. 28; *Pioneer Sav. & L. Co. v. Bartsch*, 51 Minn. 474; *Mechanics' Sav. Bank v. Thompson*, 58 Minn. 346.

Mr. A. Ueland, for respondent:

No stipulation in an insurance policy which is used knowing that it cannot or will not be observed, can be said to be a condition, not even when it is called so in the policy.

1 May, Ins. § 162.

If the agreement is to pay damages, there must be damages. A liability to pay, such as a judgment, is not sufficient. But if the contract is to prevent, or protect against, any other particular event when that event takes place, the contract is broken and an action will lie.

Chace v. Hinman, 8 Wend. 452, 24 Am. Dec. 39; *Re Nagus*, 7 Wend. 499; *Webb v. Pond*, 19 Wend. 428; *Martin v. Bolenbaugh*, 42 Ohio St. 508; *Kirkey v. Friend*, 48 Ala. 276; *Jones v. Childs*, 8 Nev. 121.

An insurance policy is a personal contract and not assignable except by consent.

Carroll v. Boston Marine Ins. Co. 8 Mass. 515.

Under the English bankruptcy act, which vested the property in the assignee just as fully as it does our insolvency law, Lord Denman held that where a cause of action for trespass was not wholly founded upon an injury to property, but partly upon a personal wrong, it did not vest in the assignee.

Rogers v. Spence, 18 Mees. & W. 571.

If this principle is applied, the assignee has no claim upon the insurance, even though a cause of action did exist when the assignment was made, for the cause of action is not on account of anything that has in any way diminished the insolvent estate.

The intervener has no claim on that estate as his claim was unliquidated at the time of the assignment, and as he was not then a "creditor" within the meaning of the insolvency law or the deed of assignment.

Burrill, Assignm. 763; *Re Adams*, 12 Daly, 454; *Black v. McClelland*, 12 Nat. Bankr. Reg. 481; *Re Schuchardt & Wells*, 15 Nat. Bankr. Reg. 161; *Re Bailey & Pond*, 2 Woods, C. C. 222; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13;

Wilder v. Peabody, 37 Minn. 248; *Re Shotwell*, 49 Minn. 186.

Buck, J., delivered the opinion of the court:

This action is brought under an employers' liability policy issued by the Fidelity & Casualty Company of New York to the Anoka Lumber Company, insuring the company for twelve months against liability for damages, up to stated limits, on account of fatal or non-fatal injuries suffered by an employee or employees of the assured while engaged in the occupations and at the places specified. On May 25, 1893, while the policy was in force, one of the insured's employees, Claus E. Nelson, the intervener, and respondent was injured. At that time the assured was informed and knew of the accident, but it then gave no notice to the insurance company of its occurrence. On September 13, 1893, Nelson claimed damages of the assured, on account of this accident; and the same day the assured, for the first time, gave notice to the agents of the insurance company that the accident had happened, and that Nelson claimed damages in consequence of it. Afterwards, on October 3, 1893, the assured made a formal statement of the accident and claim on blanks furnished by the appellant. At the time of receiving said statement, appellant claimed that there had not been a compliance with condition 3 of the policy, and afterwards, when notified by the lumber company that suit had been brought by Nelson, refused to defend the action or to consider the accident as coming under said policy, on account of material prejudice, and on account of failure to report the accident promptly. On the 4th of October, 1893, the assured made an assignment, under the insolvency laws of this state, to Albert C. Cobb; and to said Cobb was delivered, with other assets of the Anoka Lumber Company, the policy here in question. In the schedule of assets filed by the Anoka Lumber Company no mention of this policy or reference to it was made. On December 20, 1893, Nelson commenced his action against the Anoka Lumber Company; and on July 5, 1894, he obtained judgment in his suit against it for \$2,285. This judgment is wholly unpaid. Upon the entry of this judgment, the present action was brought against this appellant, by said Cobb, as assignee, and the Anoka Lumber Company. Nelson garnished this appellant insurance company, and thereafter intervened in this action. Upon the trial, the court directed a verdict against the defendant for the amount of the judgment obtained by said Nelson, and interest, viz., for \$2,380, and also directed the jury to find said sum so found against said defendant to be payable to the intervener by defendant as garnishee of said Anoka Lumber Company. The Fidelity & Casualty Company, and Albert C. Cobb, as assignee of the Anoka Lumber Company, each prosecutes an appeal.

A provision of the policy, numbered 3, is as follows: "The assured, upon the occurrence of an accident, and upon notice of an accident, and upon notice of any claim on account of an accident, shall give immediate notice, in writing of such accident or claim, with the fullest information available, to the company at its office in New York city, or to other agents, if

any, who shall have countersigned this policy."

1. The Fidelity Company contends that this provision requires notice to be given whenever any accident occurs, and also that another notice must be given whenever any claim on account of an accident is made. Opposed to this contention, it is asserted that notice is not required by the terms of such provision until there has been both an accident and a claim by reason thereof. We are of the opinion that the latter construction is the correct one. Nelson never made any claim against the Anoka Lumber Company for damages prior to the 18th day of September, 1893; and, upon such claim being made, the company immediately notified the insurance company of the accident and Nelson's claim. No question is raised as to the sufficiency of the written statement or proof of loss. If the injured party, Nelson, never made any claim against the Anoka Lumber Company on account of his injuries, it would be an idle ceremony for the company to give notice of the accident to the insurance company. It only concerned the company when it was notified by Nelson that he claimed damages against it on account of the injuries he had received. When it learned of the threatened liability, then it notified the responsible party in accordance with the terms of its policy, and that was all the notice required under the provisions of its contract. We have no doubt as to the correctness of the construction we have placed upon the provision of the policy we have quoted; but, if there were any doubt as to the meaning of the clause, then such doubt must be solved in favor of the insured. *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 13 Am. Rep. 385; *Symonds v. Northwestern Mut. L. Ins. Co.* 23 Minn. 491. This language used in the insurance policy is that of the company in the instrument which it makes and issues; and where it expresses itself in terms of its own creation, and if it needs any interpretation or construction, it certainly cannot complain if the meaning is resolved against it. The cases are numerous which sustain this position. In the case of *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 510, it is said: "A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it." We are not unmindful of the force of the appellant's contention that it would be of great benefit to have immediate notice of any accident, as well as of any claim, for the purpose of getting at the truth of the alleged accident, of finding witnesses who know the facts, and making preparation for the defense of any anticipated claim for damages. Other reasons might be readily suggested, but the insurance company must abide by its own terms, which it has deliberately expressed, and by the whole contract of which these terms are a part. Upon the other hand, it may be said that it might frequently be difficult for the employer to give immediate notice. Take, for instance, our lumbermen, where the employees are in the pine woods, a long distance from the employer's place of business or residence, and where

it would, perhaps, on account of deep snows or want of rapid communication in traveling or by telegraph, be an impossibility to know of the accident for a long time, perhaps weeks or months after its occurrence. Under such a condition of things, a policy requiring immediate notice of the accident to the employee to be given to the insurance company by the employer would render the policy entirely useless. We might very well say that the provision under consideration does not need either construction or interpretation, but that the usual and ordinary meaning of it from a grammatical point of view is that which we have indicated and decided.

2. The next question for our consideration is whether the defendant's policy is a contract of indemnity. The defendant claims that it is not liable, because the Nelson judgment has not been paid by the plaintiff. If it be simply a contract of indemnity, then, under the decision of this court in *Weller v. Names*, 15 Minn. 461 (Gil. 376), 2 Am. Rep. 150, the payment of the judgment is a condition precedent to the right of the plaintiff's recovery. With the rule laid down in that case we need not interfere in what we say here, because in this case we must look to the various terms and scope of the whole policy, and thus determine the intent and meaning of the parties, as evidenced by such contract of insurance. A brief abstract of the policy shows: (1) An insurance against all liabilities on account of fatal or nonfatal injuries suffered by an employee. (2) The company may take upon itself the settlement of any loss, and, if any legal proceedings are taken against the assured to enforce a claim for indemnity for injuries, the company shall, at its own cost and expense, have the absolute conduct and control of defending the same throughout in the name and on behalf of the assured, and the assured shall render to the company all possible aid in securing information and evidence in effecting settlements. (3) The assured shall not, except at his own cost, settle any claim or incur any expense without the consent of the company previously given, in writing, except that he may provide such immediate surgical relief as may be imperative. (4) No action shall lie against the company after the expiration of the period within which an action for damages on account of the given injuries or death might be brought by such claimant or his representatives against the assured, unless, at the expiration of said period, there is a suit, arising out of such accident, pending against the assured, in which case an action may be brought in respect to the claim involved in such action against the company by the assured within thirty days after judgment is rendered in such suit, and not later. Thus we see, from the very terms of the instrument itself, that it is not merely an agreement to indemnify the plaintiff against any act of the employee, but that in case of an accident of such a character as to injure him, whereby a cause of action arises against the assured, the insurer or company will assume the liability. The company takes upon itself the settlement of loss and the control of all legal proceedings, and the assured is forbidden to settle any claim or incur any expense without its consent in writing. At the expiration

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of the time when a suit can be brought by the employee against the employer arising out of such accident, an action may be brought in regard to such claim against the company within thirty days after judgment is rendered in such suit. If the plaintiff is forbidden to settle a claim for an accident of this kind, we fail to see how it is imperative upon him to pay a judgment rendered against him upon such a claim, as a condition precedent to his right of recovery. The insurance company, by the terms of its own policy, has taken into its own hands the whole machinery for settling such claim, and will not allow the employer to do it. When the injured employee notified the plaintiff of his claim, it at once notified the insurance company thereof, and also of the commencement of the suit against it by Nelson, the injured employee, and demanded that the defendant defend the same. It did not do so, and the burden and expense of so doing fell upon the plaintiff. In that action, which went to judgment after trial and a verdict of \$2,285.02, it does not appear that there was any fraudulent collusion between the employer and employee. If the defendant challenges the amount of the verdict as excessive, it can properly be said that its own negligence or obstinacy in not defending may in some measure account for it. At least, it did not do what it agreed to, and in this respect it is bound by the judgment so rendered, which is a substantial liability against the plaintiff in favor of Nelson, the employee.

3. We will now consider the question of the claim and rights of the intervener, Nelson. His claim is hostile to that of the assignee, and the defendant denies any liability to either. When the Anoka Lumber Company made its assignment, no suit had been commenced against it, and judgment was not recovered therein until the ensuing July. Therefore, if the intervener's rights are superior to those of the assignee, it is because the rights and interest which the Anoka Lumber Company had in the insurance policy did not, under its assignment, pass to the assignee, Albert C. Cobb; and if the intervener, Nelson, is entitled to the benefits of this insurance policy, it is by virtue of his garnishment, and not by virtue of any privity of contract growing out of the insurance policy so executed between the Anoka Lumber Company and the insurance company. We are of the opinion that the rights and remedies of the Anoka Lumber Company growing out of the insurance policy did not pass to the assignee by virtue of the assignment. "The assignment is for the benefit of creditors having existing debts against the assignor at the time of the assignment," *Wilder v. Peabody*, 37 Minn. 248. This was not an existing debt against the insurance company at the time of the assignment. Nelson's merely making a claim against the lumber company did not create a debt which could properly be said to then exist; and whether the lumber company would ever have a substantial claim against the insurance company depended upon two contingencies, one of which was the recovery of a judgment against it by Nelson for an unliquidated personal injury claim in a suit for damages therefor, and the other that the insurance company had a right, under the con-

tract policy of insurance, which it might exercise, to take upon itself the settlement of any loss; and, if legal proceedings were taken by Nelson against the lumber company to recover damages for injuries, then the insurance company had the right to have the absolute conduct and control of the defense throughout the entire proceedings in the name and on behalf of the Anoka Lumber Company; and it was forbidden to settle any claim or incur any expense without consent of the insurance company. Until the judgment in favor of Nelson against the Anoka Lumber Company was rendered, some nine months after the assignment, or whether it was liable at all, the amount of the liability of the Anoka Lumber Company in favor of Nelson was entirely unknown; and, if known, the insurance company had the right to assume and settle or pay it, not to the Anoka Lumber Company, but to Nelson, at least up to the time when Nelson commenced his action against the Anoka Lumber Company, on the 20th day of December, 1898, more than two months after the date of the assignment. This claim might never have become an existing debt in behalf of the Anoka Lumber Company, and until then it was too indefinite and uncertain to come within the

provisions of the insolvency law, empowering an insolvent to make an assignment of all of his unexempt property. It was not entered in the schedule of assigned assets, and for the very good reason that a claim resting upon such contingencies would be of no avail, and only a source of embarrassment in settling the insolvent's estate as provided by law. We do not hold that certain rights of action may not be assigned, such as those for recovering real or personal property, and for the recovery of damages, where they have been withheld, or the value thereof diminished, where the cause of action existed at the time of the assignment; but we do not think that a claim or cause of action of this kind comes within the letter or spirit of the law. It is therefore held that the Fidelity & Casualty Company of New York is liable, under its policy, for the amount of the judgment recovered by Nelson, against the Anoka Lumber Company, *vis.*, \$2,285.02, with lawful interest thereon, and that the same is subject to the garnishment of the intervener, Claus Edward Nelson.

The order of the Trial Court denying the plaintiffs and the defendant's motion for a new trial is affirmed.

NORTH CAROLINA SUPREME COURT.

William H. STRAUSS, in Behalf of Himself and Other Stockholders,

v.

CAROLINA INTERSTATE BUILDING & LOAN ASSOCIATION.

(.....N. C.)

1. **The affairs of an insolvent building and loan association are to be settled in North Carolina by charging borrowing members 6 per cent interest on the amounts they received, with a credit for all they have paid into the concern, whether it was called "fines," "penalties," "weekly dues" or by any other name, while nonborrowing members are entitled to interest at the same rate upon the amounts due them.**
2. **A receiver of a building and loan association cannot foreclose under the power of sale contained in mortgages held by the association.**
3. **Instructions to receivers which seem material, if not necessary to their work, may be given by an appellate court in reviewing instructions given by a lower court.**
4. **Receivers will not be instructed as to the distribution of funds until they have them in court.**

(December 20, 1896.)

A PPEAL by the receivers and nonborrowing members of the Carolina Interstate

NOTE.—For the rights of a member of an insolvent building and loan association, see note to Southern Bldg. & L. Assn. v. Anniston Loan & T. Co. (Ala.) 29 L. R. A. 120.

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Building & Loan Association, from an order of the Superior Court for New Hanover County in favor of borrowing members upon a petition by receivers of the association for instruction as to the proper method of settling its affairs. *Modified.*

The facts sufficiently appear in the opinion. *Messrs. E. S. Martin and Ricard & Weill*, for appellants:

This court should prescribe such a rule for the settlement of the affairs of this corporation as will do equity and justice between its several stockholders.

Davis v. Industrial Mfg. Co. 114 N. C. 327, 23 L. R. A. 823.

Insolvency occurring in such an association, even the constitution and by-laws of the association itself are not to be regarded.

Endlich, Bldg. Assn. 2d ed. p. 506; *Towle v. American Bldg. L. & I. Soc.* 61 Fed. Rep. 446.

There is an implied agreement that all burdens must be equally borne and all profits equally shared.

Endlich, Bldg. Assn. 505, 506.

The true rule of settlement is: The borrowing member must pay what he actually received, with legal interest thereon, but is not to be allowed to deduct all that he has paid in.

Endlich, Bldg. Assn. 580.

The value of his stock, after deducting all losses and expenses must be approximated, and that value, so ascertained, be allowed as an offset on his mortgage debt, and the balance of said debt paid.

Endlich, Bldg. Assn. 581; *City Loan & Bldg. Assn. v. Goodrich*, 48 Ga. 445; *Goodrich v. City Loan & Bldg. Assn.* 54 Ga. 98.

Messrs. W. R. Allen and Jacob Battle, for appellees:

The rule adopted in the court below is that the borrowing member be charged with all he has received and 6 per cent interest thereon for the average time, and that he be credited with all he has paid to the association, from all sources, and 6 per cent interest thereon for the average time.

This is the rule established by the supreme court for settlement between the borrowing member and the association.

Rowland v. Old Dominion Bldg. & L. Asso. 115 N. C. 825; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882.

If the insolvency of the association consists in its inability to meet the demands of its own members, and if these demands existed prior to the appointment of a receiver, it is difficult to see how the appointment of a receiver can change the rule of settlement.

A receiver's general duty may be said to be to take possession of the state in the room and place of the owner thereof.

Blapham, Eq. § 580.

The appointment does not affect the title, the property, or rights of any who have an interest therein.

Ex parte Dunn, 8 S. C. N. S. 207; *Ellis v. Boston, H. & E. R. Co.* 107 Mass. 1; *Union Bank v. Kansas City Bank*, 136 U. S. 223, 34 L. ed. 341.

If the right existed prior to the appointment of the receiver to set off against the debt to the association all that the borrowing member has paid in, and if the appointment of the receiver does not change the title to the property, the right exists to-day.

Kneeland v. American Loan & T. Co. 136 U. S. 39, 34 L. ed. 879; *Endlich, Bldg. Asso.* 2d ed. 518, note 2, and cases there cited.

Furches, J., delivered the opinion of the court:

The defendant is what is called a "building and loan association," organized as a corporation under the laws of North Carolina. Defendant becoming insolvent, the plaintiffs brought an action in the superior court of New Hanover county to close out and wind up the concern. The petitioners, Iredell Meares and P. B. Manning, were appointed receivers, and filed their petition, and asked instructions from the court, in which they say: "Your receivers respectfully report to the court that, in the attempt to collect the debts due to the defendant association by its members, they are met with the difficulty of how to adjust the balances that may be due the association, between the amount of the debt and the amount which may have been paid in by the borrowing members on their shares of stock. The complication arises from the fact that the borrowers, who are indebted to the association, are likewise stockholders therein, and, as stockholders, liable for their *pro rata* share of whatever losses may have been incurred in the failure of the association. If the relationship between the borrower and the association was simply that of debtor and creditor, the balance could be easily ascertained. The association, however, under its plan, loaned money only to its members;

and these members made monthly payments on their stock, which, when amounting, with accruing profits, to the par value of their stock, were expected to be applied to the extinguishment of their loan, the stock being then canceled. The failure of the association, however, eliminates the possibility of maturing the stock, and necessitates an equitable adjustment between its members for the collection and distribution of the assets." Upon the hearing, Judge Graham made the following order:

"This action coming on to be heard before his honor, A. W. Graham, judge presiding in the sixth judicial district, at chambers at Clinton, North Carolina, on the 11th day of October, 1895, by consent of all parties thereto, upon the petition of Iredell Meares and P. B. Manning, receivers of the defendant, the Carolina Interstate Building & Loan Association, praying the court for direction and instruction as to the winding up and settlement of the affairs of said corporation with and among the members and shareholders thereof, and the same being argued by counsel for said receivers and borrowing members of said defendant corporation, respectively, and considered by the court, the court rejects all of the plans of settlement suggested in the petition of said receivers, and now orders, adjudges, and decrees, and the said receivers are hereby advised and directed to wind up, adjust, and settle the affairs of said corporation defendant, and distribute the assets thereof among the respective members or shareholders of said corporation upon the principles and in the manner following, that is to say: In the settlement with members of said corporation who have borrowed money therefrom, and secured the said loan either by a pledge of stock, or by pledge of stock and mortgage on property, and who are now indebted to said association, the said receivers shall charge the said borrowing member with the amount of money loaned to him by said association, charging interest thereon from the date of said loan to the 24th day of July, 1895, at the rate of 6 per cent per annum. And said member shall be credited with all sums of money paid in by him, whether paid as dues, fines, premiums, or in any other manner, and also with interest on all of said payments from the respective dates thereof until the said 24th day of July, 1895, and the sum so ascertained shall be deducted from the amount of the loan to said member by the association, and the balance remaining shall be the debt due and owing by said member to the said association, and shall bear interest from the said 24th day of July, 1895, until paid, at the rate of 6 per cent per annum, and be secured by the mortgage executed by said member to the association securing the original loan. And upon the payment of said balance so ascertained, with all interest thereon, the mortgage given as aforesaid shall be released and discharged by said receivers according to law. That the said receivers shall ascertain as aforesaid the amount due by each and every member or shareholder of said association, and shall notify him in writing of the same, and de-

mand payment thereof; and, if the said amount due by such member shall not be paid within thirty days after service of said notice, the said receivers shall, in their discretion, proceed, either under the power of sale contained in said mortgage, or by proceedings in the proper court having jurisdiction, to foreclose said mortgage, and sell the property conveyed thereby upon such terms as to said receivers shall seem best, or said court may prescribe. And in those cases where only a pledge of stock was made as security for the loan, upon such default the said receivers shall, in their discretion, bring suit against said member personally to recover the balances due said association by him. Upon the ascertainment in the manner aforesaid of the balance due by the borrowing members to the association, and the payment thereof, such borrowing member shall cease to be a member of said association, and shall be discharged from all further liability to said association, either as debtor or stockholder, and shall have no right to participate in the distribution of the assets of said association, but his stock shall be deemed canceled and surrendered. All sums of money collected from borrowing members as hereinbefore directed shall be held by said receivers, and applied by them, with all other assets of said association—First, to the payment of cost, charges, and expenses of executing the trust of said receivership; secondly, to the payment of the creditors of said association in full; and the residue thereof shall be distributed equally and ratably among the nonborrowing members of the association in proportion to the amounts paid in by them, respectively, upon the shares of stock held by them, including the interest upon said several payments from the average date thereof until the said 24th day of July, 1895. And the court doth retain this cause for further direction."

To the order of Judge Graham the receivers and nonborrowing stockholders excepted and appealed.

This is a new question to us. But it seems to us that the parties have applied too much refinement to their theories of settlement, when one more simple, based on plain business methods, would be better. The receivers say in their application for instructions that the whole trouble grows out of the fact that all the parties interested are both stockholders and debtors to the concern; that, if the debtors were not stockholders, there would be no trouble in adjusting the matter. This being so, it seems to us to be of easy solution, by first considering every one having stock in the concern, whether as creditor or debtor, as a corporator. Endlich, Bldg. Asso. § 527. Then consider each member indebted to the concern as a debtor, and you have the condition of things that the receivers say, if they existed, there would be no trouble in adjusting the whole matter. It seems to us that there can be no trouble in the mind, separating the parties interested upon the line we have indicated. And, if this is so, it would seem that the greatest trouble in the way of a settlement has been removed.

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But there are other matters to be considered. On the 24th of July the first receiver was appointed, and the corporation ceased at that time. Id. § 528. This date is when the receivers' work commenced, and will be the dividing line between the work of the corporation and that of the receivers. Every one who held stock in the concern on that day, whether as a borrowing or nonborrowing member, is a corporator, and must so remain until the concern is closed out, and will be subject to the burdens and entitled to the benefits according to his amount of stock. *Ibid*. The capital of the concern will be the shares of stock it has issued, and which have not been redeemed; when redeemed in part, then only as to that part unredeemed, and any other available assets it may have. Its assets will be what money and effects it had on hand on the 24th of July, 1895, including, of course, what debts were then owing to the corporation. In making collections of the borrowing members, they should only be charged with the amounts they had received. Id. §§ 527, 528. And under our statutes as construed in *Rouland v. Old Dominion Bldg. & L. Asso.* 115 N. C. 825, 116 N. C. 877; *Meroney v. Atlanta Bldg. & L. Asso.* 116 N. C. 882,—these borrowing members can only be charged 6 per cent interest on the amounts they received, from the time they received them, and are entitled to credits on the amount for all they have paid into the concern since they borrowed the money, whether it was called "fines," "penalties," "weekly dues," or by any other name. The nonborrowing members will be entitled to have interest computed on the amounts due them at the rate of 6 per cent. The receivers should be fully empowered, by order of court, to proceed to collect in the funds of the concern, and to do any other necessary act for the benefit of the concern; to employ attorneys, if necessary, whose pay must be fixed by the court. The appointment of the receivers of this insolvent corporation caused the debts and mortgages due the concern to mature, and they may be collected at once. Endlich, Bldg. Asso. § 528. This rule only applies to insolvent building and loan associations, so far as we have been able to see. But we know of no law that will authorize the receivers to foreclose under the power of sale contained in the mortgages, as we see they were made to the corporation, and the corporation alone is empowered to foreclose by sale.

At first we entertained some doubt as to whether we should review the judgment of the court below and give instructions to the receivers. But as it seemed material, if not necessary to their work, we have gone as far as we thought we were authorized in doing. Beach, Receivers, § 259. But we must decline to give any instruction as to the distribution of the funds until the receivers have them in court. This we think is the well settled rule of equity.

Therefore the order appealed from will be modified and reformed in accordance with this opinion.

Beverly SCOTT, *Appt.*,

S. H. FISHBLATE.

(.....N. C.....)

A mayor is not subject to a civil action for damages because of an erroneous order made through malice, for the imprisonment of a person for contempt, if it was an order made in court and within his power to make.

(December 17, 1895.)

A PPEAL by plaintiff from a judgment of the Superior Court for New Hanover County in favor of defendant in an action brought to recover damages for false imprisonment. *Affirmed.*

The facts are stated in the opinion.

* **Mr. Thomas W. Strange**, for appellant: If the court ordering said arrest or making said commitment is one of limited jurisdiction, the rule is the judge is liable in a private action for such judicial act, whether it be in excess of, or outside of, his jurisdiction; and such jurisdiction is not presumed, but must be proved.

7 Am. & Eng. Enc. Law, p. 669, notes 1, 2.

False imprisonment is the unlawful restraining of a person contrary to his will, either with or without process of law.

7 Am. & Eng. Enc. Law, p. 669; Bigelow, Torts, student's ed. pt. 2, chap. 7, § 8, pt. 144.

There was no law in existence prohibiting any one, except a health officer, from burying night soil, at the time of plaintiff's arrest. Therefore a warrant was issued and the plaintiff arrested thereon, detained, and restrained of his liberty without any authority whatsoever, for the warrant was void, and the defendant had exceeded his authority and his jurisdiction.

State v. Weed, 21 N. H. 262, 53 Am. Dec. 188; 7 Am. & Eng. Enc. Law, p. 673, note 1.

Defendant is certainly a magistrate of limited jurisdiction, and if such a magistrate exceeds his jurisdiction and imprisons another, he is guilty of false imprisonment.

7 Am. & Eng. Enc. Law, p. 669, note 2, p. 673.

Contempt committed in the presence of the court, as alleged in this case, may be punished summarily; but to justify such a punishment and make it lawful, the court must cause the particulars of the offense to be specified on the record, and a copy of the same to be attached to every committal, attachment, or process, etc.

Code, vol. 1, § 650; *State v. Mott*, 4 Jones, L. 451; *Re Deaton*, 105 N. C. 59.

Mears, **Ricaud & Weill** and **W. R. Allen**, for defendant:

When a justice is acting in a judicial capacity within the sphere of his jurisdiction, no action will lie for any judgment, however erroneous or malicious.

Furr v. Moss, 7 Jones, L. 526; *Bradley v.*

Fisher, 80 U. S. 13 Wall. 335, 20 L. ed. 646; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652; *Cooke v. Bangs*, 81 Fed. Rep. 640.

Furches, J., delivered the opinion of the court:

This is an action of false imprisonment.

At the time of the act complained of, the defendant was mayor of the city of Wilmington, and plaintiff was under arrest, upon a warrant issued by defendant, upon a charge of "burying night soil" within the limits of the city. The gravamen, the act complained of, is an order for contempt of court, made by defendant, under which plaintiff was imprisoned in the common jail of New Hanover county for a number of days. Sufficient appears in the history of this case, as contained in the record, to satisfy us that defendant acted badly on the occasion of making this order, and that he was lacking in that respect for the position he occupied that is usually found in those occupying such positions, and as should have governed his conduct on that occasion, and it seems to us that the testimony of De Rosset and others strongly tended to establish plaintiff's contention that defendant's court was not in session when this order was made; that it was made hastily, and in bad temper; that defendant resumed the chair, and took control of plaintiff's case; that he had just before made an order to remove, for the purpose of carrying into effect an order he had no right to make, when he did make it; and that the claim of defendant, as a reason why he told Clowes (who seems to occupy the convenient positions of justice of the peace, chief of the city police, and clerk of the mayor's court) to fine plaintiff for contempt of court, was that his order given to Clowes, as his clerk was an afterthought. But this was defendant's testimony, and he introduced other testimony tending to sustain his contention that his court was in session at the time the order was made. But this case presents for our consideration a very grave proposition of law, in which the suffering and damage of plaintiff, and the bad conduct of defendant, must be subordinated, for the present, to a discussion of the individual rights of the citizen and the independence of the judiciary. All courts exercising judicial powers have the inherent right to punish for contempt. This power is necessary to their existence, and, where it is for conduct in the presence of the court, it is final, and cannot be reviewed by this or any other court. *Bradley v. Fisher*, 80 U. S. 13 Wall. 335, 20 L. ed. 646; *Pratt v. Gardner*, 2 Cush. 63, 48 Am. Dec. 652; *Cooke v. Bangs*, 81 Fed. Rep. 640; *State v. Mott*, 4 Jones, L. 451; *Re Deaton*, 105 N. C. 59. As we have said, this power exists in all courts having and exercising judicial functions,—mayor's courts and justice's courts, as well as higher courts, having and exercising greater jurisdiction. *Cooke v. Bangs*, and *Re Deaton*, *supra*. The defendant then had the right—the power—to make the order of contempt, if he was sitting, and his court was open for the transaction of business when he made the order; and, if it was made then, it was in the exercise of a

NOTE.—For liability of judicial officer for acts of a judicial nature, see *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138, and note; *Williamson v. Lacey* (Me.) 25 L. R. A. 506; *Thompson v. Jackson* (Iowa) 27 L. R. A. 92, and note.
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judicial power, and was a judicial act,—a judgment of the court,—and a civil action cannot be maintained by the plaintiff against the defendant for damages, though the order complained of was erroneous, and made through malice. *Pratt v. Gardner*, *Cooke v. Bangs*, and *Bradley v. Fisher*, *supra*. This seems to be a wrong without a remedy, which is said to be contrary to the spirit of our institutions “that where there is a wrong, there is a remedy.” But, if this is so, it is necessarily so, and it must be taken that the plaintiff agreed that it shall be so. But for the government, of which he is a part, there would be no law, nor would there be any courts to right public wrongs, none to which the citizen (the plaintiff) could appeal to have his private rights declared and enforced. But for the law, and the courts to declare and enforce the law, the plaintiff would be without remedy for any grievance, and the law, of course, must prevail. To have this legal protection, it is necessary to have courts,—judges, justices of the peace, including the courts of mayors of towns and cities; and it is the experience and wisdom of our country that these courts cannot exist, or at least cannot discharge their judicial functions, unless they are made free from pecuniary liability for their judgments while so acting. This does not protect them from impeachment, nor from indictment for misconduct, fraud, or corruption in office, because these are public wrongs, committed against the government, whose servants they are.

This brings us to the real issue in this case, and that is, whether the defendant's court was open for the transaction of business when he made the order imprisoning the plaintiff for thirty days for laughing in his court; and the jury has settled this question, if there are no errors in the rulings and instructions of the court. There are no exceptions to evidence, and there is no exception to the charge of the court upon the question as to whether the defendant's court was in session or not when the order committing

plaintiff for contempt was made. It is expressly stated that there was no exception to this part of the charge. Nor do we find any exception to the charge of the court “except that the court did not give the prayers asked by plaintiff.” We have examined these prayers with care, and can see no error in the refusal of the court to give them to the jury. The first is principally as to whether the “burying night soil” was an offense, under the ordinances of the city of Wilmington, or not, and whether the defendant would not be liable for issuing the original warrant of arrest. If this had been the gravamen declared on in the complaint, it would have presented a very interesting question. *Cooke v. Bangs*, *supra*. But it is not, and we do not feel called upon to discuss this question. The gravamen, as we have before stated, is the order for contempt. The only part of this prayer applicable to the case in hand is the closing paragraph, and this was given, in substance, accompanied with the statement that there was no exception to this part of the charge. The other prayers, if asked,—and we are treating them as if asked in writing,—are subject to the same reasons given for not giving the first, and we find no error in the court's refusing them.

There is another exception as to the juror Solomon Bear, and we can very well see, from the conflicting evidence as to whether defendant's court was in session or not, and the surroundings, why the plaintiff should not want Bear on the jury. But we are unable to see any legal error the court made in calling him into the jury box. It seems to be one of the many incidents which take place in the progress of a trial, by which a party is prejudiced, and for which the only relief is at the discretion of the judge. This was asked and refused, and there can be no review of his ruling in this court. After a careful investigation of the case, we find no error entitling the plaintiff to a new trial.

The judgment of the court below is affirmed.

KENTUCKY COURT OF APPEALS.

Thomas H. MAJOR, *Appt.*,

v.

J. W. CAYCE *et al.*

(.....Ky.....)

The trustees of a common-school district may contract with a teacher that the latter may teach certain higher branches and as a part of his compensation have the right to charge and receive compensation therefor from all pupils taking such branches, under statutes entitling all pupils of

school age within the district to free tuition in certain studies, and providing that no teacher shall be required to teach any other than the common-school branches, unless it is so specified in a written contract with the trustees.

(December 4, 1895.)

APPPEAL by plaintiff from a judgment of the Circuit Court for Christian County sustaining a demurrer to the petition in a proceeding brought to compel defendants to provide instruction in the district school for

NOTE.—The above case presents a peculiar question in the law of public schools, which does not seem to have been decided in any prior case.

For some other matters respecting employment of teachers, see *Gates v. Fort Smith School Dist.* 30 L. R. A.

(Ark.) 10 L. R. A. 186; *Hull v. Aplington Independent School Dist.* (Iowa) 10 L. R. A. 278, and *note*; *Marion v. Oakland Bd. of Edu.* (Cal.) 20 L. R. A. 197; *Hosmer v. Sheldon School Dist. No. 2* (N. D.) 25 L. R. A. 353.

plaintiff's daughter without charging extra compensation therefor. *Affirmed.*

The facts are stated in the opinion.

Messrs. J. I. Landes and John Feland, for appellant:

All of the resident pupils of the district are entitled to instruction in every branch of learning that is taught, by permission of the trustees, in the school during the term for which the common school is to be kept.

There is an instance of a "common school," and a "private school" conducted in the common-school building in District No. 78 at one and the same time, which is plainly against the policy of the law.

The statutes provide that all of the resident pupils of the district shall have the privilege of the school "free of expenses" and without being required "to contribute toward defraying" the expenses of the school.

Mr. M. D. Brown for appellees.

Grace, J., delivered the opinion of the court:

The appellant, Thomas H. Major, being a citizen and resident of common-school district No. 78, Christian county, and being the father of four children resident therein, and within the school ages between six and twenty years, and the father being thus entitled under the law to the benefits of said common school for the education of his children, which was being taught in said district by one G. V. Donnell, under a contract with appellees, as trustees of said district, yet appellant complains that he is denied, and that his children are denied, the full benefit of said common school, to which, under the law, they are entitled, in this: that he says his eldest daughter being sufficiently advanced, and having capacity to study algebra and higher arithmetic, and that both himself and his daughter desiring to do so, yet she is refused the benefit of instruction in these particular branches, unless he will pay additional and specific compensation for such instruction to the teacher, which, he being unwilling to do, he therefore seeks by this proceeding against the trustees and the teacher to compel them to furnish such instruction in these branches to his daughter. Plaintiff states in his petition that these particular studies are in addition to those prescribed by the state board of education, which he says embrace "spelling, reading, writing, arithmetic, English grammar, English composition, geography, physiology, hygiene, civil government, United States history, and history of Kentucky, and the nature and effect of alcoholic drinks on the human system." And plaintiff says that the said trustees have authorized and permitted the defendant George V. Donnell (the teacher), employed by them as aforesaid to teach the common school in said district, to introduce and teach in said common school certain other higher studies or branches of learning, which are not embraced in the course of study in such schools under the statute, and which have not been prescribed by the state board of education. *viz.*: "algebra, higher arithmetic, Latin, bookkeeping, etc.;" and that defendant George V. Donnell has established classes,

and is teaching these branches in the school along with, and in addition to, the studies required by law to be taught in such common schools. Plaintiff further alleges that before filing this proceeding he laid his complaint before the trustees, and requested them to compel the teacher to so give the instruction to his daughter in these higher classes, without extra compensation, which they refused to do. Plaintiff contends that under the Constitution and by the provisions of the common-school law his daughter is entitled to this right as claimed. We are cited by plaintiff to the following sections of the common-school law of this state: Ky. Stat. § 4363, chap. 113. This section provides that there shall be maintained throughout the state of Kentucky a uniform system of common schools, in accordance with the Constitution of the state and this chapter. Section 4364 provides that "no school shall be deemed a common school, within the meaning of this chapter, or be entitled to any contribution out of the school fund, unless the same has been, pursuant hereto, actually kept, or is under contract to be kept, by a qualified teacher therein, . . . for five months during the same school year, and at which every child in the district between the ages of six and twenty years has had the privilege of attending, whether contributing towards defraying its expenses or not: provided, nothing herein shall prevent any person from attending a common school, who will obtain the consent of the trustees, and the teachers, and pay the required tuition fees." This section again repeats that "tuition shall be free of expense to every pupil child." Section 4366, among other things, provides that when the school shall require an assistant to serve regularly at a salary, such assistant shall hold a certificate of qualification, and be employed by the trustees. Section 4383 provides that "the state board of education shall, among other duties, prescribe and publish a public graded course of study for common schools, specifying the order of studies, and the time to be allotted to each, which course of study shall be observed by the teacher, and enforced by the trustees." Section 4388 designates what the instruction prescribed by the board shall embrace, and the same is correctly set out by plaintiff in his petition, and has been quoted herein. Section 4445 provides that "the trustees in their corporate capacity, at a meeting called for that purpose, shall employ a qualified teacher, and agree with him as to compensation." Section 4506 provides that "teachers shall faithfully enforce in school the course of study, the use of the text-books adopted in the county, and the regulations prescribed in pursuance of the law. . . . But no teacher shall be required, or under any obligation to teach any other than the common-school branches prescribed by the state board of education in the common schools, unless it shall be so specified in a written contract with the trustees." It may be noticed that while the petition of plaintiff, in speaking of the authority and permission given by the trustees of this school district to the teacher to teach these other and higher branches of education than those

prescribed by the state board of education, yet it does not say, in so many words, that the teacher was authorized by the trustees to charge and receive compensation therefor; and while it may be fairly inferred therefrom that such was the case, yet this point is made clear by appellant's counsel in their brief, wherein they say: "In this case, as shown by the allegations of the petition, the trustees of common-school district No. 78 of Christian county employed Donnell to teach the school for five months, beginning September, 1895, and allowed him in the contract of employment to teach what are called the 'higher branches,' not prescribed in the course of studies for common schools, and allowed him to charge tuition fees for these higher branches; and that the teacher refused to permit a daughter of appellant, who is a pupil, within the school age, of the school, to study some of these higher branches which are mentioned in the petition without the payment of extra tuition therefor to the teacher, which appellant refuses to do," etc.

Assuming, as we do, that under the school law the pupils, all within the age and resident in the district, are entitled to attend these common schools, and to receive tuition in all the branches prescribed by the state board of education to be taught therein, free of expenses, and without contributing anything to the expense of such school; and assuming, as we do, that the trustees must in good faith in their conduct with reference to these schools in all respects observe and carry out the provisions of the school law, appropriating to the support of such common school the entire fund provided by law for defraying the expenses of same,—yet we are at a loss to understand what right it is that plaintiff is entitled to, under this school law, that he has been deprived of. It is not alleged that the trustees have in bad faith, or even unlawfully or wrongfully, or at all, in their contract with the teacher, omitted or neglected to demand and require of the teacher to do everything incumbent on him as such teacher. They did not omit from the studies or branches to be taught by him any study or branch of education that the state board of education required to be taught in the common schools of the state. Neither was the teacher authorized to charge or demand, neither has he charged or demanded, of plaintiff any compensation whatever for teaching his children all the branches required by law to be taught, the same that are taught to every other pupil in the school. Neither did he refuse to teach and give instruction to the children of appellant in every branch of education required by law to be taught in common schools, nor did he demand any compensation therefor. In the language of the law, all this was given and tendered, and ready to be performed by the teacher, free of any and all charges to appellant, for his children, as well as to every other child within the school age in the district. There was not accorded, under this contract between the trustees and the teacher, any right or privilege to the children of any other parent resident within the district than was accorded to the children of appellant.

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Keeping in view these essential requirements of the law, that the tuition as prescribed by the state board of education must be taught in all common schools of the state, and that every child resident within the several school districts within the school age shall be entitled to attend and to receive instruction in all these branches free of cost, all beyond this was subject to the control, authority, and management of the trustees. They select and make the contract with the teacher, and fix his compensation; they determine where, and under what circumstance, an assistant shall be employed; and, of course, in both cases the trustees must fix the salary to be paid, both the teacher and the assistant, looking in all cases to the school fund. All this matter is under the jurisdiction of the trustees. True it is that we find that under section 4506, before quoted, the trustees may, in their discretion, and by written contract with the teacher, require that he shall teach other branches than those prescribed by the state board of education. This is a matter in their discretion, and can only be done by contract with the teacher. Where the school fund is sufficient to pay such a teacher, and where, by the contract in writing between the trustees and the teacher, they undertake to have other and higher branches taught than those prescribed by the board, paying therefor out of the common-school fund, then doubtless every pupil child who has capacity to study such higher branches, would be entitled to receive such instruction free of charge. But in this case no such requirement was made. No such contract was made between the trustees and the teacher, and we think herein is where appellant's counsel have misapprehended the rights of their client. So far from the trustees contracting with the teacher to give instruction in these higher branches of education, making him compensation therefor, this was expressly disavowed in the contract that they did make with him. And as a part of their contract with the teacher, by which, instead of his being required to do this as a part of the service to be rendered by him for the stipulated price to be paid, it was, on the contrary, expressly agreed that this teacher should have the privilege of teaching these "higher branches," and, as a part of his compensation, that he should have the right to charge and receive compensation for such service from all those who sought to avail themselves of his services in these branches. Such persons paid, and none other. We are unable to see any wrong in all this done to appellant. And while we do not find this thing expressly authorized, we do not find it prohibited by the school law, nor can we see that it in any way impairs the equal benefit of this common-school system to appellant with all others; while we do find that by section 4964 any person may attend these common schools who can obtain the consent of the trustees and of the teacher, and who will pay the tuition charged. It is noticed that it is not provided by law whether this tuition so paid by such an one shall go to the common-school fund, or be paid to the teacher. Doubtless it is left to be disposed of as the trustees and

the teacher may determine by contract; and if by this authority, persons not entitled by law to tuition in the common schools can obtain same, we see no reason why by the same method, by contracts between trustees and the teacher, provision may not lawfully be made, as in this case, whereby the teacher may give lessons in the higher branches of education for his own profit. In fact this higher branch of education is contemplated by the common-school law, and it is marked out, and the way and manner in which it may be generally obtained for any particular school district is set forth by article 10 of this same chapter 118, entitled "Graded Common Schools," wherein it is pointed out when, where, and under what circumstances this graded common school may be established; the same to be based on the consent of the people interested, and to be supported by a system of taxation, as supplementary to the common-school fund, properly speaking. In these graded common schools it is contemplated that these higher branches may be taught. This stage of graded common

schools, however, has not yet been reached in the district wherein this particular school is being taught. No taxes have been levied for this purpose. Until that is done, and while no fund is provided for it, we see nothing illegal in the trustees, by contract with the teacher, permitting him to give lessons in these higher branches, not prescribed by the common-school law, to those pupils whose parents desire them to take such instruction at their own expense. We have not spoken of the policy of this plan, nor do we commend it as altogether safe. We only say it is not illegal. We think this matter may be fairly left to the sound discretion of the trustees. Of course we regard it a power that should be exercised with great prudence and caution, and care should be taken always that it in no wise impairs the duty, obligation, or efficiency of the teacher in the common-school branches required by law to be taught. The petition does not charge that the efficient service in this matter has been impaired.

Judgment affirmed.

INDIANA SUPREME COURT.

GUM-ELASTIC ROOFING COMPANY,
Appl.,
v.

MEXICO PUBLISHING COMPANY et al.

(140 Ind. 158.)

1. Attaching a certified copy of a justice's judgment as an exhibit to a com-

plaint to enjoin the execution of a judgment does not make it a part of the record so that it can be considered on appeal.

2. Allegations that a judgment was rendered without jurisdiction of the subject-matter or person of defendant, that no sufficient ground for publication was shown, and that the affidavit stated no ground for attachment,—are mere legal conclusions and not sufficient to require the enjoining of the judgment.

NOTE.—Injunctions against judgments for errors and irregularities.

I. For erroneous rulings and decisions.

- a. Generally.
- b. In refusing a continuance.
- c. In rulings on pleadings or motions.
- d. In rulings on evidence.
- e. As to incompetency of evidence.
- f. As to insufficiency of evidence.
- g. As to excessive judgments.
- h. As to parties.

II. For irregularities.

- a. Generally.
- b. As to infants.
- c. In trial.
- d. In matters of form.
- e. In pleadings and papers.
- f. In records and dockets.
- g. In regard to time of rendering judgment.

1. For erroneous rulings and decisions.

The case of **GUM-ELASTIC ROOFING CO. v. MEXICO PUB. CO.** holds that the rendition of a judgment by a justice of the peace for a greater amount than the sum stated in the affidavit in attachment is only erroneous, and not void, where the justice had jurisdiction of the subject-matter and the parties. An injunction is therefore refused. This is in accord with the general doctrine.

a. Generally.

As to injunctions against judgments that are erroneous, the rule is well established that equity
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will not generally interfere with such judgments because there is adequate remedy at law. So, error in refusing a continuance, or erroneous rulings on pleadings, or refusal of a defense, and erroneous rulings on evidence, or that the judgments were rendered on incompetent evidence, or on insufficient evidence, or without evidence, will not be ground for an injunction. To this latter proposition there are some exceptions on the ground of mistake, or where the error is such as to render the judgment void. It is a general rule that an injunction will not be granted against judgments that are excessive, but to this there are exceptions under statutes rendering such judgments void, or where there is no remedy at law, or where the error is such as to render it fraudulent; and some cases go so far as to grant an injunction for excessive judgments on the ground that they are against conscience, or where the matters are connected with the settlement of an estate which is regarded as giving equity jurisdiction. In regard to judgments erroneous as to parties, or that the death of a party was not suggested of record before the judgment was rendered, an injunction will not be granted, but where the error in regard to parties is such as to render the judgment void or fraudulent, an injunction will be granted.

So, it may be said that the rule is almost universal that an injunction will not be granted against a judgment that is erroneous. *Neville v. Pope*, 95 N. C. 346; *Collier v. Falk*, 66 Ala. 223; *McIndoe v. Hazelton*, 19 Wis. 568, 88 Am. Dec. 701; *Budd v. Long*,

3. A complaint does not show absence of jurisdiction in a justice which will require an injunction against his judgment which alleges that the "process under which appellant was before said justice being publication of notice as a nonresident."

4. A justice's rendition of judgment for more than is demanded by the affidavit of attachment does not make the judgment void so as to warrant an injunction against its execution.

(January 10, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendants in an action brought to enjoin the enforcement of a judgment. *Affirmed.*

The facts are stated in the opinion.

18 Fla. 228; Danaher v. Prentiss, 22 Wis. 311; Stockton v. Briggs, 5 Jones, Eq. 309; Earl v. Matthey, 60 Ind. 202; Dunham v. Downer, 31 Vt. 249; Norman v. Burns, 67 Ala. 248.

As there is a remedy by appeal. Neville v. Pope, *supra*; Rountree v. Walker, 46 Tex. 300; Clopton v. Carlos, 42 Ark. 560; Nicklin v. Hobin, 13 Or. 406.

And an injunction will not be granted for errors in a decree as to priority in insolvent estates, where there is no showing that the same is unjust and that the complainant was not negligent. Coffin v. McCullough, 30 Ala. 107.

Or for errors of the court in a settlement of an account, there being a remedy by appeal. *Ex parte* Christian, 23 Ark. 641.

So, an injunction will not be granted against an erroneous judgment, as the remedy is in an appellate tribunal. Meem v. Rucker, 10 Gratt. 506.

So, a judgment in favor of a clerk, or commissioner of a court, on a note given for land sold under a court decree, will not be enjoined on the ground that it is erroneous, as the remedy is in the court rendering such judgment. Whiteside v. Latham, 2 Coldw. 91.

Or for illegality inherent in the judgment where the suit is not to annul, as the remedy for such illegality is by an action of nullity. Bell v. Francke, 23 La. Ann. 599.

And an injunction will not be granted on the ground that it is erroneous because the defendant was not personally responsible, as the remedy is by writ of error or supersedeas. Turpin v. Thomas, 2 Hen. & M. 139, 3 Am. Dec. 615.

Or for rendering a personal judgment in a foreclosure suit for notes not yet due, to be paid when they become due, as the remedy is by appeal. De Haven v. Covatt, 33 Ind. 344.

Or for giving a personal judgment against a trustee of an association for a corporate debt, as the remedy is by appeal or certiorari. Wolf v. Schleiffer, 2 Brewst. (Pa.) 553.

That the proceedings to render stockholders liable should have been conducted under the Iowa Code, and not under the Iowa act of 1847, and that the court could not render them liable for more than the amount of their stock, and that they were liable to the company only on certain previous conditions, such as the advertisements of the calls for instalments,—will not entitle an injunction, as the proceedings and judgment of a court within its jurisdiction cannot be inquired into, and set aside in this manner. Hampson v. Wear, 4 Iowa, 12, 66 Am. Dec. 116.

And as a party cannot obtain an injunction against a judgment for alleged errors, a stranger to the suit cannot. Mayes v. Woodall, 35 Tex. 637.

And that a judgment was obtained on an ordinance that was unconstitutional will not authorize 30 L. R. A.

Mr. M. Moores for appellant.
Mr. J. E. Flores for appellees.

Monks, J., delivered the opinion of the court:

The appellant, who was the plaintiff below, instituted this action against the appellees to vacate a judgment rendered by a justice of the peace, and to enjoin the collection of the same. It is alleged in the complaint "that the Mexico Publishing Company, on November 7, 1892, recovered a pretended judgment in proceedings in attachment and garnishment against the plaintiff, and against certain indebtedness due the plaintiff from the Kimberlin Manufacturing Company, before a justice of the peace, which judgment was in and for the sum of \$86.70 and costs of such proceeding. And the plaintiff makes

an injunction against the same, as the remedy is by appeal. *New Orleans v. De La Cuesta*, 10 La. Ann. 724.

A judgment upon bonds given under an unconstitutional act for the sale of liquor will not be enjoined; although the judgment was erroneous it was not void, and will be operative until reversed by a writ of error. *Cassell v. Scott*, 17 Ind. 614.

So, alleged errors in a judgment of the supreme court will not be relieved against, or sale enjoined, where a party through his own negligence fails to present to the court in which the suit was pending his claim for relief which properly belongs to that court as to the constitutionality of the act on which the judgment is based. *Reeves v. Cooper*, 12 N. J. Eq. 223.

That a judgment of the supreme court is erroneous will not be ground for injunction. *Cochrane v. Van de Vanter* (Wash.) 43 Pac. 42.

And that the supreme court rendered an erroneous decision through haste and inadvertence is not ground for an injunction. *Pettes v. Bank of Whitehall*, 17 Vt. 435.

Or that such court overlooked material facts in the record will not entitle an injunction against the judgment, the remedy being by petition for rehearing. *Russell v. Slaton*, 33 Ga. 195.

An irregular affirmance in the supreme court furnishes no ground for enjoining a judgment, as there is a remedy in the supreme court to set aside the affirmance. *Roebeling Sons Co. v. Stevens Electric Co.* 33 Ala. 39.

Or where the attention of the supreme court was not called to the fact that a scire facias showed that it was not issued in time, and which should have caused a reversal, the judgment will not be enjoined. *Nicholson v. Patterson*, 5 Humph. 394.

And where such court rendered a judgment for the plaintiff below, against whom there had been a verdict and it was erroneous, a lower court cannot enjoin the same, as the remedy is by motion in the supreme court. *McCrimmin v. Cooper*, 37 Tex. 422.

A judgment on an injunction bond where it has been affirmed on appeal will not be enjoined, although the judgment in the case in which the injunction bond was given was reversed on appeal, as an erroneous judgment is binding until reversed. *Boos v. Morgan*, 140 Ind. 206.

And a judgment in replevin omitting the alternative, and corrected in the circuit court, and in the justice's court also, after the circuit court had dismissed the appeal, will not be enjoined for errors therein, there being a remedy by appeal. *Putnam v. Webb*, 15 Or. 440.

An injunction will not be granted for errors in attachment proceedings, the remedy being in that court. *Reeves v. Cooper*, 12 N. J. Eq. 224, 493.

And an injunction will not be granted on the

said pretended judgment a part of this complaint, and files a duly certified transcript of said judgment, and of all the proceedings herewith, as a part of this complaint, marking such transcript Exhibit A." The plaintiff avers that such pretended judgment was and is null and void for the following reasons: "(1) Because the said justice of the peace had no jurisdiction of the subject-matter; (2) because such justice had no jurisdiction of the person of the said Gum-Elastic Roofing Company; (3) because no valid or legal process was ever served upon said Gum-Elastic Roofing Company, and no sufficient ground was shown for publication of notice to said defendant; (4) because the affidavit

upon which the proceedings in attachment and garnishment were commenced before the justice of the peace states no ground for an attachment against said roofing company; (5) because the only process under which the said Gum-Elastic Roofing Company was before said justice being publication of notice to such company as a nonresident, and said company not having entered an appearance, and not being in court either by its officer, agent, or attorney, said justice of the peace exceeded his jurisdiction, and rendered judgment against the said corporation for the sum of \$86.70 and costs, while the amount stated in the affidavit in attachment filed in said proceedings on behalf of the said Mexico

ground that the verdict is erroneous. *Rhodes Burford Furniture Co. v. Mattox*, 185 Ind. 372.

Or because the verdict was "for the amount sued for" in consolidated actions. *Bentley v. Crenshaw*, 85 Ga. 371.

Or that the verdict was obtained by undue influence with the jury, and that the verdict was erroneous, as the remedy is by appeal. *Terrell v. Dick*, 1 Cal. (Va.) 546.

As to verdicts, see *Cochran v. Street*, *infra*, and *Jawless v. Reese*, 8 Bibb, 479, *infra*, II. c; *Butt v. O'Neal*, 61 Ga. 368, *infra*, II. c; *Leonard v. Collier*, 53 Ga. 387, *infra*, II. c; *Parsons v. Pierson*, 128 Ind. 479, *infra*, II. L.

An injunction will not be granted on the ground of errors of the court to obtain a retrial of facts falsely found by the jury, whether right or wrong. A court of equity is not to hear errors or reverse judgments of law. The case of *Ambler v. Wyld*, 2 Wash. (Va.) 88, *infra*, d. must be admitted goes the full length, but that decision is a solitary one, and will not be allowed to overturn a long train of contrary decisions, and the oldest and best-established maxims of our law. *Fentress v. Robins*, N. C. Term Rep. 177, 7 Am. Dec. 704.

An error of the trial court in the finding of facts is not the mistake of the party, within the meaning of Ind. Rev. Stat. 1881, § 306, authorizing relief against judgments. *Center Twp. v. Marion County Comrs*, 110 Ind. 579.

An injunction will not be granted because a judgment was for gold or silver, or equivalent in United States currency, as the error, if any, could be reviewed by appeal. *Windisch v. Gussert*, 30 Tex. 744.

That a judgment was void and illegal because given for confederate notes will not entitle an injunction where complainant does not allege in his petition that such notes at the time of their maturity were worthless, and under the rule as now enforced in this court, as well as in the Supreme Court of the United States, there is nothing to show otherwise than that it was a fact greatly to his advantage. *Roller v. Wooldridge*, 46 Tex. 485.

But in *Thompson v. Bohannon*, 38 Tex. 241, where the court erred in rendering a judgment enforcing written contracts for confederate money, apparent on the face of the notes, the judgment was enjoined. This case is not referred to in *Roller v. Wooldridge*, *supra*, but the doctrine in regard to such judgments is regarded as changed by the decisions in the United States Supreme Court. The decision in the United States Supreme Court is not quoted, but in *McManus v. Scott*, 48 Tex. 601, the change in the line of decisions in Texas in regard to confederate money is noted in the following manner: "Though the instructions were in accord with the decisions of the supreme court of this state at the time it was given, the rule has since been changed so as to conform to the decisions of the Supreme Court of the United States in regard

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to transactions in confederate treasury notes," citing *Thorington v. Smith*, 75 U. S. 8 Wall. 1, 19 L. ed. 861.

And erroneous taxing of witness fees will not be cause for enjoining the judgment, as the remedy is by certiorari. *Stokes v. Knarr*, 11 Wis. 390.

An injunction will not be granted for errors in giving judgment for costs, as the remedy is in the court of errors. *Thompson v. Meek*, 3 Sneed, 271; *Calderwood v. Trent*, 9 Rob. (La.) 227.

Defects and informalities as to the maturity of the debt in a bill of foreclosure will not authorize an injunction against the same, where the complainant is not prejudiced. *Carey v. Houston & T. C. R. Co.*, 45 Fed. Rep. 438.

A court of chancery does not act as a court of errors to examine or reverse the judgments of a court of law. *Curtis v. China*, 1 Ohio, 429; *Bullard v. White*, 2 Tex. App. Civ. Cas. (Willson) 288; *Odom v. McMahan*, 67 Tex. 232; *Miller v. Morse*, 23 Mich. 365; *Ex parte Christian*, 23 Ark. 641.

As the remedy is by appeal or writ of error. *Holmes v. Remsen*, 7 Johns. Ch. 228.

That a judgment is rendered by a mistake of law, will not entitle an injunction where there is a remedy by appeal. *Moeschler v. Lochte*, 12 N. Y. S. R. 855.

Or a remedy in the court to correct the same. *Jillet v. Union Nat. Bank*, 56 Mo. 304.

Where the circuit judge made a mistake in remanding the case to the common pleas, instead of allowing it to remain in the circuit court, and the chief justice on a rule to open the case remanded the case to the common pleas, when it ought to have been remanded to the circuit, and the defendant did not know of this until the time to take out a writ of error had expired, an injunction will not be granted where no merit was shown. *Stout v. Slocum*, 52 N. J. Eq. 83.

But where complainant obtained a change of venue and the case was sent to another justice, but not the next nearest justice, who refused to try the case, and the officer took him before another justice, to which complainant objected, and a judgment of a fine and costs was rendered, and certiorari was taken to the district court, which refused to try the case, and sent it to the circuit court, which refused to try it, and sent it back to the district court,—an injunction will be granted as the judgment is void, although it does not appear whether an attempt has been made to correct the erroneous decision in the certiorari proceeding, and the remedy to resist execution will not prevent an injunction. *Connell v. Stelson*, 33 Iowa, 147.

And where the justice refused a change of venue in forcible detainer, and Mo. Rev. Stat. 1899, § 6241, provides that after affidavit for change of venue is filed the justice shall not have jurisdiction, the judgment will be enjoined where the title of the land is in question. *Jones v. Pharis*, 59 Mo. App. 254.

Publishing Company stated that said Mexico Publishing Company ought to recover the sum of \$68.60, and gives said sum as the amount sought to be recovered; (6) because said justice of the peace attempted to render a judgment for a larger amount than the sum stated in the affidavit in attachment as due from the said plaintiff herein to said Mexico Publishing Company. Wherefore plaintiff prays that said judgment be vacated and annulled and held for naught, and that the defendants, and each of them, be perpetually enjoined from enforcing, or seeking to enforce, said so-called judgment." Appellees filed separate demurrers to the complaint, upon the ground that it did not state facts

sufficient to constitute a cause of action, which were sustained, and appellant excepted. Appellant refused to amend the complaint, and judgment was rendered in favor of the appellees.

Did the court err in sustaining the demurrers to the complaint? This is the only question to be decided. The certified transcript of the judgment and proceedings before the justice of the peace, which were filed with the complaint as an exhibit, did not thereby become a part of the record, and cannot be considered in determining the question of the sufficiency of the complaint. *Conwell v. Conwell*, 100 Ind. 437; *Brooks v. Harris*, 41 Ind. 390; *Wharton v. Wilson*, 60 Ind. 591; *Morrison*

And in *Cochran v. Street*, Wythe, 69, 1 Wash. (Va.) 79, it was held that the mistaken belief of four jurors that they were bound by a majority to render a verdict contrary to their own judgment was sufficient ground for enjoining the judgment at law, where this was discovered too late to apply for a motion for a new trial.

But in *Howard v. McCall*, 21 Gratt. 305, the case of *Cochran v. Street*, 1 Wash. (Va.) 79, as to allowing a juror to impeach his verdict, was overruled.

b. In refusing a continuance.

An injunction will not be granted against a judgment at law for error in refusing a continuance. *Syme v. Montague*, 4 Hen. & M. 180; *Risher v. Koush*, 2 Mo. 96, 23 Am. Dec. 442.

As the remedy, if any, is by resort to a higher tribunal. *Western v. Woods*, 1 Tex. 1.

In *Naylor v. Phillips*, 2 Stew. & P. (Ala.) 53, it was said that the illegal refusal of a continuance will not justify an injunction against the judgment.

c. In rulings on pleadings or motions.

The exclusion of a defense will not be ground for an injunction against a judgment, there being a remedy by appeal. *Hart v. Life Assn.*, 54 Ala. 496; *Moore v. Dial*, 3 Stew. (Ala.) 155; *Danaher v. Prentiss*, 23 Wis. 311; *Dunn v. Fish*, 8 Blackf. 407; *Robbins v. Holley*, 1 T. B. Mon. 191.

Or where there is a remedy by certiorari which the party through negligence has failed to secure. *Haloomb v. Kelly*, 57 Tex. 618.

And erroneous proceedings before a justice refusing an affidavit of illegality will not authorize an injunction against a sale on an execution, as there is a remedy in the circuit court to compel the justice to hear and determine the claim under an affidavit of illegality. *Wordehoff v. Evers*, 13 Fla. 339.

In *Marine Ins. Co. v. Hodgson*, 11 U. S. 7 Cranch, 332, 3 L. ed. 392, where an injunction was sought because a plea had been erroneously rejected at law, it was held that where a case was fully and fairly tried at law, though the defense ought to have been sustained, an injunction will not be granted against the judgment.

Errors of a court of law in not sustaining a plea of *non est* record will not authorize an injunction against the judgment. The remedy is by appeal, writ of error, or supersedeas. *Black v. Smith*, 13 W. Va. 730.

An injunction was refused for change in the interrogatories, where such change was made before they were executed, and for refusing leave to file an amended plea, where a motion for a new trial was not made, and the bill of exceptions was not lost, and the clerk was not insolvent, as was alleged in the bill of complaint. *Reynolds v. Dunlap*, 94 Ga. 727.

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ment on the ground of erroneous rulings. *Meixell v. Kirkpatrick*, 28 Kan. 315.

Or where erroneous rulings on the trial were not excepted to, as there is a remedy on error. *Robuck v. Harkins*, 38 Ga. 174.

And errors in allowing an amended attachment will not be ground for enjoining a sale. *Tilton v. Coffield*, 93 U. S. 163, 25 L. ed. 363.

And error in refusing a new trial will not be ground for enjoining the judgment. *Reynolds v. Horine*, 13 B. Mon. 234; *Collins v. Butler*, 14 Cal. 223.

In *Hood v. New York & N. H. R. Co.*, 23 Conn. 609, it was held that an injunction will not be granted to prevent a party from prosecuting his motion for a new trial, on the ground that it was apprehended that the court would commit errors and set the judgment aside.

Erroneous rulings on a motion for a new trial, or failure to charge the jury, will not authorize an injunction against the judgment. *Montgomery v. Griffin*, Walk. (Miss.) 453.

d. In rulings on evidence.

That the rulings on the evidence were erroneous will not authorize an injunction against the judgment. *Gibson v. Cohen*, 35 Ga. 350.

Mistakes made by a witness are not ground for enjoining a judgment. *Governor v. Barrow*, 13 Ala. 540.

And the same was held where erroneous evidence was received, the remedy being by certiorari. *Hotzeln v. Cox*, 22 Tex. 62; *Leiby v. Ludlow*, 4 Ohio, 409.

An injunction will not be granted on account of admitting improper evidence, and for errors in the verdict, as the remedy is by appeal. *Long v. Smith*, 39 Tex. 160.

And error in the admission or rejection of evidence, or for erroneous decisions of law, will not justify relief by injunction where complainant moved for a new trial and then withdrew the motion. *Miller v. Duvall*, 26 Md. 47.

And error in excluding evidence is not ground for injunction. *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Thomas v. Hearn*, 2 Port. (Ala.) 263.

As the remedy is by appeal or by writ of error. *Hahn v. Hart*, 12 B. Mon. 423.

The exclusion of evidence or a defense will not authorize an injunction against the judgment, as there is a remedy by appeal or writ of error. *Dunn v. Fish*, 8 Blackf. 407.

But in *Ambler v. Wyld*, 2 Wash. (Va.) 36, it was held where evidence was freely admitted on one side, and without color of reason was rejected on the other, the trial was not fair and equal, nor such as ought to conclude the parties, and since the injured party did not, and now cannot obtain relief in a court of law, it can only be afforded by a court of equity, and may properly be so, as innumerable precedents will prove; and in *Pickett v. Morris*, 2 Wash. (Va.) 253 the court says that in

v. *Fischel*, 64 Ind. 177; *Parsons v. Milford*, 67 Ind. 489; *Lytle v. Lytle*, 87 Ind. 281; *Wilson v. Vance*, 55 Ind. 584; *Matheney v. Earl*, 75 Ind. 533; Thornton's Pr. Code (Ind.) § 862, note 2. When a recovery is sought on a note, mortgage, or other contract in writing, our Code requires that a copy of the same be filed with the pleading; but when the cancellation or legal destruction of such an instrument is demanded, this rule does not apply. *Johnson v. Moore*, 112 Ind. 91; *Heitman v. Schnek*, 40 Ind. 93; *Barkley v. Tapp*, 87 Ind. 25. Examining the complaint in this case without reference to the transcript, we find that the first, second, third, and fourth reasons given for the judgment of the justice of the peace

being void are mere conclusions, and do not help the complaint in any way. Facts, not conclusions, must be averred. *Kleyla v. Haskett*, 112 Ind. 515; *Guerin v. Kraner*, 97 Ind. 533; *Kern v. Haslerigg*, 11 Ind. 443, 71 Am. Dec. 860; *Clark v. Lüneberger*, 44 Ind. 223; *McClamrock v. Flint*, 101 Ind. 278. The fifth and sixth specifications present substantially the same question. It appears from the allegations in the fifth specification that the appellant was a nonresident corporation, and was served by publication of notice. That said corporation did not enter any appearance to said cause, and was not in court by any officer, agent, or attorney, and that the justice rendered judgment against the

Ambler v. Wyld he might have appealed, and still the court gave him relief. But see *Fentress v. Robins*, *supra*, a.

e. As to incompetency of evidence.

That a judgment was obtained on incompetent evidence will not be ground for an injunction. *Merritt v. Baldwin*, 6 Wis. 439.

Or that it was obtained by incompetent or false evidence. *Galena & S. W. R. Co. v. Ennor*, 116 Ill. 55.

And an injunction will not be granted on the ground that at the time of the trial the witness for complainant was incompetent. *Greenfield v. Frierson*, 7 Helsk. 633; *Williams v. Carr*, 4 Colo. App. 368.

f. As to insufficiency of evidence.

And insufficiency of evidence is not ground for an injunction against the judgment. *Martin v. Pifer*, 96 Ind. 245; *Burke v. Wheat*, 22 Kan. 723; *Braden v. Reitzenberger*, 18 W. Va. 286; *A. B. Smith Co. v. Bank of Holmes County (Miss.)* 18 So. 847; *Lockard v. Lockard*, 16 Ala. 423.

As the remedy is by appeal. *Shreveport v. Flournoy*, 26 La. Ann. 709; *Cobb v. Garner (Ala.)* 17 So. 47; *Sartorius v. Dawson*, 13 La. Ann. 111; *Dupre v. Anderson*, 45 La. Ann. 1134; *Naughton v. Dinkgrave*, 25 La. Ann. 588.

Or by certiorari. *Rotzein v. Cox*, 22 Tex. 62; *Jordan v. Corley*, 42 Tex. 284.

Or there is ample remedy by appeal or motion. *Morschler v. Lochte*, 12 N. Y. S. R. 855.

So where it was rendered without proper evidence, the remedy was by writ of error. *Burke v. Wheat*, 22 Kan. 722.

Defects in the evidence of service of process will not entitle an injunction against a judgment, the remedy being by appeal or motion to vacate. *Pico v. Sunol*, 6 Cal. 204.

A judgment "by default" without evidence rendered by a justice of the peace will not authorize an injunction. *Hunter v. Hoole*, 17 Cal. 418.

Or where the judgment is rendered by a justice without evidence. *Wright v. Eaton*, 7 Wis. 595.

And an injunction will not be granted on the ground of failure of proof. *Powell v. Stewart*, 17 Ala. 719.

So, an injunction will not be granted against a judgment, on the ground of inability to prove in the action at law the character of the consideration, for the rules of evidence in equity are the same as those in law. *Reed v. Clarke*, 4 T. B. Mon. 18.

And that a judgment against a garnishee was rendered on insufficient evidence will not justify an injunction. *A. B. Smith Co. v. Bank of Holmes County (Miss.)* 18 So. 847. But see *Freeman v. Miller*, *infra*.

Relief against dispossession in ejectment may be granted where defendant, having an older entry 30 L. R. A.

but the younger patent, had a defense by possession which he was not allowed to prove because the entry number as recited by the surveyor was wrong and there was no officer from whom he could get copies of the entries to show the mistake. The fact that the court at law had concurrent jurisdiction to relieve against mistakes in titles did not prevent the relief, and the court said: "If a court of law determine contrary to equity, recourse must be had somewhere. It would seem that if a jury acting upon a complicated mass of equitable testimony should err, and persist in it, remedy should be had in equity." *Wilson v. Kilcannon*, 1 Overt. 201.

That the evidence for a change of venue was insufficient where a change was allowed, and the judgment was enjoined, will not authorize a reversal, if the discretion of the court is not shown to have been abused. *Triplett v. Scott*, 5 Bush. 81.

For change of venue, see *Connell v. Stelson*, 38 Iowa, 147, *supra*, a.

Where a garnishee had made full answers to the inquiries propounded to him by the officer, who wrote out the same and certified it to the court, a judgment for failure to answer interrogatories as to effects in his possession will be enjoined where such interrogatories were not propounded, and he was not aware of the judgment until after the term, and owed nothing. *Freeman v. Miller*, 33 Tex. 372.

But see *P. B. Smith Co. v. Bank of Holmes County*, *supra*.

Injunction will lie to stay execution of a judgment rendered by a justice of the peace against a garnishee, on the answer of the latter that he had executed for his indebtedness a negotiable note which was not yet due, where the justice of the peace had no authority to render judgment against a garnishee, who answered to the effect stated, and without further proceedings or proof, as the justice was without authority to enter up judgment. *Kapp v. Teel*, 33 Tex. 811.

g. As to excessive judgments.

Generally an injunction will not be granted against a judgment on the ground that it is excessive. (This is in accord with *GUM-ELASTIC ROOFING Co. v. MEXICO PUB. CO.*) *Smith v. D'Lashmutter*, 4 Mo. 103; *Jones v. Neely*, 32 Ill. 71; *Fenstermacher v. Xander*, 116 Pa. 41; *Reed v. Clarke*, 4 T. B. Mon. 18; *McGowan v. Young*, 2 Stew. & P. (Ala.) 160; *Bates v. Murphy*, Id. 165; *Walker v. Shreve*, 37 Ill. 474.

As there is a remedy by appeal. *Murdock v. De Vries*, 37 Cal. 527.

Or by motion for a new trial. *Pogue v. Shotwell*, 2 Dana, 282.

Or by writ of error. *Burlington Ins. Co. v. Mortimer*, 52 Kan. 754.

Or by appeal or certiorari. *King v. Vaughan*, 3 Yerg. 57, 29 Am. Dec. 104.

And in *Roots v. Brown*, 1 Bibb, 354, as to whether

appellant for a greater amount than the sum stated in the affidavit in attachment. Counsel for appellant contend "that the justice of the peace had no jurisdiction over the person of the appellant. The complaint contains no allegation showing a want of such jurisdiction. On the contrary, it is alleged that the only process under which appellant was before said justice being publication of notice as a nonresident." This, then, is a case where the justice had jurisdiction over the person of the appellant, and does not fall within the rule declared in the following cases cited by counsel for appellant: *Penrose v. McKinzie*, 116 Ind. 89; *Johnson v. Ramsey*, 91 Ind. 193; *Brickley v. Heilbruner*, 7

Ind. 488; *Grass v. Hess*, 87 Ind. 193; *Earl v. Matheney*, 60 Ind. 202; *Cain v. Goda*, 84 Ind. 209. The justice also had jurisdiction over the subject-matter. Sections 953, 1433, Rev. Stat. 1881 (Rev. Stat. 1894 [Burns' ed.] §§ 965, 1500). Counsel for appellant urge that the judgment is void for the reason that the justice of the peace rendered judgment for a greater amount than the sum stated in the affidavit in attachment, and cites in support of this proposition the following cases: *Henrie v. Swasey*, 5 Blackf. 275; *Rowley v. Berrian*, 13 Ill. 202; *Hichins v. Lyon*, 35 Ill. 150; *Hobson v. Emporium Real-Estate & Mfg. Co.* 42 Ill. 806; *Forayth v. Warren*, 62 Ill. 68; *Fellows v. Dickens*, 5 La. Ann. 181;

a judgment will be enjoined for excessive damages, was not decided, as new trials will not be granted where the defense only goes to mitigation of damages.

Or that a judgment bears interest which is not supported by the verdict will not authorize an injunction against the same. *McMicken v. Millaudon*, 3 La. 180.

And error in interest in the judgment will not authorize an injunction, as the same can be corrected after sale on execution, if the property sells for more than the mortgage debt. *Walker v. Villavaso*, 26 La. Ann. 43.

An injunction will not lie to restrain the execution of a judgment on the ground that the amount is erroneous, being greater than the liability of complainant limited on the bond as surety. *Stinson v. Hill*, 21 La. Ann. 560.

If in serving the summons the constable by mistake entered a less amount on the copy served then in the original summons, the judgment in excess is only voidable, and the judgment in excess of the amount indorsed cannot be enjoined. (Reversing the former opinion in the same case.) *Bassett v. Mitchell*, 40 Kan. 549.

So, under W. Va. Code 1868, chap. 124, § 5, providing for a proceeding to correct the judgment by notice and motion, an injunction will not be granted on the ground that the judgment was excessive by reason of miscalculation. *Alleman v. Knight*, 19 W. Va. 201.

Where a defendant claims that a judgment against him is excessive, and the answer under oath denies the excess as to all but a portion which he credits on the *fi. fa.*, the injunction should be dissolved. *Rodahan v. Driver*, 23 Ga. 362.

Where it was claimed that a judgment was obtained upon a note given only to be used as collateral and not to be sold, and which was for a greater amount than was due, a judgment upon the same will not be enjoined, in the absence of an allegation that adequate relief could not be had at law, or fraud, or assignment contrary to contract, or unfairness of the defendant. *Hungerford v. Sigerson*, 61 U. S. 20 How. 156, 15 L. ed. 869.

That the amount of a judgment at law is too large on account of mistake which is not indicated will not authorize an injunction against the enforcement of such judgment, where the mistake occurred through negligence on the part of complainant, and the remedy exists at law to appeal to the court rendering the judgment for relief. *Muscatine v. Mississippi & M. R. Co.* 1 Dill. 536.

But under Tex. Rev. Stat. art. 4841, providing that the judgment against the claimant in attachment shall be for the principal and interest and 10 per cent damages of the amount claimed in the writ, where the execution was for the assessed value of the property under the statute and greatly in excess of the debt and judgment and damages, the

same should be set aside as there is no remedy by motion or appeal. *Wills Point Bank v. Bates*, 78 Tex. 329.

And where a replevin bond was indorsed "Forfeited," and execution issued against the securities for the full amount of the judgment, interest, and cost, and the appraisal made by the sheriff and indorsed upon the bond was not in compliance with the law in that he appraised personality and realty together as though they were but one thing, and it was evident the bond was given for the forthcoming of the personal property only,—an injunction was granted to allow the surety to prove the real value of the personal property not forthcoming. *Miles v. Davis*, 36 Tex. 660.

A judgment in attachment for a greater amount than due will be enjoined at the instance of another attaching creditor where judgment was taken with knowledge of the complainants' claim, and this on the ground of implied fraud. *Hale v. Chandler*, 3 Mich. 531.

In *McRae v. Woods*, 2 Wash. (Va.) 80, the court enjoined a judgment at law on the ground that it was more than the plaintiff was in conscience entitled to, and there was no standard by which the court could determine the excess. In this case it was a judgment for the whole value of a lottery ticket, which was certainly more than he was entitled to, and the value had not been fixed in the scheme of the lottery, or in the sale, or in the verdict, and evidence of jurors to explain the verdict conflicted.

In *Bullock v. Goodall*, 3 Call (Va.) 44, a fine of \$234 against a sheriff for not returning an execution was enjoined on the ground that by the bill of rights "excessive fines shall not be imposed," and that this was excessive, unconstitutional, oppressive, and against conscience, where the delay in returning execution was at the request of a creditor who had been satisfied. The relief would be granted even if objection had been made to jurisdiction of equity.

And an injunction was granted in a similar case on the ground of a mistake of law owing to a general delusion. *Tomkies v. Downman*, 6 Munt. 567.

But both these cases were overruled in *Bierne v. Mann*, 5 Leigh, 364, on the ground that a court of equity cannot correct the errors of a court of law.

Where an executor recovered vindictive damages for levying on a slave as the property of a legatee, and the executor had, prior thereto, sold to himself the slaves belonging to the estate to pay the debts of the estate, an injunction was granted on the ground of vindictive damages, and also to require an account to see whether a sale was necessary for the debts of the estate, although a defense was not made at law in the action of trespass, and the verdict could be impeached, as matters involving an account of executorship are peculiarly within the province of a court of equity. *Anderson v. Fox*, 2 Hen. & M. 245.

Tilton v. Coffield, 2 Colo. 392. These cases do not sustain the contention of counsel for appellant. The legal proposition they declare is that "the plaintiff in attachment proceedings is not entitled to a judgment for a greater sum than he demands by his affidavit together with interest, if the debt be such as to draw interest." In the cases cited the question was presented and determined on appeal. There is no intimation that a judgment so rendered would be void. In *Henrie v. Sweetser*, 5 Blackf. 278, this court held that it was error to render a judgment for a greater sum than the plaintiff demands in his affidavit in attachment, together with interest,

if the debt be such as to draw interest, and reversed the cause for that reason. The rendition of the judgment for a greater amount than the sum stated in the affidavit did not deprive the justice of jurisdiction nor render the judgment void. If such action of the justice was erroneous, the judgment could not be enjoined, the court having jurisdiction of the parties and the subject-matter. *Earl v. Matheney*, 60 Ind. 202; *Williams v. Hite*, 88 Ind. 808; *De Haven v. Covall*, Id. 346; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, Id. 598. The court below did not err in sustaining the demurrers to the complaint. *The judgment is therefore affirmed.*

b. As to parties.

That the judgment and execution were against *S. et al.*, and in the suit in which it was pretended to be rendered there were several other defendants named; and that the judgment was rendered on the order of the judge at chambers, and not in term time; and that the only entry of the judgment was in the minute book of the court,—will not be ground for enjoining the judgment where there is no allegation that the judgment was unjust. *Sanchez v. Carriaga*, 81 Cal. 170.

So, relief will not be granted against a judgment erroneous because of a remission of a verdict against one of the defendants, as the remedy is at law. *Reynolds v. Horine*, 18 B. Mon. 224.

The enforcement of a judgment rendered on a scil. fa. will not be enjoined where the court rendering the same had jurisdiction of the person and subject-matter, although it was claimed that this complainant was not the party against whom the original judgment was rendered, as a writ of error was an adequate remedy if the judgment was erroneous. *Burke v. Gibson*, 6 Kulp, 310.

That a discontinuance as to one defendant operated as a discontinuance as to all, will not justify an injunction against the judgment, for if there was error it should have been taken advantage of at the time. *Markley v. Rand*, 12 Cal. 276.

And where a justice of the peace refused to make proper parties to the suits, and rendered judgments that were unjust, the same will not be enjoined even if no appeal is allowed. *Galveston, H. & S. A. R. Co. v. Dowe*, 70 Tex. 1.

So, irregularity in rendering a judgment by default against a corporation contrary to statute will not authorize an injunction against the same. *Boyd v. Chesapeake & O. Canal Co.* 17 Md. 195, 79 Am. Dec. 646.

A judgment against a firm in a firm's name will not be enjoined because not against the partners by name individually, where there is a release of errors, as Wis. Rev. Stat. chap. 100, § 7, subsec. 10, provides a remedy by motion for curing defects in judgment by amendment. *McIndoe v. Hazelton*, 19 Wis. 567, 88 Am. Dec. 701.

Under La. Code Prac. art. 118, providing that when the suit is brought against the wife for a cause of action relative to her separate interests, the husband must be made a party, and that if the husband is absent the plaintiff must demand that the wife be authorized by the judge before whom the suit is brought, to defend it alone, if she be of age, where the husband was not absent, and citations were served personally on both the wife and the husband, they were not bound to defend the suit, and the effect of the default was to create a tacit joinder of issue as to both husband and wife, and to fully justify a final judgment against the wife which will not be enjoined at her instance. *Hall v. Carroll*, 10 La. Ann. 412.

An injunction will not be granted on the ground that a plaintiff was dead at the time of the rendition of a judgment, as there is a remedy at law to quash the same. *Wynn v. Wilson*, Hempst. 688.

Or the remedy is by error *coram vobis*. *Williamson v. Appleberry*, 1 Hen. & M. 206.

And an injunction will not be granted against a judgment in ejectment in favor of the purchaser at an execution sale, on the ground that the judgment was entered after death of the defendant in the suit without notice by scil. fa., where it is not shown that the judgment has been satisfied and a scil. fa. would not have aided them. *Harper v. Hill*, 35 Miss. 63.

That a judgment was rendered against a defendant after his death, or rendered on two verdicts which were contradictory, will not authorize an injunction, as there is a remedy by affidavit of illegality, or motion to set aside. *Lockridge v. Lyon*, 66 Ga. 137.

The failure to suggest the death of one of the parties to a judgment will not entitle to an injunction against the execution. *Hastings v. Cropper*, 8 Del. Ch. 165.

So, error in rendering judgment against a garnishee where the debtor was not a party to the judgment will not entitle to an injunction as there is a remedy by appeal. *Earl v. Matheney*, 60 Ind. 202.

And under R. I. Pub. Laws, chap. 433, providing that any person claiming attached property may assert his claim by becoming a party to the action on motion, the refusal of such right is an error of law, and the judgment for this cause will not be enjoined, as the remedy is by exceptions. *Barr v. Carpenter*, 16 R. I. 724.

But in *Dobbin v. Wybrants*, 3 Tex. 457, it was said that a garnishee liable in judgment of garnishment may obtain an injunction against a judgment in favor of the original creditor, against him, for the debt, where he pleaded that the garnishing creditors should be made parties, and pleaded the garnishment in discharge of the debt, which plea was refused.

And where a verdict was rendered against one of two defendants, and the justice entered it against both, it will be enjoined at the instance of the aggrieved party, on the ground of being rendered without jurisdiction and in fraud of plaintiff's rights. *Dady v. Brown*, 76 Iowa, 523.

An execution and sale will be enjoined where the verdict was uncertain, and indefinite, and improper, as to the party against whom it was rendered, there being several parties to the suit. *Butt v. Oneal*, 51 Ga. 368.

And a levy, sale, execution, and proceedings on a decree will be enjoined in a bill of review by a defendant where the original decree is erroneous, not being against all the parties that it should have been, thereby prejudicing complainant, and was signed by the solicitor instead of the judge, and there was no order taking the decree *pro confesso*. *Bennett v. Brown*, 56 Ga. 216.

Separate judgments rendered by different tribunals against different defendants and at different

ALABAMA SUPREME COURT

LEVYSTEIN BROTHERS, *Appts.*,

v.

Elizabeth O'BRIEN *et al.*

(.....Ala.....)

1. Jurisdiction of an infant defendant may be acquired by the service of summons in the same manner as upon defendants who are *sui juris*.

2. Failure of a court to appoint a guardian *ad litem* for an infant defendant

times where they are joined in the same action are irregular, as under Ga. Code, § 3559, the verdict must cover the issues made, and under § 3595, if the judgment is void, it may be set aside, providing that it was not occasioned by the negligence of the complainant, and an injunction should be granted. *Norris v. Pollard*, 75 Ga. 353.

Where a judgment was taken in a county against one only of two obligors, who was not served with process in that county, and the resident debtor was not served at all, and judgment was not taken against the one who resided in the county of judgment, an injunction was granted against proceeding on the levy and sale, at the instance of the nonresident debtor. *Austell v. McLarin*, 51 Ga. 407.

The enjoining of a judgment because of irregularity in its including improper persons will not prevent the issuing of a proper execution. *Turner v. Smith*, 9 Tex. 623.

For injunctions against judgments for errors occurring subsequent to their rendition, see note to *Little Rock & Ft. S. R. Co. v. Wells*, *ante*, 560.

II. For irregularities.

The case of *LEVYSTEIN BROS. v. O'BRIEN* holds that where the court acquired jurisdiction of the person of an infant, and failed to appoint a guardian *ad litem*, the judgment would not be void, and the injunction would not be granted on the principle that chancery has no jurisdiction to enjoin a judgment at law for irregularities attending and errors committed by the court in the rendition thereof, unless such irregularities or errors were sufficient to render the judgment void. This is in accord with the general doctrine.

a. Generally.

Generally an injunction will not be granted for irregularities in judgments, or for matters occurring during the trial, or for matters of form, or for consolidation of causes, or for matters of pleadings, signing, or entering judgments, or for irregularities in receiving verdicts, or in docketing the cause; and the injunction is usually refused on the ground of there being a remedy at law. But there are some exceptions, and injunctions have been granted where the irregularity is such as to render the judgment void, and have been granted for amendments to pleadings, on the ground of surprise, and have been granted for irregularities in docketing the case, and this on the ground of mistake. As to irregularities in the time of trial, or the time of rendition of judgments, there is some conflict of authority which is noted below.

Irregularities in the proceeding or judgment are not sufficient to obtain an injunction against such judgment or the execution. *Adams v. White*, 23 Fla. 352; *Genobles v. West*, 23 S. C. 154; *Hartford F. Ins. Co. v. Meyer*, 30 Neb. 138.

As there is a remedy at law. *Fowler v. Lee*, 10 Gill & J. 358, 32 Am. Dec. 172.

Or there is a remedy by appeal. *Cobb v. Garner* (Ala.) 17 So. 47.

30 L. R. A.

does not make the judgment if recovered against him so invalid as to be subject to collateral attack.

3. Injunction will not lie against a judgment at law against an infant merely because no guardian *ad litem* was appointed for him and his general guardian was not brought into the action.

(April 26, 1895.)

APPEAL by defendants from a decree of the Montgomery City Court in favor of com-

Or where there is a remedy by appeal, especially where such irregularities have been corrected, *Moeschler v. Loochte*, 13 N. Y. S. R. 855.

And will not be enjoined where there is a remedy by writ of error. *Eyster's Appeal*, 65 Pa. 473.

Or a remedy by an action, or appeal, or by motion in the action. *Moeschler v. Loochte*, *supra*.

Or by motion in the action to set the same aside. *Neville v. Pope*, 35 N. C. 346.

Or a remedy by a motion before the justice or his successor in office, to set aside the judgment, or a writ of recordari in the nature of a writ of false judgment in the superior court. *Gallop v. Allen*, 113 N. C. 24.

In *Eyster's Appeal*, *supra*, it was said that if a judgment was irregularly obtained the remedy is by writ of error, and not by injunction.

Irregularity in proceedings in ejectment will not be ground for a mandatory injunction to regain possession, as there is a remedy at law to regain possession. *Baker v. Morgans*, 2 Dow, P. C. 526.

Irregularities in restoring a lost record without notice will not be ground for injunction, where it is not claimed that the record as restored was not true. *Fuller v. Little*, 69 Ill. 229.

And injunctions will not be granted for irregularities in a decree after the lapse of twenty years. *Duncan v. Williams*, 30 Ala. 341.

b. As to infants.

The failure to appoint a guardian *ad litem* for an infant where the court has jurisdiction is only an irregularity and will not entitle to an injunction. (This was also held in *LEVYSTEIN BROS. v. O'BRIEN*.) *Drake v. Hanshaw*, 47 Iowa, 201.

As the remedy is by writ of error. *Ibid*.

Or where the nature of the claim is not shown, nor that the judgment is unjust. *Lemon v. Sweeney*, 6 Ill. App. 507.

An injunction will not be granted in favor of a purchaser against a judgment on a purchase-money bond, on the ground of irregularities in the guardian's proceedings for a sale of property without legal notice to the ward, at least if there is no offer to rescind, as such a defense could have been made in the judgment at law. *Shipp v. Wheelless*, 33 Miss. 644.

But where the court had no jurisdiction because no representative of minors was before the court, and their guardian had no notice of the proceeding to sell their real estate, an injunction will be granted. *Colley v. Duncan*, 47 Ga. 663.

So, where the application for the appointment of a guardian *ad litem* does not show that it was personally served, and the order appointing the guardian *ad litem* does not show that it was filed, and the guardian's answer does not show that it was served, and the plaintiff's attorney, and the officer who made proof of service, and the infant testify that the infant was not personally served, the court did not acquire jurisdiction, and such infant is not bound. *Genobles v. West*, 23 S. C. 154.

plaintains in a proceeding brought to enjoin the collection of a judgment against Archie O'Brien, Jr., deceased. *Reversed.*

The facts as stated by the appellants as a ground for the appeal were as follows:

About the 28th of April, 1894, Levystein Bros obtained a judgment against Archie O'Brien, Jr., in a justice's court of Montgomery county, upon which an execution was duly issued, and levied upon the interest of said Archie in certain real estate in the city of Montgomery, and on motion of plaintiffs therein, in the circuit court of said county, to which these papers were transmitted, an order was made for the sale of said property so levied upon. After this, and before the sale, O'Brien died. At the time said judgment

was rendered, and at the time of his death, O'Brien was a minor. No guardian *ad litem* was appointed to act for him, and no notice given to his regularly appointed guardian. It is not denied that O'Brien had due notice of said proceedings, nor is it averred that any plea of infancy was interposed to any of said proceedings. It is not denied that the debt for which said judgment was rendered was valid and binding upon O'Brien, nor one which he should, in equity and good conscience, pay. Neither is it averred that O'Brien, or any one else, could prove a valid defense to said action. The only averment upon this question is "that, if suit were properly and legally brought on said claim against him, there is a full and legal defense

c. In trial.

An irregularity of an attorney in making a compromise is not sufficient for an injunction. *Roller v. Woodriddle*, 46 Tex. 486.

A judgment will not be enjoined on the ground that three justices presided in forcible detainer instead of one, as there is a remedy by appeal. *Murphree v. Bishop*, 79 Ala. 404.

But the incompetency of a judge because interested in the cause will authorize an injunction as the judgment is void, and his incompetency cannot be waived. *Chambers v. Hodges*, 28 Tex. 104.

And under Tenn. Code, § 4098, prohibiting a justice who is related to the party, from sitting in the case unless his incompetency is waived in writing, a judgment rendered in such a case without a waiver may be enjoined as void. *Smith v. Pearce*, 6 Baxt. 72.

A judgment of a justice of the peace in Indiana will not be enjoined where a trial was had by a jury of twelve instead of six, and is not void, as Ind. Rev. Stat. 1881, § 1148, provides for granting injunctions only where the plaintiff is entitled to the relief demanded. *Rhodes Burford Furniture Co. v. Mattox*, 136 Ind. 872.

Impropriety in jurors will not entitle an injunction against a judgment. *Yancey v. Downer*, 5 Litt. (Ky.) 8, 15 Am. Dec. 35.

But where the sheriff had improperly influenced the jury, which was not discovered in time to apply for a new trial, an injunction against proceeding on the judgment was granted. *Lawless v. Reese*, 3 Bibb, 486.

For undue influence, see *Terrell v. Dick*, 1 Call (Va.) 546, *supra*, I. a.

Intoxication of a witness is not ground for enjoining a judgment. *Governor v. Barrow*, 13 Ala. 540.

d. In matters of form.

An error of the justice as to matters of form in rendering a judgment will not be ground for injunction. *Hunter v. Hoole*, 17 Cal. 418.

Blanks in judgment for the amount of taxed costs are not grounds for an injunction. *Cammann v. Traphagan*, 1 N. J. Eq. 230; *Pittsburgh, C. & St. L. R. Co. v. Elwood*, 79 Ind. 306.

And a sale of real estate under legal process will not be enjoined because of irregularity in the proceedings, rendering it uncertain as to complainant's right to redeem, or because the judgment is void, where no serious injury to the title is shown as likely to result. And a court of equity will not determine the regularity of former sales in advance of the redemption. *Union Iron Works v. Bassick Min. Co.*, 10 Colo. 24.

But where the report of accounts, and partition, and verdict, were too uncertain to be enforced, and under the pleadings it was impossible to deter-

mine the intent of the jury, an injunction was granted. *Butt v. Oneal*, 51 Ga. 358.

e. In pleadings and papers.

The irregularities in consolidation of cases will not entitle a party to an injunction against the judgment where the debt was valid, there being a remedy by appeal, or by direct application to the court. *Saunders v. Albritton*, 37 Ala. 716.

The failure to file with the pleadings an affidavit required by law will not entitle a party to an injunction against the judgment. *Jackson v. Darcy*, 1 N. J. Eq. 194.

And an injunction will not be granted on account of a defective affidavit in attachment, and that the execution misrecited (the judgment, the remedy being by writ of error. *Budd v. Long*, 13 Fla. 238.

Irregularity in the affidavit attached to the petition under Neb. Code, § 112, providing that every pleading of fact must be verified, is not ground for enjoining the judgment. *Johnson v. Jones*, 2 Neb. 126.

So, illegal issuing of an attachment will not be cause for enjoining a judgment. *Earl v. Mathe-ney*, 60 Ind. 202.

The case of *GUM-ELASTIC ROOFING CO. v. MEX-100 PUB. CO.* holds that a complaint in alleging that the affidavit in attachment states no ground for an attachment will not be a cause for enjoining the judgment, as the same is only a conclusion of law.

Irregularity in the issuing of an attachment by a justice, under Md. act 1831, chap. 271, not made as a defense to the action, will not authorize an injunction against proceedings on the judgment at the instance of a garnishee. *Peters v. League*, 13 Md. 58, 71 Am. Dec. 622.

And a judgment on a lost note will not be enjoined for insufficiency of the indemnifying bond. *Mills v. Jones*, 9 La. Ann. 11.

Irregularities in proceedings before a justice, where it was claimed that the party who took a forthcoming bond was not an officer, will not be ground for enjoining the judgment, as there is a remedy by appeal. *Clopton v. Carlos*, 42 Ark. 560.

And a judgment against the garnishee will not be enjoined for irregularity or insufficiency of the bond relating to his creditor who is a party to the same suit. *Field v. McKinney*, 60 Miss. 761.

An injunction will not be granted against judgments of a justice of the peace on the ground of splitting into several cases an account which was originally beyond the jurisdiction, where the bill does not show how much the alleged account was, and that the purpose was so made to appear before the justice. *Brundage v. Candle*, 25 Tex. Supp. 357.

Or where it was not shown that complainant did not participate in such action, and that he was

thereto." There is no offer in said bill to pay the said Levystein Bros. any amount that might be found due them. The prayer is that said judgment be declared void, and the collection thereof perpetually enjoined. To this bill defendants interposed several grounds of demurrer, and also moved to dismiss same for want of equity. From a decree overruling the demurrers, and denying the motion defendants appeal.

Messrs. Farnham, Crum, & Weil, for appellants:

The failure to appoint a guardian *ad litem* was, at most, only an irregularity in no wise affecting the jurisdiction of the court rendering the judgment, and the city court in equity was without jurisdiction to avoid said judgment or to enjoin its collection.

thereby deprived of some right. *Pryor v. Emerson*, 22 Tex. 162.

An injunction will not be granted on the ground that there is a variance between the judgment, execution, verdict, and declaration, as the remedy at law is by an affidavit of illegality, or by a motion in court to set it aside, or enforcing the plaintiff to amend. *Leonard v. Collier*, 53 Ga. 287.

But an order of seizure and sale on a judgment by confession was enjoined, where the confession of the judgment, power of attorney, certificate, and affidavit of the justice, taken in another state, were not in compliance with law, and the identity of the note with this on which judgment was confessed was not shown, and there was a defense to the action. Although an appeal lies, yet the injunction will not be dissolved when the facts show that on dissolution the party will be entitled to that remedy on other grounds. *Chambliss v. Atchison*, 2 La. Ann. 438.

And where foreigners being residents abroad went to trial upon a declaration having a good defense, and new counts were filed covering another claim after the trial commenced, and a delay of a short period only was allowed before the trial was again resumed, and the foreigners had no notice of such counts, an injunction was granted on the ground of surprise, where there is a good defense to such action. *Bell v. Cunningham*, 1 Sumn. 89.

So, an amendment to the pleadings made without knowledge of counsel for defendant, which authorized a judgment without evidence for \$5,000, instead of about \$50, where the attorney for the plaintiff had just offered to dismiss on payment of costs and fees, will authorize an injunction against the judgment. *Webster v. Skipwith*, 26 Miss. 341.

f. In records and dockets.

That the judge did not sign the record of a judgment in Kansas does not destroy the validity of the same, nor justify enjoining a sale under foreclosure. *Gordon v. Bodwell* (Kan.) 39 Pac. 1044.

Where a judgment was signed "By the court, B. H., plaintiff's attorney," and the minutes were signed by the judge, and the judgment was on the minutes, and the judge approved it, and signed it when he signed the minutes, the injunction will not be granted. *Jones v. Word*, 61 Ga. 28.

An irregularity in a trial as to the verdict not being written is not ground for enjoining the collection of the judgment, as the remedy is by appeal. *Parsons v. Pierson*, 128 Ind. 479.

Where, in a judgment in a bastardy case the clerk of the court in the absence of the court and clerk took the verdict of guilty from the jury, which was written by the clerk in the clerk's book, and a formal judgment entered on record, and the supreme court pronounced the judgment a nullity, but was unable to afford relief, and the court be-

low refused to set aside the judgment, and the supreme court refused to change the same on certiorari, as it was a matter of discretion with the court below,—an injunction will not be granted where the complainant does not show any defense to the proceedings. *Davis v. Delaware Twp. Overseer of Poor*, 40 N. J. Eq. 156.

1 Black, Judgm. § 196; *Trawick v. Trawick*, 67 Ala. 271.

Infancy is a personal privilege; and the defense upon this ground can only be taken advantage of by the infant himself, or his personal representative, and must be specially pleaded.

Shropshire v. Burns, 46 Ala. 108; *Sharp v. Robertson*, 76 Ala. 348; *Hutton v. Williams*, 60 Ala. 107; Ala. Code 1886, Form No. 89, p. 797; *Blake v. Douglass*, 27 Ind. 416; 1 Black, Judgm. § 196.

The rules governing courts of chancery, in proceedings to enjoin the enforcement of judgments at law, must be very strictly construed.

low refused to set aside the judgment, and the supreme court refused to change the same on certiorari, as it was a matter of discretion with the court below,—an injunction will not be granted where the complainant does not show any defense to the proceedings. *Davis v. Delaware Twp. Overseer of Poor*, 40 N. J. Eq. 156.

Equity will not enjoin an execution sale or judgment claimed to be void, because not properly docketed, as there is adequate remedy at law, and no merit is shown. *Wilkinson v. Rewey*, 59 Wis. 554.

So, if a court erred in resuming jurisdiction in redocketing a case without notice, and the error if not waived or corrected could have been corrected by appeal or writ of error, an injunction will not be granted. *Virginia v. Dunaway*, 17 Ill. App. 68.

Although Minn. Gen. Stat. 1878, §§ 273-277, provide that the entries shall be in the following order: (1) entry of judgment; (2) filing judgment roll; (3) docketing,—an injunction will not be granted at the instance of the assignee for creditors against entering a judgment *nunc pro tunc*, where it had been docketed, but the parties are not all before the court in the injunction suit. *Rookwood v. Davenport*, 37 Minn. 533.

But where the magistrate had marked the name of the attorney upon the wrong side of the docket, and given him a leave of absence, and judgment was rendered by default, and not discovered until too late to appeal, and there is a defense to the merits, proceedings on the judgment will be enjoined on the ground of mistake. *Brewer v. Jones*, 44 Ga. 71.

So, where the rules of court required a new calendar each month, and the call of the docket was at a time when a new calendar should have been made, and the attorney for the defendant, learning that no new calendar was to be made, gave no further attention to the case for that month, a judgment obtained in the absence of such attorney and his client should be enjoined where there was a good defense. *Beveridge v. Hewitt*, 8 Ill. App. 467.

As to restoring record, see *Fuller v. Little*, 69 Ill. 229, *supra*, II. a.

As to time of entering and signing judgment, see *infra*, g, and *Sanchez v. Carriaga*, 31 Cal. 170, *supra*, I. b.

g. In regard to time of rendering judgment.

In regard to an injunction on account of irregularity as to the time of the rendition of the judgment an injunction will not be granted because rendered prematurely. As to those rendered at an improper term, or where the justice continued the case to a time when he lost jurisdiction, there appears to be some conflict in the cases. The cases denying the injunction are where the trial took place

National Fertilizer Co. v. Hinson (Ala.) 15 So. 844.

And in proceedings by infants to set aside judgments against them, and to enjoin their enforcement, we are governed by the same rules as in the cases of adults.

13 Am. & Eng. Enc. Law, p. 147a; *Ralston v. Lahee*, 8 Iowa, 17, 74 Am. Dec. 291; *Joyce v. McAvoy*, 81 Cal. 278, 89 Am. Dec. 190, note; 1 Freem. Judgm. 4th ed. § 151.

If no appointment of a guardian *ad litem* is made for the infant heirs, this is not jurisdictional.

Brown, Jur. p. 113, p. 10, note 1; *Milne v. Van Buskirk*, 9 Iowa, 558; *Drake v. Hanshaw*, 87 Iowa, 292; *Joyce v. McAvoy*, 81 Cal. 378, 89 Am. Dec. 186, note 2; *Cook v. Rogers*, 64 Ala. 406; *Simmons v. McKay*, 5 Bush, 25; 1 Freem. Judgm. § 151.

The adjudication of any question is always final unless corrected by some appellate tribunal, and is never subject to re-examination in any other than an appellate court, upon any issue of law or fact, nor upon the sole ground

that the former decision is contrary to equity and good conscience.

2 Freem. Judgm. §§ 486, 487; 12 Am. & Eng. Enc. Law, p. 147; Brown, Jur. p. 113, note; Story, Eq. Jur. §§ 1572, 1575.

A court of equity will never set aside or enjoin a judgment on the ground of error or mistake in the judgment in the court of law, nor will this general law be varied because the judgment was upon default, unless there was fraud or surprise or other good reason for the failure to defend.

2 Freem. Judgm. 4th ed. § 487; Ala. Code, § 2835; *Marion v. Regenstein*, 98 Ala. 475; 1 Beven, Judgm. § 198.

None but the parties to the writ of execution who are liable to be injured by it can complain of irregularities by which it may be infected.

Freem. Execution, § 75; *Jefford v. Ringgold*, 6 Ala. 544.

The bill should have averred that a valid defense to said claim of appellants could have been proved by the said Archie O'Brien upon

at proper time, and the entry of the judgment was too late. This being only a ministerial act would not entitle to an injunction, although the statute may be mandatory as to the time of entry. Others refuse injunctions on the ground that there is a remedy at law, or that complainant is estopped, or was negligent, or that the same is not unjust. Those granting injunctions do so on the ground that the judgments are void when the trial was at a term unauthorized, or that the justice lost jurisdiction by continuing the case without consent beyond the time allowed by law, or on the ground of surprise, where the case was tried after the court had said that it would not be tried at that term.

The premature entry of a judgment will not authorize an injunction against the same. *Davis v. Staples*, 45 Mo. 567; *White v. Crow*, 110 U. S. 183, 28 L. ed. 118.

The remedy of appeal against a judgment of a justice rendered in the absence of a party, or proceedings in error where such judgment was rendered by the justice changing the time for trial, advancing the same without notice, will bar an injunction against such a judgment, where no valid defense is shown. *Proctor v. Pettitt*, 25 Neb. 96.

Proceedings on a judgment and execution levy will not be enjoined on the ground that the presiding judge had been employed before his election to defend for complainant, and at the trial term announced that no cause in which he had been employed as counsel would be tried, but no other counsel was employed by complainant, and he had no substantial defense, and judgment was rendered in his absence at that term. *Cardin v. Jones*, 23 Ga. 175.

For incompetency of judge, see *Smith v. Pearce*, 6 Baxt. 72; *Chambers v. Hodges*, 23 Tex. 104, *supra*, II. c.

A judgment will not be enjoined on the ground of surprise, where defendant's attorney left court on an announcement that there would be no more jury trials that term, and judgment was taken in his absence, but no valid defense was shown to the action. *Phillips v. Samuel*, 78 Mo. 657.

An injunction will not be granted against a judgment of a justice rendered on a debt not due, and before statutory time allowed to defend, even where plaintiff answered in the injunction suit that it was void, as it was only voidable, and the remedy was by certiorari. *McNeill v. Hallmark*, 28 Tex. 157.

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Where the justice continued a case until the defendant should return, and was to give notice, and the defendant had returned, but was not notified of the time of trial although his attorney was, and declined to make any defense, whatever irregularity there may be in the record in failing to show that the defendant had returned, or that he had received notice of that particular day, the judgment cannot be attacked by injunction as the remedy is by proceedings in error. *Devinney v. Mann*, 24 Kan. 692.

Forgetfulness of the court to notify counsel when the case will be taken up, after it has been postponed on account of opposing counsel's absence, is not fraud in the ordinary, nor fraud as against the party, where there was no promise of counsel shown to give notice; and an execution on such judgment will not be enjoined, as there is a remedy by motion to set aside, although six years were wasted by attempted writs of certiorari and requests. *Morris v. Morris*, 76 Ga. 733.

A judgment will not be enjoined where the judge represented to the complainant that an action on appeal was not pending in his court and then rendered a judgment against him *ex parte*, as such judgment is void, and a complainant has an action of trespass against all parties seeking to enforce the same. *Gutierrez v. Pino*, 1 N. M. 392.

Irregularities in process, and a statement by the justice that no personal judgment had been rendered, will not authorize an injunction against the judgment, as the remedy is by appeal. *Clopton v. Carlos*, 42 Ark. 560.

A judgment rendered by a justice in Missouri on Thanksgiving Day is not void, and an execution levy will not be enjoined, as Mo. Rev. Stat. § 2343, provides that a justice may hold court on any day except Sunday, and this is not affected by the statute regarding Thanksgiving Day. The fact that such judgment was void, would not alone entitle relief by enjoining the execution sale. *Dear v. Youngman*, 19 Mo. App. 41.

Proceedings under a decree contrary to a stipulation respecting the time and manner will not be enjoined where complainant did not comply with such stipulation. *Buell v. San Francisco Sav. Union*, 65 Cal. 202.

An injunction will not be granted to restrain proceedings on a judgment on the ground that a

a trial of said cause, or that appellees can prove such defense.

National Fertilizer Co. v. Hinson (Ala.) 15 So. 844; *Secor v. Woodward*, 8 Ala. 500.

The court erred in overruling the demurrer and motion of appellant.

Black, Judgm. §§ 193, 394.

Mr. E. P. Morrissett, for appellee:

A judgment against a minor who has not been brought into court by service as requested by law is a nullity, not voidable merely, but void.

Ala. Code, § 2579, Rule 23, Ch. Pr. *Herring v. Ricketts*, 101 Ala. 342.

The service upon the infant in person, without service upon parent or guardian, is no service at all, and does not bring the infant before the court.

Herring v. Ricketts, *supra*.

How can a valid judgment be rendered against a party not before the court?

A judgment against a party not before the court is a nullity and may be set aside in a collateral proceeding.

Daily v. Reid, 74 Ala. 415.

col. fa. was not issued in proper time. *Nicholson v. Patterson*, 6 Humph. 304.

An injunction against proceedings on the judgment at law rendered on appeal from a justice, after eight years' delay, where complainant did not know of the appeal having been filed, where there was a valid defense, will not be granted, as there is a remedy by writ of error *coram nobis*, and complainant knew that an appeal had been granted, and could have taken up the papers, and had it affirmed. *Gunn v. Neal*, 2 Helsk. 318.

Irregularities of the justice in continuing the case beyond the time allowed by law are not grounds for an injunction, where such adjournment was at the instance of the party complaining. *Ewing v. Nickle*, 45 Md. 418.

An injunction against a judgment and levy of execution will not be allowed where it was claimed that the judgment of a justice was rendered at an improper time without notice, and after the time fixed for appearance, where a valid defense is not alleged against the claim, and besides there is a remedy at law of motion to set aside, and appeal or error. *Peralka v. Fittle*, 38 Neb. 754.

Under Justices' Code Civ. Proc. § 58 (Ind. Rev. Stat. 1881, § 1489), providing that on dismissal, confession, or verdict, judgment shall be entered and signed immediately, and in other cases within four days, where the judgment was not rendered or entered until six days after the verdict, an injunction was refused, although this appears to conflict with *Burton v. McGregor*, 4 Ind. 550, but may be distinguished by the fact that the latter case was tried by the justice, and no decision was given, and no entry made until four days after. In the present case the verdict fixed the judgment which followed as a matter of law, and the failure to enter it was merely ministerial omission, and there was remedy by appeal. *Martin v. Pifer*, 36 Ind. 245.

Martin v. Pifer, *supra*, was distinguished in *Greenwaldt v. May*, 127 Ind. 511, in which case the judgment for costs was obtained by fraud, and entered after the case was dismissed, and an injunction was granted against the judgment in the latter case.

That a justice neglected to make any minute of the verdict, or to enter it in his docket until the day after it was received, will not authorize an injunction against the judgment where no injustice is shown. *Stokes v. Knarr*, 11 Wis. 390.

Where a case was set for 9 o'clock before a justice, 30 L. R. A.

The heirs at law were proper parties plaintiff in this bill.

Sharp v. Robertson, 76 Ala. 843.

McClellan, J., delivered the opinion of the court:

In actions against infants, service of summons must be had upon the defendant, as upon defendants who are *sui juris*; and such service is as efficacious in the former as in the latter case to give the court jurisdiction of the cause. Having thus acquired jurisdiction of the person of an infant defendant, it is the court's duty to appoint a guardian *ad litem* to make defense for him; but a failure to discharge this duty does not oust the court's jurisdiction, which has already attached, but, to the contrary, if the case proceeds to judgment against the infant without such appointment, whether upon issue joined and trial had, or upon the default of the defendant, such judgment, though irregular and erroneous, and to be so declared upon appeal, is not void, and is therefore not open to impeachment upon collateral attack. 1

and before 10 o'clock the justice announced judgment by default, but desiring to leave town closed his docket, stating that he would make further entry in the afternoon, and the defendant appeared at 10 o'clock and found no entry, and at 3 o'clock the justice finished the judgment entry,—this was erroneous and irregular, but not void. The justice did not lose jurisdiction by adjourning the case, and as the error can be corrected by appeal, or writ of error, an injunction cannot be granted. *Central Iowa R. Co. v. Piersol*, 65 Iowa, 498.

Where the justice had jurisdiction of the subject-matter, and of complainant, who did not appear, the fact that the justice postponed the writing-up or entry of the judgment until the date to which the cause was set for trial against the other parties to the suit did not divest the justice of his jurisdiction either of the subject-matter, or of complainant, nor render the judgment absolutely void, and there is a plain and adequate remedy at law for the review and reversal by appeal, and proceeding in error. *Langley v. Ashe*, 38 Neb. 55.

Where a justice of the peace having jurisdiction of the subject-matter and parties rendered judgment after the time fixed by statute, an injunction will not be granted, as the remedy is by a direct proceeding to correct the error, and a valid defense to the action must be shown. *Gould v. Loughran*, 19 Neb. 392.

And that a judgment was rendered without jurisdiction by a justice after the statutory time, where the evidence is conflicting, and the record shows that it was at the proper time, will not authorize an injunction in a collateral attack. *Paul v. Davidson*, 43 Neb. 505.

And where the justice had not jurisdiction to render the judgment at the time it was rendered, but lost jurisdiction by adjourning it to an uncertain and unknown time, an injunction will not be granted, as such judgment can only be corrected by direct proceedings, at least if there is no showing that the same is unjust, or that the defendant is insolvent. *Lindinger v. Glenn*, 33 Neb. 187.

The failure to give the defendant notice of the place of hearing to which a justice of the peace had continued a case will not authorize an injunction against the judgment, where there is a remedy at law, and it is not charged that the judgment was obtained by fraud. *Gallop v. Allen*, 113 N. C. 24.

That complainant believed or supposed a judge

Freem. Judgm. § 151; 2 Freem. Judgm. § 487; 10 Am. & Eng. Enc. Law, pp. 692-697; Brown, Jur. p. 118; *Milne v. Van Buskirk*, 9 Iowa, 558; *Drake v. Hannahaw*, 47 Iowa, 292; *Joyce v. McAtoy*, 81 Cal. 278, 89 Am. Dec. 172, and notes pp. 185 *et seq.*; *Simmons v. McKay*, 5 Bush, 25. This doctrine had been recognized by this court in the analogous case of a lunatic defendant. *Walker v. Clay*, 21 Ala. 797, 807. And there is, we take it, nothing in the suggestion that, because of the mandatory terms of section 2579 of the Code, a judgment against an infant without the appointment of a guardian *ad litem* is not merely erroneous and irregular, but void. This section is equally mandatory in respect of suits by infants.—they “must sue by next friend;” yet it would scarcely be insisted that a judgment at the suit of an infant in his own name against one *sui juris* would be void. The succeeding section (2580) is equally mandatory in form in respect of lunatics; but, as we have seen, judgments against lunatics are not void, though this mandate has been disregarded. And a reference to the authorities cited above will show that, under equally mandatory statutes in other states, the ruling has been that a failure to appoint a guardian to defend for the infant is, at most, reversible error,

and not matter for impeachment of the judgment, except upon direct assault. In chancery, infant defendants can only be brought in by service upon their parents, or either of them, if in life, or upon their general guardian, in case the parents are dead, provided such parents or guardian are not adversely interested; and in this latter case, or if there be no parent or guardian, then upon the infant personally, if over fourteen years of age, etc. Code, p. 814, rule 23. Hence what is said in *Daily v. Reid*, 74 Ala. 416, 417, as to the invalidity of a decree *pro confesso* against an infant, has no application to a judgment at law on personal service against an infant defendant, especially in view of the doctrine there announced,—that the chancery court “is the guardian of all infant litigants before it, and will permit no such irregularity and error [as the taking of a decree *pro confesso* against an infant] to pass unredressed.” Nor was it intended by this language of the court in that case, as counsel insist, to convey the idea that the substantive rights of an infant stood upon a plane different from, and higher than, the rights of persons *sui juris*, or were to be adjudged by a different standard, but only that the court would so far act as his guardian as to see to it that his abstract rights were properly

ment could not be rendered at the first term will not justify an injunction, where he was negligent in making defense, and there is a remedy by appeal. *Shrieker v. Field*, 9 Iowa, 386.

And an injunction was refused against an execution and judgment claimed to have been rendered on a day not authorized by law, where it was not shown that the term was other than a legal and valid one. *Galveston, H. & S. A. R. Co. v. Ware* (Tex.), 11 S. W. 554.

An injunction will not be granted on the ground that the judgment was void, because rendered on the order of the judge at chambers and not in term time, and that the only entry of the judgment was in the minute book of the court, but there was no showing that the judgment was unjust. If the judgment was void the remedy is by suspension of the execution until a motion to quash is heard, and the court can arrest all process if the judgment is void. *Sanchez v. Carriaga*, 81 Cal. 170.

An injunction will not be granted against a seizure on the ground that the judgment was void because signed at chambers, where the complainant does not deny under oath that neither he nor his counsel consented to the same. *Rush v. Faust*, 15 La. Ann. 477.

And judgments and executions thereon will not be enjoined on the ground that the judgment was rendered on the day on which the justice was not authorized by law to hold his court, where there is a remedy by certiorari. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47.

But as to such judgments that cannot be reviewed because the amount is too small, an injunction will be granted. *Ibid.*

And in *Iowa U. Teleph. Co. v. Boylan*, 86 Iowa, 90, it was held that a judgment by default rendered by a justice of the peace after he had lost jurisdiction by an unlawful adjournment for more than three days without complainant's consent is void, and an execution thereon will be enjoined; and in *Iowa* it is held that the complainant in the injunction case need not show that he is not indebted to the party obtaining a void judgment.

And an injunction will be granted against a judgment where there was an order of continuance of all contested causes, and the defendant and his attorney left the court, and judgment was thereafter taken during that term without their knowledge, and there was a valid defense to the action, and this on the ground of mistake and surprise. *Jones v. Kincaid*, 5 Lea, 677.

As to whether or not a justice lost jurisdiction of a case and power to enter a judgment by neglecting to make a minute of the verdict, and to enter it on the docket until the day after it was received,—*quære*. But if he did, an injunction will not be granted unless there is a good defense to the action; and besides there is a remedy by certiorari. *Stokes v. Knarr*, 11 Wis. 369.

In *Mahr v. Young*, 18 Wis. 634, it was said that where a justice had continued a case beyond the time allowed by law, and lost jurisdiction, and set the same aside, and rendered a judgment which was void, the proper remedy was by injunction or certiorari.

A judgment rendered at a term of the circuit court not authorized by law is void, and proceedings thereon and execution will be enjoined. *Cala v. Goda*, 84 Ind. 309.

An execution on a judgment that is void because entered in vacation without consent, and not read, approved, or signed by the judge, will be enjoined, and Ind. Acts 1881, p. 93, validating records duly entered, will not cure it, as it is not a record duly entered. *Mitchell v. St. John*, 96 Ind. 566.

And under La. Code Prac. art. 308, providing for an injunction against doing some acts injurious to the other party, and under La. Const. art. 10, providing that every one shall have an adequate remedy for every injury done to him, an injunction will be granted against proceedings on a judgment that is void because rendered out of term time. *Hernandez v. James*, 22 La. Ann. 433.

For error as to time of rendering judgments, see *Norris v. Pollard*, 75 Ga. 368, and *Sanchez v. Carriaga*, 81 Cal. 170, *supra*, I. h.

For irregularity as to parties, see *supra*, I. h.

L. T.

presented to and represented before the forum of conscience; but this is not to say that a court of equity, any more than a common-law court, when the claim of the infant is fully presented, would grant any other relief on the merits thereof than an adult litigant would be entitled to on the same facts. It is therefore quite an error to suppose that chancery will enjoin a judgment at law against an infant, which is not void, and merely irregular and erroneous, on the theory that it is the guardian of all infant litigants, when it is without competency to enjoin such a judgment against a person of full age. The well settled law is that chancery has no jurisdiction to enjoin any judgment at law for irregularities attending, and errors committed by the court in, the rendition thereof, unless such irregularities or errors were of a character to avoid the judgment *ipso facto*. A merely erroneous and irregular judgment, whether against infants or adults, will not be enjoined. A void judgment against either will be. We have seen that the judgment sought to be enjoined here was of the former class. It was irregular and erroneous, but

not void. This appears by the bill. And this is the only ground upon which relief by injunction is sought. No surprise, accident, mistake, or fraud is alleged. The bill was therefore without equity. The court erred in overruling the motion to dismiss for want of equity, and also in overruling those assignments of demurrer which went to the point we have been considering. 2 Freem. Judgm. §§ 489, 518; 10 Am. & Eng. Enc. Law, pp. 889 *et seq.*; 12 Am. & Eng. Enc. Law, p. 147a; *Collier v. Falk*, 66 Ala. 228, 228; *Murphree v. Bishop*, 79 Ala. 404; *Preston v. Dunn*, 25 Ala. 507. It may also be that, even had this judgment been void, complainants' remedy against it was not by bill for injunction, though as, if void, it is not so upon its face, we have proceeded upon assumption that equity would enjoin it, had it been not merely irregular, but wholly invalid. The decree of the city court must be reversed, and a decree will be here entered sustaining the demurrer, and the motion to dismiss the bill for want of equity, and dismissing the same.

Reversed and rendered.

TEXAS SUPREME COURT.

HOUSTON DIRECT NAVIGATION COMPANY
v.
INSURANCE COMPANY OF NORTH AMERICA, *Pff. in Err.*

(.....Tex.....)

1. A shipment from one point to another within the same state is interstate commerce, although a bill of lading is given and charges are collected to the latter point only where the destination of the property is in a foreign state to which a continuous voyage is contemplated with only a stop to change carriers at the terminal point mentioned in the bill of lading.
2. A provision in a carrier's charter that it shall be subject in the transportation of freight to the laws applicable to common carriers, does not make it subject to state control when engaged in interstate commerce.

(November 25, 1895.)

ERROR to the Court of Civil Appeals for the First Supreme Judicial District to review a judgment affirming a judgment of the District Court for Galveston County in favor of plaintiff in an action brought to recover the amount which it had been compelled to pay for the destruction of property in defendant's possession for transportation for the loss of which defendant was alleged to be liable under the state statute. *Reversed.*

The facts are stated in the opinion.

NOTE.—For note on the effect of shipments between points in the same state as interstate commerce, see *Missouri P. R. Co. v. Sherwood* (Tex.) 17 L. R. A. 642.
30 L. R. A.

Messrs. Mott & Armstrong for plaintiff in error.

Messrs. Hume & Kleberg for defendant in error.

Brown, J., delivered the opinion of the court:

The Insurance Company of North America sued the Direct Navigation Company to recover damages done to and the value of cotton destroyed by fire while in the possession of the navigation company; the insurance company having paid the loss to the owners of the cotton, which had been shipped from Houston on a barge belonging to the navigation company, and insured for the owners by the Insurance Company of North America. The insurance company claimed to be subrogated to the rights of the owners. The navigation company pleaded a general denial, and by special answer to the effect that the fire "was not due to its negligence, nor to its design or neglect;" that the shipment was an interstate shipment, and that the contracts for the transportation of the cotton were maritime contracts concerning the transportation of freight upon the navigable waters of the United States connecting with the high seas; that the barge *Katinka* was duly enrolled and licensed under the laws of the United States for engaging in such commerce; that the loss was occasioned by fire not due to its negligence. There was a trial before the court without a jury, and judgment rendered for the plaintiff, which judgment was affirmed by the court of civil appeals. The facts are as follows: The Direct Navigation Company is a corporation created by special act of the legislature of the state

of Texas, approved October 9, 1866, which act contains, among others, the following provision: "Sec. 10. That the company shall, within six months after the passage of this charter through the legislature, have on the waters of Buffalo bayou and Galveston bay and harbor a sufficient number of steamers, barges, and propellers to meet the demands of commerce upon said company, and they shall be subject in the transportation of freight to the laws applicable to common carriers." The navigation company was organized under this act, and ever since has operated under it, and under license from the United States, running and navigating steamers, barges, and propellers upon the waters of Buffalo bayou and Galveston bay, between the city of Houston and the city of Galveston, and to seagoing vessels, for the purpose of transporting freight. During the month of September, 1892, it owned and operated upon said waters the barge Katinka. On the 15th of September, 1892, the company received at Houston, Tex., 184 bales of cotton, and on the 16th of the same month it received at Houston 154 bales of cotton, giving bills of lading therefor. The bills of lading recited that the cotton was received by the Houston Direct Navigation Company, in apparent good order and well conditioned, of Zeigler & McIlhenny, "for delivery to order; notify John Sherwood & Co. and O. Hayworth, respectively, or their assigns, at Galveston; he or they paying freight and charges, as per margin." The freight and charges were paid at Houston. The bills of lading further provided as follows: "It is understood and expressly stipulated that the liability of the Houston Direct Navigation Company shall cease upon delivery to the next connecting line, and that the said Houston Direct Navigation Company and its connections which receive and transport the said property shall not be liable for loss by fire. . . . The cotton, under this bill of lading, . . . is to be transported to the depots or the landings of the steamboats of forwarding lines at the points receipted to for delivery. It is further agreed that, in case of any loss or damage, that company alone shall be answerable therefor in whose actual custody the same may be at the time of the happening of such loss. This contract is executed and accomplished, and the liability of the Houston Direct Navigation Company terminates, on the delivery of the cotton to the Mallory line, at Galveston, when the liability of the said Mallory line commences, and not before." The cotton shipped to order, "notify John Sherwood & Co.," was the property of John Sherwood & Co., who resided in Liverpool; and the cotton shipped to order, "notify O. Hayworth," was the property of C. Menelas, who was a foreign buyer. When the cotton was delivered to the Direct Navigation Company, it was started on its trip to New York and Liverpool, to be transported by the defendant, the navigation company, to Galveston, there delivered to the Mallory line, which was to transport it to New York, to be there delivered to a connecting line, and thence transported to Liverpool. The bill of lading given by the navigation

company was only to Galveston, and then the remainder of the cotton, not destroyed, was delivered to the Mallory line, which gave another bill of lading. On the 19th day of September, 1892, after 172 bales of the cotton had been unloaded from the barge Katinka at one of the wharves at Galveston, a fire broke out in the balance of the cargo yet on board the barge, destroying a part thereof and damaging the balance. The insurance company, under the terms of its policy, took the damaged cotton, and paid the full amount of the insurance on the cotton so burned, amounting in the aggregate to the sum of \$6,729.38. It sold the damaged cotton in open market to the highest bidder, sustaining a loss of \$1,643.78, being the value of the cotton burned and the difference between the value of the damaged cotton before it was damaged and the amount realized from the sale. The trial court found that the origin of the fire was unknown, but it expressly declined to determine whether the fire originated from the negligence of the navigation company or not. Under a number of assignments, practically two questions are presented in this case, which may be stated as follows: (1) Was the Direct Navigation Company engaged in interstate commerce while transporting the cotton in question from Houston to Galveston? If so, then (2) did the provision in its charter, that it should "be subject in the transportation of freight to the laws applicable to common carriers," operate to make it liable under the laws of the state for the loss sustained, notwithstanding the limitation contained in the bill of lading, and the exemption provided by the statutes of the United States?

No distinct and certain definition of "interstate commerce" has yet been fixed by the decisions of the courts, and perhaps none can be given which will apply to all cases. But the law, as applicable to this case, deducible from the decisions of the courts, may be stated thus: When a commodity has been delivered to a common carrier to be transported on a continuous voyage or trip to a point beyond the limits of the state where delivered, the character of interstate or foreign commerce attaches thereto. *Cos v. Errol*, 116 U. S. 517, 29 L. ed. 715; *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 557, 19 L. ed. 999; *Ex parte Koehler*, 80 Fed. Rep. 867, 1 Inters. Com. Rep. 238; *Re Greene*, 53 Fed. Rep. 113; *Missouri P. R. Co. v. Sherwood*, 84 Tex. 125, 17 L. R. A. 643, 4 Inters. Com. Rep. 240. In *Cos v. Errol*, *supra*, the question to be determined was whether or not the property in question was subject to taxation in the state where it then was, and this question depended upon whether or not it had become an element of interstate commerce. The court said: "But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease

to be a part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation, in a continuous route or journey.

We think that this must be the true rule on the subject. . . . And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true it was said in the case of *The Daniel Ball v. United States*, 77 U. S. 10 Wall. 565, 19 L. ed. 1002, 'whenever a commodity has begun to move, as an article of trade, from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them to the depot where the journey is to commence, is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm or the forest to the depot is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." The questions to be determined are, Did the cotton in question, when delivered to the navigation company, start on its journey to a point outside of the state of Texas? Was its destination at that time fixed and determined upon, and was the carriage from Houston to Galveston a part of the voyage, which was to be continuous? The facts of this case show that the owners of the cotton lived in Liverpool, and the cotton itself was by their agents put in transportation, by delivery to the navigation company, to be carried by it to the city of Galveston, and there delivered to the Mallory line, by which it was to be transported to New York, and thence by connecting line of steamers to the city of Liverpool. The bill of lading upon its face showed that the navigation company was to deliver the cotton to the Mallory line, at Galveston, at which time the liability of the navigation company should cease and that of the Mallory line should attach. There can be no doubt that the destination of the cotton, at the time of its delivery to the navigation company, was fixed and determined, and the point at which it was destined for final delivery was beyond the limits of this state. It is equally clear, from the bill of lading and other testimony, that a continuous voyage was contemplated, and the trip be-

tween Houston and Galveston was simply a part of that voyage. Upon this state of facts the cotton would undoubtedly come within the rule laid down in the case cited above, and would be classed as interstate commerce. But the evidence likewise shows that the Houston Direct Navigation Company gave a bill of lading to Galveston only, and not a through bill to cover the entire route, and the charges of freight to Galveston, and wharfage at that place, were paid at the time that the cotton was delivered. Do these facts change the rule of law applicable to the case, and constitute this a local shipment, as distinguished from interstate or foreign commerce?

It has been generally held that where a carrier in one state receives a commodity for shipment by a continuous trip over its own line and connecting lines, giving a through bill of lading to the point of destination, with the provision that its own liability shall cease upon delivery to its connecting line, at a point within the state where it was received, such transportation is to be considered as interstate commerce, and the carrier is but one of several agencies employed. *Missouri P. R. Co. v. Sherwood*, 84 Tex. 185, 17 L. R. A. 648, 4 Inters. Com. Rep. 240. The fact that the bill of lading given by the Direct Navigation Company was only to Galveston establishes simply that the liability of the company terminated at that point, and has the same effect, and no more, as if a through bill had been given by the receiving carrier, with the stipulation that its liability should terminate when delivered to the connecting carrier. The effect of such bill of lading as last named would be to make it, although a through bill upon its face, in effect a separate bill, so far as the liability is concerned of each carrier engaged in the transportation. We do not understand that it is necessary that all of the carriers engaged in an interstate or foreign shipment shall be parties to the contract of shipment for the entire route. In fact, as we understand the decisions the character of the commerce is not affected by the terms of the contract of the carrier as it relates to liability for the freight, but only in so far as it shows that it is or is not a part of the continuous carriage from the beginning point to the point of destination. *The Daniel Ball*, cited above; *Harmon v. Chicago*, 140 Ill. 274; *Foster v. Davenport*, 63 U. S. 22 How. 244, 16 L. ed. 248. The last two cases cited involved the question as to whether or not tugboats engaged in towing vessels which were themselves engaged in interstate commerce were to be considered as likewise engaged in such commerce. In each case it was held that such tugboats, although operating locally and within the limits of a state, were to be considered as engaged in interstate commerce, and not subject to the laws of the state. The tugboats were in no sense parties to the contracts for transportation, but were simply agencies employed therein. In *Heiserman v. Burlington, C. R. & N. R. Co.* 63 Iowa, 782, the supreme court of that state, upon a bill of lading similar to the one given in this case, held that the transaction constituted a

local shipment, and that the rights of the parties were to be determined by the laws of that state. In *Missouri P. R. Co. v. Sherwood*, 84 Tex. on page 185, 17 L. R. A. 648, 4 Inters. Com. Rep. 240, the judge who delivered that opinion approved the case of *Heiserman v. Burlington, C. R. & N. R. Co.*; but the question decided in the case approved, and now before this court, was not embraced in the case then being decided, and the expressions of approval of the Iowa case are simply *obiter dicta*, and not to be taken as authority. The court of civil appeals and the counsel for defendant in error refer to the case of *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, in which this court refused an application for a writ of error. In that case the court of civil appeals said: "The evidence does not show that the shipment of the money was interstate, but, if it did, the limitation of liability by the steamship company in its bill of lading applies only to carriage by the ship." The two propositions were involved in the decision of that case, and this court refused the application for writ of error upon the ground that the limitation of liability by the steamship company in the bill of lading given by it did not apply to the carriage by the railway company. The refusal of a writ of error does not imply the approval of the decision of the court of civil appeals upon all questions discussed by it, but simply of the result of the judgment of that court. We conclude from the authorities and the facts in this case that the transportation of the cotton by the Direct Navigation Company from Houston to Galveston was interstate or foreign commerce, and that its liability for the loss must be determined by the rules of law established by Congress, in so far as such rules have been prescribed, unless the provision of the charter before quoted operates to subject the corporation, in the carriage of interstate commerce, to the statutes of the state, instead of the laws of Congress. We believe that the proper construction of the language used in the charter of the navigation company is simply to express, as matter of law, that it

is to be regarded as a common carrier, and as such subject to whatever law may be applicable to a common carrier in the business in which it may be engaged. The effect of this statutory declaration is to relieve persons who may have claims against it of the necessity of establishing its character as a common carrier, and to make it liable as such for all losses sustained or injuries inflicted in the transaction of its business. It is not necessary, in the view we take of this case, to determine the question of the validity of such a provision in the charter, if found to be in conflict with the laws of the United States. We simply hold that the language quoted does not have the effect to make the corporation created by the charter subject to state control when engaged in interstate commerce, but that, being a common carrier, and so declared by its charter to be, its liability as such is to be determined under the law which may be applicable to the character of commerce in which it may be engaged at the time. It follows from what we have said that in our opinion the liability of the navigation company in this case is to be determined under the laws of Congress upon the subject, or the common law, in so far as Congress has made no provision therefor, and not by the statutes of the state of Texas, which forbid the carrier to limit its liability as at common law.

The trial court expressly declined to pass upon the question of negligence on the part of the navigation company, and the court of civil appeals made no finding thereon. There was evidence on the part of the carrier tending to show diligence, and to negative the idea of negligence, on its part; but the evidence is not so conclusive as to justify this court in holding, as matter of law, that the loss did not occur through the negligence of the navigation company. We therefore cannot enter judgment in this case, but for the errors of the District Court and the Court of Civil Appeals, as shown herein, *the judgments of both courts are reversed*, and this cause is remanded to the District Court.

MISSISSIPPI SUPREME COURT.

Mrs. C. M. TAYLOR, *Appl.*,

v.

John HART.

(.....Miss.....)

1. A lessee of rural as well as urban property is within the provision of Code 1892, § 2498, exempting him from liability to pay rents for buildings destroyed without his fault.
2. An abatement of so much as was paid "for the building" must be allowed under Code 1892, § 2498, in case of the destruction of buildings which constituted a material part of the consideration of the lease.

NOTE.—See, in connection with this case, the note to *Porter v. Tull* (Wash.) 22 L. R. A. 613, 30 L. R. A.

(October 28, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Yazoo County in favor of plaintiff in an action brought to recover possession of cotton which she had seized for rent. *Affirmed.*

Defendant leased to plaintiff a plantation for the period of three years for \$1,150 per year, on which was a gin house, press, and machinery and the lease stipulated that it was to be returned at the end of the term in as good condition as when received, and that if it was damaged or destroyed by the negligence of the lessee he was to be liable for its value. It was destroyed by fire soon after the lessee took possession without his fault or negligence. He

then claimed a deduction of its annual value from the yearly rent and refused to pay the full amount of the rent, whereupon the landlord distrained and seized some of his cotton to pay the rent. He replied it claiming that he was entitled to the deduction in the rent, and also that the landlord had refused to comply with her agreement to furnish means to replace the gin-house if he would do the work. Demurrers to these claims were overruled.

Further facts appear in the opinion.

Messrs. Barnett & Thompson for appellant.

Messrs. Hudson & Perrin for appellee.

Whitfield, J., delivered the opinion of the court:

The general doctrine of the common law unquestionably was that, upon a covenant in a lease of land and buildings for a term of years to pay rent, the rent could be recovered after a destruction of the buildings leased by accidental fire. The express contract and promise were not discharged by an act for which the lessor was not responsible. But if "the interest of the lessee in a part of the demised premises was destroyed by the act of God or the public enemy, so as to be incapable of any beneficial enjoyment," the rent was, even at common law, apportioned. Such is the accurate statement of the rule at common law given by Justice Brewer in *Whitaker v. Hawley*, 25 Kan. 674, 37 Am. Rep. 277, in an opinion of great learning and power, exposing the absurdities of the common-law rule on this general subject as especially applied to the conditions of society existing with us. See also *Fowler v. Payne*, 49 Miss. 82, 79; *Jemison v. McDaniel*, 25 Miss. 83; Taylor, Land. & T. § 375. A universal exception to this rule in this country was established where the lease was of a particular room or apartment in a building, or a building merely without any land, in which case the total destruction of the room or building or apartment terminated the lease, and released the tenant from the payment of subsequently accruing rent. See the learned and exhaustive note to *Porter v. Tull* (Wash.) 22 L. R. A. 618; note to *McMillan v. Solomon*, 94 Am. Dec. 662; 12 Am. & Eng. Enc. Law, p. 742, and authorities cited therein; *Lanpher v. Glenn*, 87 Minn. 4. Perhaps the inflexible rigor of the general common-law rule is nowhere more strongly put than by Brickell, Ch. J., in *Warren v. Wagner*, 75 Ala. 202, 51 Am. Rep. 446, where, the lease being of lands and tenements, accompanied with the right of quarrying stone upon the lands during the term, and the injury complained of being the destruction of the limekiln, which it was conceded constituted the principal consideration for the lease, it was held, at the common law, the lessee was bound for the whole rent. This rule has often been assailed as utterly repugnant to justice and reason, never more forcibly than by Justice Brewer in the case of *Whitaker v. Hawley*, *supra*, and Chancellor Walworth in *Gates v. Green*, 4 Paige, 854, 27 Am. Dec. 68, and so harsh was the operation of the rule that in many states (all whose statutes are cited in the note to *Porter v. Tull* (Wash.) 22 L. R. A.

R. A. 616) statutes have been passed for the purpose of modifying or abrogating it. Many of these statutes, such as those of New York, Ohio, Connecticut, New Jersey, and Minnesota, expressly refer to "lessees or occupants of any building . . . which shall be so destroyed or injured," etc., providing that in such case the lessee may surrender possession, etc., of the leasehold premises. It is clear that all such statutes relate to buildings, and not to lands; and all the decisions to which we are referred on the proposition that the appellee should have surrendered possession of the premises if he wished to avoid the payment of rent accruing subsequently to the fire are constructions of such statutes, and are in cases where buildings in cities were destroyed. Such are *Roach v. Peterson*, 47 Minn. 291, the buildings being in Minneapolis; *Lanpher v. Glenn*, 87 Minn. 4, the buildings being in St. Paul; *Gay v. Davey*, 47 Ohio St. 896, the buildings being in Cincinnati; *Johnson v. Oppenheim*, 55 N. Y. 280, the buildings being in New York; and *Miller v. Benton*, 55 Conn. 529, the buildings being in New Haven, in which last case the court remarks upon the use of the word "tenement" as a word applicable in New Jersey, "in popular and legal meaning, to parts of a building leased without the land upon which the buildings stand," as well as to land (page 544).

Our statute, section 2498, Code 1892, * upon the construction of which this case depends, has no such limiting words. Its benefits are for "a [that is, any] tenant." It contains no provision for the surrender by the tenant of the leased property. Where the subject-matter of the lease is a building merely, the tenant may justly be required, in the states whose decisions are cited *supra*, to "quit and surrender possession" of the demised premises, if he would escape the payment of subsequently accruing rent. But there can be no reason, in the case of a farmer whose cotton crop, in this state it may be, is opening in the field, in requiring him, after the expenditure of large sums on an annual crop, to surrender possession of the premises, and abandon his crop, in order to claim an apportionment of the rent where a gin-house and machinery constituting an essential part of the subject-matter of the lease have been destroyed by fire, if, under our statute, he is otherwise entitled to apportionment. Our condition, as an agricultural community, is wholly different from that of the people of the manufacturing states; and this difference in condition was doubtless in the mind of the compiler of the Code of 1880, in which this statute first appears, and may well have occasioned the difference in the phraseology,—a difference aptly suiting the law to the actual conditions of our people, by far the larger part of whom are agriculturists. The farm in this case was a large and valuable one, 160 bales of cotton being grown thereon in the year 1894. Certainly, no building could have been more essential to the value of the

*"A tenant shall not be bound to pay rent for buildings after their destruction by fire or otherwise, without negligence or fault on his part, unless he have expressly stipulated to be so bound."

use of this leased plantation than the steam gin of the kind and value shown in the testimony. The appellee testifies that he would not have rented the place without the gin-house and machinery. The reasonable proportion of the whole rental of \$1,150, which the gin-house and machinery constituted, is shown to have been \$850 by two witnesses, and the jury allowed only \$275. The clear tendency of all the modern decisions, in our states, has been to so modify the rule of the common law as to work out a result just and equitable in the situation. At common law, "in the hiring of chattels, though the terms be as absolute and positive as those of a real-estate lease, their absolute destruction without the fault of the hirer terminated the contract;" and it is well said by Mr. Justice Brown in the case cited that "the clear tendency of the rulings has been to do away with the common-law technicalities concerning real estate, and to bring the rules of the common law more in harmony with those respecting personal property;" and that "the distinctions growing out of the feudal system are disappearing, and this distinction between the lease of real property and the hiring of chattels is one which sooner or later will cease to exist." In the same spirit is *Coogan v. Parker*, 2 S. C. N. S. 255, 16 Am. Rep. at pages 679, 680.

We must give this statute a construction suited to the needs of our people; and in giving it the construction which we do, holding that it applies to buildings rural as well as urban, and that, in case of the destruction of either kind by fire without the fault of the tenant, there should be an abatement of so much of the rent as was paid "for the building," we think we do this. It is, we think, somewhat significant, too, that sections 2497 and 2498 of the Annotated Code are placed now in the law relating to landlord and tenant, and immediately succeeding sections furnishing remedies for enforcing agricultural liens. In the Code of 1880 they stood in a connection perfectly consistent with the view here announced of the statute, though not so markedly so as they do in their present connection. We have given the subject a most thorough examination, due to its importance, and are satisfied that the construction of section 2498 herein announced is the one most in harmony with the language of the statute looking to the old law, the evil, and the remedy, with justice, and with the peculiar condition and needs of our agricultural population. We refer to the following authorities as bearing out the reason and spirit of our views, in addition to those already cited: "Rent is compensation for the use, and implies the continued existence of the property to be used," says Justice Brewer in the case referred to, at page 691, 25 Kan. To the same effect, in stronger language, is *Porter v. Tull*, 6 Wash. 408, 22 L. R. A. 617. See *Graves v. Berdan*, 26 N. Y. 498; *Gates v. Green*, 4 Paige, 855, 27 Am. Dec. 68; *Coogan v. Parker*, 2 S. C. N. S. 255, 16 Am. Rep. 659; *Penn v. Kearny*, 21 La. Ann. 21; *Levey v. Dyess*, 51 Miss. 510,—as to the tendency of our decisions; *Willard v. Till-*

man, 19 Wend. 358, a striking case, where, even in New York, prior to the act of 1880, in a case where the lease was of three rooms and a strip of land 200 feet in length, and the buildings were wholly destroyed, it was held that the interest in the land remained, and was capable of beneficial enjoyment, but that the tenant was entitled to a *pro rata* abatement of the rent, and could only be held for an amount which would bear to the entire rent a proportion which the value of the use of the reversionary premises bore to the whole at the date of the annual rent. See also *Viterbo v. Friedlander*, 120 U. S. 707, 30 L. ed. 776; *Coogan v. Parker*, *Gates v. Green*, and *Penn v. Kearny*, *supra*. And, specially, see the masterly opinion in *Coogan v. Parker*, *supra*, a case noticing, as does Mr. Justice Brewer in the case cited *supra*, the distinction made at common law between destruction of the leased premises by the act of God or the public enemy, and by accident, as to the reasonableness of which distinction we express no opinion. See *Coogan v. Parker*, 2 S. C. N. S. 255, 16 Am. Rep. 666, 667. The distinction seems to have obtained at common law, whether the accidental fire was due to negligence of the lessee or not. The distinction seems to be approved in *Coogan v. Parker*, but repudiated in *Whitaker v. Hawley*, *supra*. Our statute states the matter for us. In this case, *Coogan v. Parker*, the court says on the general subject, in the absence of any statute at all: "Rent is defined to be a certain yearly profit; . . . in retribution for the use. . . . The existence of rent, therefore, presupposes land, and a possible usufruct, for there can be no just demand for retribution or compensation for that which does not exist. An agreement to pay rent, whether a simple contract or a covenant in form, is controlled by the nature of rent. If the conditions under which rent accrues do not exist, there is nothing for either an agreement or a covenant to pay rent to rest upon. . . . Where parties contract together in terms that import the relations expressed by the foregoing definitions, it is obvious that their contract ought to receive such a construction as to preserve the rights and equities lying at the foundation of such definitions. The equity of a contract is its life, springing out of the idea of a reciprocity of benefits and obligations. . . . A contract is the law of the parties. Its equity is the reason of that law. And it is not a mere figure of speech to say that where the reason ceases the law ceases also." This equity—the reasons of the law as related to this subject-matter—is for us happily crystallized in section 2498 of the Annotated Code of 1892.

We do not think the first instruction subject to the criticism made of it. The principle announced, not as clearly as it might have been, but substantially, is that, if the gin-house constituted a material part of the consideration of the lease, on its destruction by fire without the lessee's fault or negligence the rent should be abated in the proportion that the value of the use of the gin-house and machinery bore to the value of the

use of the whole premises. It was not intended to authorize "damages," and, fairly construed, does not do so. The instruction is inartificially drawn, but we do not think

it could have misled the jury. We find no error.

Affirmed.

OHIO SUPREME COURT.

Julia L. WEBSTER *et al.*, *Plffs. in Err.*,
v.
DWELLING HOUSE INSURANCE COM-
PANY of Boston, Mass.

(33 Ohio St. 79.)

1. The interest of a husband in the dwelling house of his wife, used as a homestead by the family, is sufficient to support a recovery by the two jointly on a policy of fire insurance issued to both.
2. Rules followed in courts of equity respecting forfeitures may be available in a suit at law where the facts make their application necessary to the ends of justice.
3. Provisions for forfeitures are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced.
4. If it be left in doubt, in view of the terms of the instrument and the relation of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction will be adopted which is most beneficial to the promisee.
5. Where a farm dwelling and farm implements are insured by a fire policy issued to a wife and husband, and the dwelling is used and occupied as a family homestead, and the implements are used on the farm where the dwelling is situate, a representation and warranty in the application that the property is owned by them jointly should, unless the contrary intent is manifest, be construed in the popular, and not in a technical legal sense, and when so construed will not be held to be untrue simply because the title to the dwelling is wholly in the wife and the title to the personality wholly in the husband.
6. The examination required to be made by the agent of an insurance company by § 3643, Rev. Stat., relates to the physical condition of the property such as an inspection would disclose, and does not relate to the matter of encumbrances. The "change" mentioned in the statute refers to some physical change in the insured property, its use, or its surroundings, and does not relate to a change respecting encumbrances.
7. Where a policy of insurance stipulates that if any part of the property shall be encumbered by a mortgage without the consent of the company, the policy shall be void, such stipulation is not within the provisions of § 3643. And if, after the issuing of the policy and before the loss, such encumbrance is

*Headnotes by the COURT.

created by the insured without the consent of the company, the policy is thereby invalidated.

(December 20, 1895.)

ERROR to the Circuit Court for Ashtabula County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

Statement by Spear, J. :

Action on a policy of fire insurance issued to Julia L. Webster and James E. Webster, wife and husband, for \$2,000 on dwelling house and \$250 on farm implements. Defense of forfeiture: First, that representation and warranty made by insured was that property was owned jointly by them, while, in fact, the house was owned wholly by the wife, and personal property wholly by the husband; second, that after issue of policy and before loss insured placed a mortgage lien on the real estate, without notice to or consent of the company, in violation of the terms of the policy. Recovery for amount of insurance on house, no proof being offered of loss or value of personality. Reversed by circuit court on the ground of error in the charge to the jury.

Messrs. Edward H. Fitch and A. J. Trunkay, for plaintiffs in error:

The holding and construction given to the statute (Rev. Stat. §§ 3643, 3644) by the court of common pleas is right.

Queen Ins. Co. v. Leslie, 47 Ohio St. 409, 9 L. R. A. 45; *People's Mut. F. Ins. Co. v. Bowerson*, 5 Ohio C. C. 444; *United Firemen's Ins. Co. v. Kukral*, 7 Ohio C. C. 358.

The construction I contend for has been given by the supreme court of Maine in *Cannell v. Phaniz Ins. Co.* 59 Me. 582.

See also *United Firemen's Ins. Co. v. Kukral*, *supra*; *Reilly v. Franklin Ins. Co.* 43 Wis. 454, 28 Am. Rep. 552; *Cayon v. Dwelling House Ins. Co.* 68 Wis. 510; *Emery v. Piscataqua F. & M. Ins. Co.* 52 Me. 324; *Barnard v. People's F. Ins. Co.* 66 N. H. 401.

Messrs. Squire, Sanders, & Dempsey, for defendant in error:

There is not an intimation to be found in any language used in this statute that the word "change" refers in any way to the interest of the assured, or to his title, or to encumbrances.

To confine the provisions of this statute as to "changes" and "intentional fraud" to the subject-matter, in regard to which the legislation is had and to what precedes in the very sentence in which the words occur, is but to

NOTE.—For undivided interest as sole and unconditional ownership, see *Beebe v. Ohio Farmers' Ins. Co.* (Mich.) 18 L. R. A. 481, and *note*.

30 L. R. A.

construe the section grammatically and according to one of the fundamental rules of construction of statutes, namely: "All words of a general nature, not express and precise, are to be restrained unto the fitness of the subject matter or the person."

Brigel v. Starbuck, 84 Ohio St. 280; *Aultman, M. & Co. v. J. F. Seiberling Co.* 81 Ohio St. 201; *Shultz v. Cambridge*, 88 Ohio St. 659; *Lane v. State*, 89 Ohio St. 812; *Myers v. Seaberger*, 45 Ohio St. 234; *Howland v. Carson*, 28 Ohio St. 628; *Elliott v. Shaw*, 32 Ohio St. 481.

Spear, J., delivered the opinion of the court:

The action of the trial court which was the ground of reversal may be more briefly treated by considering defendant's requests to charge which were refused than by a review at large of the charge as given.

1. As applicable to its defense of forfeiture by reason of alleged false representation and warranty regarding ownership of property, the defendant requested the court to charge that "no recovery can be had in this action for the loss of any property described in the policy if the jury are satisfied from the evidence that Mrs. Webster had no interest or ownership in the personal property mentioned in the policy, and that Mr. Webster had no ownership or interest in the dwelling house described in the policy."

The claim of the company on this branch of the case was, and is, that in the face of the representation and warranty of the insured that they jointly owned the property, there could be no recovery on a policy issued to them jointly so long as the proof disclosed that the wife was sole owner of the dwelling and the husband sole owner of the personality; in effect that the agreement was violated the moment it was made, and although the parties had paid the company \$45 as premium, which the company retained, yet that there never was any valid contract, and the insured, although acting in entire good faith, never had a dollar of insurance on their property.

Perhaps, technically speaking, the claim is not one of forfeiture, for forfeiture is deprivation or destruction of a right in consequence of the nonperformance of some obligation or condition, and we are not accustomed to associate the idea of forfeiture with a contract which has not existed; but manifestly the law as to forfeiture will furnish a guide to the proper disposition of the question. Relief against forfeitures is matter of equitable cognizance, but rules applicable to the subject are resorted to in courts of law, and there seems no good reason why the principles which govern courts of equity should not be available in a suit at law where the facts make such cognizance necessary to the ends of justice.

A primal rule is that forfeitures are not favored either in equity or at law; indeed it is declared as a universal rule that courts of equity will not lend their aid to enforce a forfeiture. Following as a corollary from this, provisions for forfeitures are to receive, when the intent is doubtful, a strict construc-

tion against those for whose benefit they are introduced. *West v. Citizens' Ins. Co.* 27 Ohio St. 1, 22 Am. Rep. 294; *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156, 58 Am. Rep. 806; *Blackwell v. Miami Valley Ins. Co.* 48 Ohio St. 533, 14 L. R. A. 431; *Livingston v. Stickles*, 7 Hill, 255; *Catlin v. Springfield F. Ins. Co.* 1 Sumn. 434; *Breasted v. Farmers' Loan & T. Co.* 8 N. Y. 305, 59 Am. Dec. 482. As said by Sherman, J., in *Bond v. Swearingen*, 1 Ohio, 403, respecting a statutory forfeiture: "Whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the statute creating it." And by Porter, J., in *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 418, 88 Am. Dec. 337: "It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. *Potter v. Ontario & L. Mut. Ins. Co.* 5 Hill, 149; *Barlow v. Scott*, 24 N. Y. 40. It is also a familiar rule of law that if it be left in doubt, in view of the general tenor of the instrument and the relations of the contracting parties, whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. *Co. Litt.* 183; *Bacon, Law Maxims*, Reg. 8; *Doe, Webb, v. Dixon*, 9 East, 16; *Marvin v. Stone*, 2 Cow. 806. This rule has been very uniformly applied to conditions and provisos in policies of insurance, on the ground that though they are inserted for the benefit of the underwriters, their office is to limit the force of the principal obligation. *Yeaton v. Fry*, 9 U. S. 5 Cranch, 341, 3 L. ed. 119; *Palmer v. Warren Ins. Co.* 1 Story, C. C. 364, 365; *Pelly v. Royal Exch. Assur. Co.* 1 Burr. 349." See also *Western & A. Pipe Lines v. Home Ins. Co.* 145 Pa. 346; *Chandler v. St. Paul F. & M. Ins. Co.* 21 Minn. 85, 18 Am. Rep. 385; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Riddlesbarger v. Hartford Ins. Co.* 74 U. S. 7 Wall. 386, 19 L. ed. 257; *Baley v. Homestead F. Ins. Co.* 80 N. Y. 21, 36 Am. Rep. 570; *Burleigh v. Adriatic P. Ins. Co.* 90 N. Y. 221; *Griffey v. New York Cent. Ins. Co.* 100 N. Y. 417, 58 Am. Rep. 202.

Applying the foregoing rules, how stands the case?

This defense is based entirely on the language of the representation. In giving construction to this representation, what meaning should be placed on the words used? Manifestly such as was intended by the applicants, and which the company knew, or ought to have known, they intended. Should the word "jointly" receive construction in accordance with strict legal ideas? If so, does it mean that the plaintiffs were joint tenants as defined by Blackstone, giving right of survivorship? An Ohio lawyer, even, would hardly have that in mind, for joint tenancy does not exist in Ohio. Should the word be held to imply tenancy in common, where two or more hold by an undivided possession but several freeholds, neither being entitled to an exclusive part, but each

entitled to occupy the whole in common with the others, and at the death of one his interest to pass to his heirs and not to the survivors? Plaintiffs claim that they did in fact state to the agent who filled up the application the exact condition of the title, and it was not their fault if he did not so write it. But, be this as it may, and even though the word would suggest tenancy in common to the legal mind, these plaintiffs were not lawyers; the property was in the country, and they were, without doubt, plain country folk. Who would suspect them of intending to be understood that their ownership was that of joint tenants, or of tenants in common, within legal definitions? Rather is it natural to presume that they used the word in the popular sense, implying that they owned the property together, and that no other person was interested in it. And they did. They were in the joint possession of the real estate, and were enjoying the use of the personality together, and no third person was the owner, in any sense, of any part of it. While the title to the real estate was in the wife, and while the husband had no estate in it, yet he had, by force of recent statutes, an inchoate dower right in it, liable to become vested in case she should die seized of it, leaving him her widower, a substantial property right, capable of valuation in a proper proceeding, and under § 8111, Rev. Stat., he could not, even during her life, their marital relations remaining, be excluded from her dwelling.

Nor was the alleged failure to state the exact ownership prejudicial to the company. The purpose of statement of ownership is to prevent the making of wagering contracts, or such as would afford a temptation to the insured to purposely or negligently permit the property to burn; and this purpose would seem to be fully accomplished when it appears that the wife and husband own all the property covered by the policy, and are in possession and use of it in common, although there be a small portion of which the wife has not legal ownership, for usually there is no more vigilant guardian of the husband's interests than is the wife. The property is used by both, for their common comfort and welfare, and that of the family. In the husband's absence the wife has, ordinarily, the entire charge of it, and her interest in its preservation is scarcely second to his.

If the company may stand on a strict technical construction of the words used, and hold the plaintiffs to them though they did not fully apprehend their legal effect, and ought not reasonably to have done so, it is placed in the position of tempting patrons into the payment of premiums, and into resting on a mistaken belief that they have indemnity, only to find, when the trial comes, that their reliance had been upon a broken reed. A court cannot sustain such a contention. If technical forfeitures are to be maintained on such grounds, confidence in commercial faith will be weakened and important property rights impaired. It would be, as it seems to us, carrying technicality to a most unreasonable length, to hold that the

representation as to ownership shall forfeit the policy.

Whether a joint action could have been maintained for the personal property we need not determine, for no proof of loss of personal property, or its value having been offered, that claim dropped out. It was held in *Dwelling House Ins. Co. v. Leedy et al.*, decided at January term, 1894, though not reported, that the interest of the husband in the wife's dwelling house used as a homestead by the family, is sufficient to support a recovery by the two jointly on a policy issued to both, and we but follow that case in holding that the action was properly brought in the name of both in this case.

The instruction was properly refused.

2. Defendant also requested the court to charge that "if the plaintiff, after the issuing of the policy sued upon and before the loss, placed a mortgage lien upon the real estate upon which the house burned was situated, without notice to the company, or its consent to such encumbrance, such action on the part of the plaintiff was in violation of the terms of the policy and rendered the policy void, and the plaintiffs, if the jury find the facts as above stated, cannot recover in this action."

This the court refused to give, and charged in substance that the creating of a mortgage encumbrance after the issuing of the policy and before the fire, without notice or consent by the company, would not of itself constitute a defense, but that it would constitute a defense if the jury should find that the giving of such mortgage materially increased the risk. This holding rests upon the proposition that the facts bring the case within the operation of § 8643, Rev. Stat., and that it is governed by that part which reads as follows:

"Any person, company, or association hereafter insuring any building or structure against loss or damage by fire or lightning, by a renewal of a policy heretofore issued, or otherwise, shall cause such building or structure to be examined by an agent of the insurer, and a full description thereof to be made, and the insurable value thereof to be fixed by such agent; in the absence of any change increasing the risk without the consent of the insurers, and also of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurers received a premium, shall be paid; and in case of a partial loss, the full amount of the partial loss shall be paid."

No question is made as to the import of the language of the policy in respect to the creating of mortgage liens. It is so clear that its meaning could not have been misapprehended, and is to be enforced as written unless the statute controls the case.

We are not able to agree with the construction of this statute given by the learned trial judge. As we construe the statute, the examination required of the agent before taking the risk relates to the physical condition of the property such as an inspection would disclose, and does not relate to the matter of

encumbrances, and hence the change referred to in the statute relates to some physical change in the insured building, its use, or its surroundings, which would, by reason of changed condition, naturally increase the hazard incurred by the company, and does not relate to a change respecting encumbrances. And that where a policy of insurance, as in this case, stipulates that if any part of the property shall be encumbered by mortgage without the consent of the company the policy shall be void, such stipulation is not within the provision of § 8643, and the right of the company to make such a condition, and of the insured to accept it, remains notwithstanding the statute. So that, if, after the issuing of the policy and before the loss, such encumbrance is created by the insured, without the consent of the company, the policy is thereby invalidated.

The question involved is not different in principle from one of the questions disposed of in *Sun Fire Office v. Clark*, decided Octo-

ber 29, 1895, 53 Ohio St. 36, and the reasoning of the opinion in that case is so satisfactory, and so well supports the conclusion here reached, that further discussion is deemed unnecessary. It is further supported by the able opinion of the learned judge of the circuit court in *Dwelling House Ins. Co. v. Webster*, 7 Ohio C. C. 511, to which special reference is here made. Our conclusion is also in harmony with the decision in *Queen Ins. Co. v. Leslie*, 47 Ohio St. 409, 9 L. R. A. 45, and not inconsistent with the judgment of this court affirming *People's Mut. F. Ins. Co. v. Bowersox*, reported in 5 Ohio C. C. 444, and the judgment affirming *United Firemen's Ins. Co. v. Kukulak*, reported in 7 Ohio C. C. 356, when the records in those cases are understood.

It follows that in refusing this instruction, and in the charge as given, the common pleas erred.

Judgment affirmed.

OKLAHOMA SUPREME COURT.

Irwin S. DE FORD *et al.*, *Plffs. in Err.*,
v.

W. W. PAINTER, Sheriff of Logan
County.

(8 Okla. 80.)

*1. De Ford, one of the plaintiffs in error, owned a lot with a building thereon in the business part of the city of Guthrie, and rented the basement and first floor for the sum of \$1,300, and a part of the second floor for offices for the additional sum of \$250. He resided with his family on a portion of the second floor, valued at the sum of \$250 per annum. The family had no other home. Held, that the building was the dwelling of De Ford, and the home of his family, within the meaning of section 2, chapter 24, Stat. 1893, and was the homestead of plaintiffs in error, and as such exempt from execution.

2. Under this section of the statute, providing for the exemption of land, as a homestead in a city, which has been improved by a building used by the family as a home, the homestead is not lost or forfeited by the circumstances that the style of the building resembles in its architecture ordinary business structures, and that it is on one of the principal business streets, flush with the sidewalk, that the larger portion of the house is rented for the purpose of business and revenue, and the smaller part used for a home, and that the family resides on the second floor and not upon the first floor of the building. If the building is in fact the only home of the family, it is exempt from execution, although its principal use may be for business purposes.

3. The interrogation of witnesses by the judge, during the progress of the case, is not error, and he may, in the exercise of his dis-

cretion, aid in eliciting material matter suggested by the evidence.

Burford, J., dissents.

(July 27, 1896.)

ERROR to the District Court for Logan County to review an order overruling a motion for new trial after the dissolution of a temporary injunction restraining the sale of the property and a finding in favor of defendant in a proceeding brought to restrain the sale of certain real estate on the ground that it was exempt under the homestead laws. *Reversed.*

The facts are stated in the opinion.

Messrs. Green & Strang, for plaintiffs in error:

The owner of a city lot, itself exempt, may design and erect thereon a building to be used as a dwelling for himself and family, and for the further purpose of leasing a portion thereof to provide an income for himself and family.

Hoffman v. Hill, 47 Kan. 611; *Layson v. Grange*, 48 Kan. 442; *Stevens v. Hollingsworth*, 74 Ill. 202; *Williams v. Starr*, 5 Wis. 534; *Spencer v. Fredendall*, 15 Wis. 666; *Hait v. Houle*, 19 Wis. 472; *Kent v. Agard*, 22 Wis. 150; *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244; *Harriman v. Queen Ins. Co.* 49 Wis. 72; *Gainus v. Cannon*, 42 Ark. 508; *Klenk v. Knoble*, 87 Ark. 298; *Skinner v. Hall*, 69 Cal. 195; *Umland v. Holcombe*, 26 Minn. 286; *Kelly v. Baker*, 10 Minn. 154; *Jacoby v. Parkland Distilling Co.* 41 Minn. 227; *King v. Welborn*, 83 Mich. 195, 9 L. R. A. 803; *Hartsfield v. Harroley*, 71 Ala. 281; *Re Tertelling*, 2 Dill. 339; *Cass County Bank v. Weber*, 83 Iowa, 63, 12 L. R. A. 477; *Methery v. Walker*, 17 Tex. 593; *Hancock v. Morgan*, 17 Tex. 582; *Fryor v. Stone*, 19 Tex. 371, 70 Am. Dec. 841; *Moore v. Whittis*, 80 Tex. 440; *Lazell v. Lazell*, 8 Allen. 575; *Mercier v. Chace*, 11 Allen, 194; *Baldwin v. Tillery*, 62 Miss. 378; *Hogan v. Manners*, 25

*Headnotes by McATEE, J.

NOTE.—See, in connection with the above case, the note to *Cass County Bank v. Weber* (Iowa) 12 L. R. A. 477.

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Kan. 559, 33 Am. Rep. 199; *Rush v. Gordon*, 38 Kan. 535; *Morrissey v. Donohue*, 33 Kan. 646; *Bebb v. Crouse*, 39 Kan. 345; *Milford Sav. Bank v. Ayers*, 48 Kan. 602; *Wilson v. Taylor*, 49 Kan. 774; *Tumlinson v. Swinney*, 23 Ark. 400, 76 Am. Dec. 432; *McDonald v. Badger*, 23 Cal. 393, 88 Am. Dec. 123; *Freem. Executions*, § 244.

All homestead exemption laws should be liberally construed.

Vogler v. Montgomery, 54 Mo. 577; *Franklin v. Coffee*, 18 Tex. 413, 70 Am. Dec. 292; *Riggs v. Sterling*, 60 Mich. 643; *Bouchard v. Rou-rassa*, 57 Mich. 8; *Campbell v. Adair*, 45 Miss. 178; *Rhodes v. McCormick*, 4 Iowa, 874, 68 Am. Dec. 663; *Woodman v. Lane*, 7 N. H. 245; *Waples, Homesteads & Exemptions*, 188; *Horn v. Tufts*, 39 N. H. 483.

The homestead is the dwelling place of the family where they permanently reside.

Cook v. McChristian, 4 Cal. 26.

Improvements, as the word is used in the homestead exemption laws, embrace whatever is made a fixture upon the land.

Greenwood v. Maddox, 27 Ark. 660.

Messrs. Wisby & Horner, for defendant in error:

Upon the proposition as to whether a debtor ought to be permitted to withdraw assets from the reach of creditors under cover of the exemption law, the cases hold that he ought not, and the only difference in the cases is the different manner of preventing the fraud.

Phelps v. Rooney, 9 Wis. 70, 76 Am. Dec. 244; *Rhodes v. McCormick*, 4 Iowa, 868, 68 Am. Dec. 663; *Casselman v. Packard*, 16 Wis. 114, 93 Am. Dec. 710.

The spirit of the law is regarded as superior to its letter.

Church of Holy Trinity v. United States, 143 U.S. 457, 36 L. ed. 227; *Bebb v. Crouse*, 39 Kan. 342.

The Kansas court recognizes the doctrine of "principal use" in full, and the cases do not profess to be decided upon any other theory.

Hogan v. Mannors, 23 Kan. 552, 38 Am. Rep. 199; *Rush v. Gordon*, 38 Kan. 535; *Bebb v. Crouse*, 39 Kan. 342.

So with California.

Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516; *Laughlin v. Wright*, 68 Cal. 113; *McDowell v. His Creditors*, 103 Cal. 264; *Re Noah's Estate*, 78 Cal. 590.

So in Texas.

Blum v. Rogers, 78 Tex. 530; *Blackburn v. Knight*, 81 Tex. 326. See also *Garrett v. Jones*, 95 Ala. 96.

The conclusive test must be that the form, physical characteristics, and geography of the premises must be such as, when taken in connection with their use by the owner, and their value where the statute creates a limit as to value, will convey notice to persons of ordinary prudence who deal with him that they are his homestead.

Thompson, Homesteads & Exemptions, § 104; *Waples, Homesteads & Exemptions* (1893), p. 183; 2 *Freem. Executions*, § 244; *J. I. Case Co. v. Joyce*, 89 Tenn. 237.

The action of the court in interrogating the witness Gill was not only proper, but was commendable.

1 *Thompson, Trials*, § 355.

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McAtee, J., delivered the opinion of the court:

This is a proceeding in injunction to restrain the sheriff of Logan county from selling under execution the following described property, to wit: lot numbered 13, in block 56 in Guthrie proper, in Logan county, for the reason that the property was and is exempt from execution as the homestead of the plaintiffs in error. In the year 1890, Irwin S. De Ford, one of the plaintiffs in error, erected the building situated on the lot herein described, being a lot 82 feet by 80 feet, in the central part of the business portion of Guthrie, to be used, upon his own statement, as "a building to live in, and a part of it to rent for an income for a living" for his family, which consisted of his wife and three children. The basement and first floor were arranged for business purposes. The rooms on the second floor were arranged to be used as business offices, and a portion thereof for the use of himself and family as a "building to live in." There appears to have been no yard or appurtenances of any kind. The three front rooms on the second floor were expressly arranged for office rooms, and the seven remaining rooms on the second floor appear to have been arranged in such a manner (a part of them with folding doors) that they could have been rented for offices or used as a residence. About the 1st of March, 1891, the plaintiffs in error moved into the building, and occupied the rooms on the second floor (either four or six; the number does not definitely appear), and were so residing at the time this action was commenced in the court below. Their residence, as stated, has been continuous from the time the building was completed and occupied. The building is a business building in architecture, construction, and appearance, and cost \$8,000. The basement has been rented, at various times, as a justice's court room, saloon, and restaurant. The present rental value thereof is estimated at \$300 per annum. The first floor is occupied as a postoffice for the city of Guthrie, and its rental value is \$1,000 per annum. The rental value of the second floor is estimated at \$500. The value of the portion occupied by plaintiffs in error is estimated by Irwin De Ford at \$250, which he afterwards stated he thought was too high an estimate. Upon the trial below, the presiding judge interrogated one or more witnesses freely and at length upon matter upon which he had not been examined in chief, over the objection of the plaintiffs in error. Upon the findings made on the hearing in the trial court, the court concluded that the building in question was not exempt from execution as a homestead, and that the temporary order of injunction theretofore issued in this case should be dissolved, and that the building should be subject to the execution in the hands of the defendant in error, and for costs of the action taxed to the plaintiffs. To all of which findings of fact and conclusions of law the plaintiffs excepted. The plaintiffs, at the same time, filed their motion for a new trial, which was overruled, to which they excepted. Upon the evidence and findings

of the trial court, the questions to be determined in the case upon the facts are: (1) Whether the leasing of so large a part of the building, which is claimed by plaintiffs in error as a home, for the purpose of obtaining revenue therefrom for the maintenance of the owner and occupant and his family, destroys the homestead character of the property and the right of plaintiffs in error to claim the same as exempt from execution by reason of the claim thereof as a home by them; and (2) whether the interrogation of the witnesses by the judge in the court below is error, and, if it is error, whether it is of such a character as to entitle the plaintiffs in error to have the case reversed.

Upon the first proposition it is correctly observed, in the brief of the defendant in error, that, upon the general subject of the homestead laws, the views of the court may be "arranged into three classes, namely, those which hold that if any portion of the property be occupied for homestead purposes the whole is exempt; those which hold that the portion occupied is exempt, and the remainder not; and those which hold that the test of exemption is the principal use to which the property is devoted." The view has been held by the supreme court of Iowa "that the portion occupied is exempt, and the remainder not." This, however, has not been adopted, so far as we know, by any other court; and no argument has been presented for its adoption here. The defendant urges for acceptance the view which makes the principal use of the property the test of its exemption as a home, or of its liability to execution; that is, if the major interest in the property claimed as exempt be dedicated to use as a home, the property is exempt; but if the major use of the property claimed as exempt be dedicated to business purposes, then the property is not exempt from execution. In support of that view, the principal cases from the courts of the Western states upon the subject of urban homestead have been carefully reviewed; and it is thereupon concluded by the defendant in error that the doctrine of principal use is that which pervades the later cases. While the limit of area is that which is prescribed for the homestead in this territory, that of value is the limitation selected and provided for by the statutes of a number of the states. The laws of the various states differ in other respects; and little satisfaction, certainty, or advantage can be derived from an examination of the decisions coming from states of which we have not the statutes before us, or, having them before us, find them to be dissimilar to our own. No decision has, however, been hitherto made upon this subject in this territory, and it is important that the principal cases cited in the argument should be examined. In the leading Wisconsin case of *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244, cited and commented upon by both plaintiffs and defendant in error, the question was whether the south one third of lot 4, in block 5, in the city of Milwaukee, with the building and appurtenances thereon situated, constituted a homestead, under the provisions of the Wisconsin statute. The Wisconsin statute provides:

"Sec. 51. A homestead consisting of any quantity of land not exceeding 40 acres used for agricultural purposes, and a dwelling house thereon and its appurtenances, to be selected by the owner thereof, and not included in any town plat, or city, or village; or instead thereof, at the option of the owner, a quantity of land not exceeding in amount $\frac{1}{2}$ of an acre, being within the recorded town plat, or city, or village, and a dwelling house thereon, and its appurtenances, owned and occupied by any resident of the state, shall not be subject to forced sale or execution, or any other final process from a court, for any debt or liability contracted after the 1st day of January in the year 1849." Rev. Stat. 1849, chap. 102.

The style of the building was a store, situated in a block on one of the principal business streets in the city of Milwaukee. The basement and first floor were leased by Rooney, and occupied by tenants under him, and produced, in rents, \$1,500 a year. The rooms above were used by Rooney, the defendant in error, as a dwelling, and were worth \$250 or \$300 a year. Upon this state of facts, the court said: "We have a statute which exempts a homestead, . . . a quantity of land not exceeding in amount $\frac{1}{2}$ of an acre, in a city or village, with a dwelling house thereon and its appurtenances, and which exempted property we all know may be, and frequently is, worth \$10,000, \$20,000, \$30,000 or \$40,000. And the whole policy of the legislation of the state has been to extend, rather than to restrict, the privileges of the exemption laws. The courts, whatever they may think of the general policy of this legislation, and whatever hardships may arise in particular cases in consequence of it, can only construe and interpret the statute as they find it. When the law is on its face sufficiently intelligible, and when a case clearly falls within the operations of its provisions, I feel it my duty rigidly to enforce it, whatever may be my notions of its policy or equity; so, in the present case, while it may be a hardship that the respondent should enjoy, free from all compulsory powers of the court to subject it to the payment of his just debts, the property (the homestead, as I think it is), a portion of which he can rent for \$1,200 or \$1,500 a year, yet if the statute exempts it, we must so declare." And, after stating that Rooney occupied the premises as a dwelling house, and that it was his "home," the court says: "We therefore cannot see why, to all intents and purposes, it is not his homestead, within the meaning of our statute." It continues as follows: "The circumstance that the dwelling was situated on one of the principal business streets of the city or the fact that its external appearance or internal arrangement was like a wholesale or retail store, or because it would be vastly more valuable as a place of business than as a residence, could not affect the question. The case rests upon the fact as to whether the building was really and truly occupied as a dwelling house for himself and family. If so, they are secured in the enjoyment and use of it as such. This, we think, constitutes a homestead under the statute." The court fur-

ther says that "after what has already been said as to the signification of the word 'homestead,' as used in our statute, and the expression of our opinion that it included the limited amount of land in a city upon which is situated the dwelling house or habitation or abode of the owner and his family, it is only necessary further to remark that this court cannot restrain the operation of the statute within narrower limits than its words import." And the conclusion of the court, upon a review of the whole matter, was that "I cannot believe, in view of the legislation upon this subject, that the legislature intended that a person should lose and forfeit the benefit of the homestead exemption by omitting to use a portion of his dwelling house, or residence with his family, or by devoting such portion to some other use."

But it is claimed by the defendant in error that this case, thus clearly and definitely interpreting a statute like our own, was completely overruled in the later case of *Casselman v. Packard*, 16 Wis. 114, 82 Am. Dec. 710. In that case the property claimed as exempt was situated in the village of Sparta, the land not exceeding in quantity $\frac{1}{2}$ of an acre. There were situated upon it, besides the dwelling house, in which the claimant resided with his family, various other buildings, which were used and occupied for stores, warerooms, shops, schoolrooms, offices, etc. The claimant occupied the only dwelling house thereon, and its appurtenances. He rented the other buildings upon the $\frac{1}{2}$ of an acre for stores, warerooms, shops, schoolrooms, and offices. He yet claimed them also as his homestead, in addition to the dwelling house wherein his family resided, and which he occupied as a home. The circuit court did not sustain his claim as to the various other buildings, which were rented. That court, in passing upon this state of facts, says that "we cannot believe the legislature ever intended that a person should hold all the buildings which might be erected on $\frac{1}{2}$ of an acre of ground in a city or village, whatever might be their character, or for whatever purposes they were designed, under the homestead exemption law, merely because he might live in one of them. Such a construction seems to us most unreasonable. The statute exempts a given quantity of land, with a dwelling house thereon, and its appurtenances. Of course the exemption of that quantity of land has regard to the purpose for which it is used. It was supposed that this amount of land might be convenient and necessary for the comfort and enjoyment of the dwelling house. Nor are we prepared to say that the entire quantity of land must be devoted exclusively to the use of the dwelling. In addition to the dwelling, a person perhaps might erect a small shop or building of that character on the lot, which he himself used and occupied for the purpose of his trade or business, without forfeiting the exemption. But it is not necessary to express any opinion upon that point in this case; for the testimony shows that there were various buildings on the lot, which he rented for offices, stores, schools, etc.; and it is very clear that these were not exempt." The

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opinion was rendered in this case by the same judge who prepared the opinion in the *Phelps-Rooney Case* three years earlier. No reference was made to the *Phelps-Rooney Case*, and it was not therefore modified or overruled in any sense, to any degree. Indeed there was no occasion for it. The state of facts was wholly different. The *Phelps-Rooney Case* is precisely like the one in hand in this court. It determined that, upon the provision of a statute like our own, the homestead right may exist in a building occupied as a home by the family of the claimant, notwithstanding the fact that the building was erected upon one of the principal business streets of a large city, and that the basement and first stories were rented out for business purposes, and produced a large revenue to the homestead claimant, amounting to \$1,500 per annum, and that the upper rooms occupied as a home by himself and family were of very subordinate value. The case of *Casselman v. Packard* simply decides, for the state of Wisconsin, that a homestead claimant may not claim as exempt the house in which his dwelling is upon $\frac{1}{2}$ of an acre of land claimed as exempt, within the business limits of a city, and also devote the rest of the $\frac{1}{2}$ of an acre of land to stores, warerooms, shops, schoolrooms, offices, and other purposes, alien to the homestead character, and claim them also as exempt. This case does not support the contention of the defendant in error, that if the principal use of a single house in which the claimant resides within the city limits be devoted to business purposes, it will exclude the exemption of the whole house, under the statute, for homestead purposes. The cases of *Blum v. Rogers*, 78 Tex. 580, and *Blackburn v. Knight*, 81 Tex. 326, are cases decided by the supreme court of Texas, and are interpretations of a statute which is not before us, and the provisions of which are not cited in the briefs of counsel, nor in the opinions of the court. They can therefore render but little service in determining the question. In the former case, the owner of a 2-acre block had, on the east half, his residence and all the appurtenances, except his cow lot, which was on the west half. The rest of this half he cut up into three lots, on each of which he put a dwelling for rent. Each lot was fenced, and a private alley was run between the east and west halves of the block. He reserved the ground around the houses, and the right to take water from the premises, which he sometimes exercised, though there was an abundant cistern near his residence. He also occasionally used the ground about the houses for garden and other purposes. Upon this state of facts, it was held that the three lots, separated by the alley, separately improved, each separated from the other by a division fence, and all separated from the homestead by the alley, "were practically divided from the homestead, and were not exempt from execution." In the latter case of *Blackburn v. Knight*, it was shown that defendants had long since built on the lot which they now claim as their urban homestead, and had ever since rented the premises to tenants, and only used a strip on the lot about 14 feet wide for the

purpose of hauling wood, etc., to their residence, on an adjoining lot. The claim of homestead can only be sustained as to this strip. No rule can be drawn from the state of facts in either of these cases by which the proposition can be sustained that the test of exemption in the occupancy of a single building is the principal use to which the property is devoted. No such doctrine was in fact sought to be established, or announced, or was in question, in either of these cases. In the case of *Re Noah's Estate*, 73 Cal. 590, cited by the defendant in error in support of his position, it was held: "Noah died, making no provision in his will for his widow, leaving no community property; and a four-story brick business block, valued at \$25,000 is the only separate real property. This could not be divided without material loss. No homestead was set apart during the husband's lifetime. The widow applied to the court to set one apart. Cal. Code Civ. Proc. § 1465, provides that the court shall set apart a homestead, none having been selected during the lifetime of the deceased, out of his real estate. The section referred to provides that, 'if no homestead [as was the case here] has been selected, designated, and recorded during the lifetime of the deceased, the court must select, designate, and set apart, and cause to be recorded, a homestead, for the use of the surviving husband or wife and the minor children, . . . out of the common property, or, if there be no common property, then out of the real estate belonging to the deceased.'" The homestead selection was sought for by the widow. It was held that, as the property in question was of such a nature that it could not have been selected as a homestead during the lifetime of the deceased, the petition was properly denied. In the absence of the California statute, which makes provision for the family while both husband and wife are living, it is impossible to form any conclusion, or to attach to the opinion the weight which is sought to be given to it by the defendant in error. In *Ackley v. Chamberlain*, 16 Cal. 181, 76 Am. Dec. 516, a building originally intended as a family dwelling and store house, but changed during its erection so as to adapt it to hotel purposes, but also occupied in part by the family as a home, was held exempt from forced sale. A like construction was placed upon a similar statute in Nevada, in the case of *Goldman v. Clark*, 1 Nev. 607, in which the supreme court of that state held that a home in an incorporated town, constructed so as to be more suitable for a boarding and lodging house than for a residence merely, and much the larger portion of which was usually rented to lodgers, was exempt as a homestead. The doctrine of principal use was plainly excluded. In the case of *Garrett v. Jones*, 95 Ala. 96, the house was built in a business part of the town, and used principally as a store, although the owner (an unmarried man) slept in a small back room, and took his meals elsewhere. It was construed not a homestead. Upon that state of facts, the supreme court of Alabama said that it "may be laid down as a safe and

conservative rule on that subject that where the trade adaptation and use of a building are incidental or secondary only to its habitation, as a dwelling where the chief use of the structure is that of a home for the owner, and some part only, not essential to this end, is fitted up and used as a shop, an office, or salesroom,—it is a homestead. But, when this state of facts is reversed, and the residence feature is only auxiliary to the business use,—where only a relatively small part of the building is devoted to the uses of habitation, and the chief adaptation and use are those of business,—the building is not a homestead, even though the occupant have no other home, and uses this for all the purposes of living." In the cases above cited from Texas and California, the statutes upon which these interpretations are made is absent; and, if the statute of Alabama providing for the exemption of homesteads is similar to our own, we understand this ruling to support the contention of defendant in error. The same remark may be made upon the case of *Re Noah's Estate*, 73 Cal. 590.

Cases not showing a similar state of facts, nor presenting the question here proposed and coming from states of which the statutes have not been presented to us, or are unlike our own, do not materially aid us in the solution of the case, nor can we safely follow general propositions cited from such cases. The question arises solely upon a right provided for by the statutes of this territory. We must look first to the statute itself; and, since no decisions have been made upon the statute in this court hitherto, we must, in the next place, look to the courts of states in which the statutory provisions are most like our own, and, if possible, to the courts of those states whose situation is similar to our own, and from which our people have, for the most part, come. It is not too remote to observe that, while the legislature of this territory adopted this statute, of the people who created the legislature, and from which the legislature came, a large majority of them were formerly residents of the state of Kansas, and, more remotely, of other Northern and Western states, and that the legislative representatives of this territory must have passed the statute with the interpretation placed upon similar statutes in the states where the population of Oklahoma, for the most part, originated.

The statutes which we must interpret are found in chapter 84, title *Exemptions*, §§ 2844, 2845, p. 580, Okla. Stat. 1898, and are as follows:

"(2844) Sec. 1. The following property shall be reserved to the head of every family residing in the territory exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: . . .

"(2845) Sec. 2. The homestead of a family not in a town or city shall consist of not more than 160 acres of land, which shall be in one tract or parcel with the improvements thereon. The homestead in a city, town, or village consisting of a lot or lots, not to exceed 1 acre with the improve-

ments thereon; provided, that the same shall be used for the purpose of a home for the family; provided also, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired. . . ."

The conditions which entitle the debtor to claim the protection here provided for, in a city, town, or village, are, (1) that he shall have a family; (2) that the lot or lots in any town, city, or village shall not exceed in amount 1 acre, with the improvements thereon; (3) that the said lot or lots shall not exceed 1 acre, and shall be used for the purposes of a home for the family. The privilege is enlarged by the further provision that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired. The statute is without other limitations. It does not prescribe the style of the building which the homestead claimant shall erect; nor does it prescribe that the building should not resemble in architecture ordinary business structures. No limitation is placed upon his choice. It does not provide that the building in which the home is made shall not be placed upon one of the principal business streets. It does not provide that the house shall not be flush with the sidewalk, or compact with other houses, or that the family shall not take boarders in the house, or that the owner shall not rent any particular portion of it for the purpose of deriving a revenue therefrom. It is in no part of the statute provided that a part of the dwelling shall not be used for any other purpose than a home, or that the major part of the building shall be used for a residence and a minor part for business, if so used at all. Nor does it provide that the family shall live in the basement, or on the first floor, the second floor, or upon the third floor. The sole limitation upon the general subject, including all these enumerated particulars, is that "the same (the homestead) shall be used for the purpose of a home for the family, and that the space which the homestead shall occupy shall not exceed 1 acre with the improvements thereon." The same section of the statute which provides for the exemption from forced sale of a homestead "in a city, town, or village, consisting of a lot or lots not to exceed 1 acre, with improvements thereon, provides also that the 'the homestead of a family not in a town or city shall consist of not more than 160 acres of land . . . with the improvements thereon.'"

The provision of 160 acres of land, in the latter clause, is a provision intended, not only as a bare homestead, but as a homestead accompanied by a method of income and a means of support for the family. Could it be contended that, if the income from the land of the rural homestead be greater in value than the rental value of the house in which the homestead claimant resides, then the doctrine of principal use should govern, and the whole homestead be forfeited as a homestead and become subject to execution? In support of such a theory, it is to be argued that the rural homestead is often of great value, and that the revenue

from it exceeds the needs of the family, and that the result is thus a fraud upon creditors. And yet the doctrine of principal use has never, to our knowledge, been applied to the rural homestead. The provisions for rural homesteads are provided for in like terms by the statutes. The principles which govern the interpretation of one must be applied to the other. No substantial reason can be given for the application of the doctrine of principal use to the urban homesteads which does not apply with equal force to the rural homestead; and to make the application of that doctrine to the rural homestead would be to destroy the homestead privilege, as it is provided for by the statute, and to leave to the judgment of the court in each instance whether the value of the revenue from the homestead was not greater than the value of the mere residence upon it, and, if found to be so, that the homestead would then cease to be exempt, and to submit the security of the homestead, not to the express and exact provisions of the statute, but to the judgment of the court. In the language of the court in *Stevens v. Hollingsworth*, 74 Ill. 208, it would be difficult to explain "why the garden, stables, yards, orchard, etc.," upon the rural homestead "shall be exempt, and the shop, mill, or business house, although indispensably necessary to earn a support for the family, and located on the same lot of ground with the residence, shall not be exempt." We are aware that, in the case of *Greeley v. Scott*, 2 Woods, C. C. 657, Fed. Cas. No. 5,748, Mr. Justice Bradley, in construing a constitutional provision of the state of Florida upon the subject of "homestead," stated that if the rural homestead should become the scene of a diversity of industries, and the farmer owning 160 acres should undertake to establish thereon a sawmill, a gristmill, and a carding and fulling mill, he could not claim all of these separate businesses as pertaining to, and a part of, his homestead, and exempt from execution. The facts cited in the opinion of Justice Bradley would be an appropriate citation against a construction of our statute which would undertake to say that a diversity of industries might be established upon the various portions of an acre in a town or city, under color of the homestead privilege, and might be claimed as exempt from forced sale for the payment of debts. Such a construction we are not making. The construction here made is that which we hold the law to be of this territory, as applied to the facts as they are presented in this case. The statute may be invidious to the rights of creditors. It may be made the cover of great injustice. A large fortune derived from the wealth and resources of creditors may be invested under its protection, and be exempt. Such methods, if such should be the result, might reflect very injuriously upon the credit of the territory. But, if these reflections are just, they are matters to be presented to the legislature for the purpose of urging a modification of the law.

These reflections, however, do not aid us in determining what the statute means. The judicial function is to determine and declare

what the law is as it now stands. It is the privilege of the court, as well as its duty, to refrain from undertaking to alter or to give any other than that plain meaning to the law which another branch of the government has enacted and declared. The government is more secure, and the people surer of their legislative rights, when each branch of the government keeps within its own proper province. The law seems plain; and if the people of this territory wish it otherwise it is in their power to make that wish manifest. The legislative body meets in this territory every two years, with full authority to legislate upon this subject, to alter, amend, or entirely revoke this statute. While this particular case may appear to bear upon the interests of the creditor, we cannot make the law, but must declare it just as we believe it to be. The statute for the state of Wisconsin, providing for the exemption of an urban homestead, is set forth above in terms so similar to those of our own as to defy distinction, except as to the amount of land which may be claimed as exempt. We approve the views of the supreme court of that case, as expressed in *Phelps v. Rooney*, cited above, interpreting and construing that statute.

The statute of the state of Minnesota, providing for the exemption of a homestead, exempts, within a city, town, or village, "as a homestead a quantity of land not exceeding one lot." In the case of *Jacoby v. Parkland Distilling Co.* 41 Minn. 227, the following facts were, under this statute, submitted to the court for a ruling: This was an action by Fanny Jacoby to determine the adverse claims of the Parkland Distilling Company and others to a tract of land 66 by 165 feet, that being one lot, as originally platted in the city of Minneapolis, on which was erected a three-story brick building, finished for stores below, and with rooms for a residence above. The defendants in error claimed the building under a lien, by reason of certain judgments recovered by them against George G. Jacoby, the husband of the plaintiff in error. It was admitted upon the trial that the debts for which the judgments of the defendant in error were recovered were incurred as stated, and would be a lien upon the property if it was not exempt under the homestead act. The rooms in the second story were occupied as a residence by the plaintiffs in error, and claimed by them as their homestead. Upon this state of facts, it was said by the court that "the fact that the building on the lot in question was in part suited to and used for business purposes was wholly immaterial. . . . No restriction is placed upon the uses of any part of it, provided it is the dwelling of the debtor. This has been the settled construction of the statute for many years. *Kelly v. Baker*, 10 Minn. 154 (Gil. 124); *Umland v. Holcombe*, 26 Minn. 286. Neither can the questions of the value of the premises, or what proportion that value bears to the remaining property of the debtor, be at all important, so long as the premises are in area within the limit of exemption fixed by law. Unfortunately, our statute fixes no limit as to value upon a homestead 80 L. R. A.

exemption. It must be confessed that such a law may be greatly abused, and permit great moral frauds; but this is a question for the legislature, and not for the courts." In the case of *Kelly v. Baker*, here cited and relied upon, "the premises, in question consisted of a quantity of land in a town, upon which was a brick building two stories high, with a basement. The front part was built, rented, and used for a store, and was adapted to such use. The second story of the front part was used as a printing and job office, by a company of which the owner was a member, and also by the owner (who was a physician) as his office. The basement under the front of the building was also rented, a part of it in connection with the store, and the other part for pork-packing, in which the owner also had some articles stored. The rear part of the building was fitted up and used by the plaintiff as his dwelling house, having one entrance through the hall in the rear of his store, and connected with it by a door, and one from the rear of the building. The building was situated on a corner, having an alley in the rear. It was held that the entire building was exempt as the homestead of the owner. 'It is to be observed,' said Mr. Justice Berry, 'that no limitations were imposed by the legislature upon the use which would be made of the homestead of 80 acres, or of one lot, provided, only, it was the dwelling place of the party claiming the exemption. As to the balance beyond what was required for the site of the house, the claimant seems to have been left free to allow it to remain uninclosed, unimproved, vacant, and idle, or to devote it to any use he might choose.'" The statute of the state of Michigan (How. Anno. Stat. § 7721) exempts "a quantity of land not exceeding in amount one lot in any town, city, or village, and a dwelling house thereon, and its appurtenances, owned and occupied by any resident of this state." The provision of the statute is in substance the same as that which we are now interpreting. The supreme court of that state, in *King v. Welborn*, 83 Mich. 195, 9 L. R. A. 808, November 14, 1890, interpreted this statute. The defendants, Welborn and others, occupied lots 1 and 2, in block 48, and lot 21, in block 49½, in the village of Three Rivers. Upon lots 1 and 2 was a three-story building, used as an hotel, and a two-story wooden building in the rear, used as a dwelling house, and a barn upon lot 21, used in connection with the hotel. They lived in the hotel; had no other residence or home, or land or property, out of which to construct a homestead. The homestead was disregarded by the officer bearing the execution. The court said: "It is insisted that this building was occupied by petitioner and his family for the sole purpose of conducting an hotel, and that therefore no homestead right attached. We cannot agree with this contention. The adoption of this doctrine would be in plain defiance of the statute and render it nugatory as to those engaged in the business of hotel keeping. The benefits of this statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent

apparent anywhere to exclude the families of hotel keepers from the benefits of the act."

A constitutional provision of the state of Kansas (art. 15, § 9) provides "that a homestead to the extent of . . . 1 acre within the limits of an incorporated town or city occupied as a residence by the family of the owner, together with all improvements on the same shall be exempt from forced sale," etc. It is claimed by the defendant in error that the Kansas cases are decided upon the doctrine that the homestead was not exempt as a homestead if the building in which it is claimed is principally used for business, or other purpose than the home of the family. An examination of the Kansas cases does not give us that impression. In the case of *Hogan v. Manners*, 28 Kan. 552, 38 Am. Rep. 199, Brewer, J., in delivering the opinion of the court, says that "the fact that a party may have his store or shop or office in a part of his residence will not, of itself, destroy its homestead character. We are not called upon to decide whether the occupation by the family of the owner of a single room in a large building used chiefly for stores and offices, will give to the entire building a homestead character. All we do decide is, that where a building, whose size and number of rooms is not shown, is occupied as a residence by the family of the owner, its homestead character is not destroyed by proof that a single room or two is used by the owner for business purposes." In the case of *Rush v. Gordon*, 38 Kan. 535, the first or lower story and cellar were used by the wife for the purpose of carrying on a retail grocery and provision business. The entire real estate was used by the husband and wife in connection with their residence and the grocery and provision business. It was said by the court: "There is nothing to prevent it from being a homestead within the meaning of the homestead exemption laws, except that the wife keeps a grocery and provision store in the first or lower story, and makes use of the cellar and some other parts of the premises in connection therewith." The property was held exempt. In *Bebb v. Crouse*, 39 Kan. 342, part of the lower story and basement were leased for business purposes by tenants, and a room attached to the main building was, during a part of the time, leased, and during a part of the time occupied by plaintiffs as a butcher shop; and the question thereupon arose as to whether the occupancy of a part of the building would destroy the homestead right of the plaintiffs in that part of the building so used. The court said: "Why should not an owner do as he wishes with his own building, when it is in reality his own residence, the abode, the dwelling house, the home, of his family? Of course, if it should practically become a business house rather than a home, it would then cease to be exempt. The owner had the privilege of using any part of the building for his family, the basement, the first floor, or second floor. The exemptions do not depend upon so frail a thread as which part of a dwelling a family must use; nor does the architecture of the building, or the question whether it would be more convenient as a store than a dwelling house, decide its char-

acter. The test is whether the building was used as a residence, not nominally, but actually. We believe it was in fact the residence of the plaintiffs. It certainly was the only home that they had, and we believe it came within the provisions that exempt it from forced sale. . . . Homestead is limited in its extent in this state, and must be occupied as a residence of the family; but there is no limitation on its value." The doctrine of principal use, contended for by defendant in error, so far from being confirmed in these cases, seems to us to be emphatically refuted. That this conclusion is correct is confirmed by the fact that the authorities cited by the court in the latter case, as authority for the law there announced, are the cases of *Phelps v. Rooney*, 9 Wis. 70, 76 Am. Dec. 244, and the Minnesota cases of *Umland v. Holcombe*, 26 Minn. 286; *Kelly v. Baker*, 10 Minn. 154 (Gil. 124), and *Gainus v. Cannon*, 43 Ark. 503, which expressly announce the doctrine that if any portion of the property be occupied for homestead purposes the whole is exempt, and which excludes the doctrine of principal use. In the case of *Hoffman v. Hill*, 47 Kan. 611, the question was whether lot 5, in block numbered 16 in the city of Bunker Hill, Russell county, was exempt as a homestead. The house upon the premises was occupied as a residence by the family of Hill, and the building in which they lived was also used as an hotel and boarding house. Upon this state of facts, it was declared by the court that "it follows, from the decisions made by this and other courts of last resort, that it makes no difference that the homestead or a part thereof may be used for some other purpose than as a homestead, where the whole of it constitutes only one tract of land not exceeding in area the amount permitted to be exempted under the homestead exemption laws, and where the part claimed as not a part of the homestead has not been totally abandoned as a part thereof, by making it, for instance, another person's homestead, or a part thereof, or by using it, or permitting it to be used, in some other manner inconsistent with the homestead interests of the husband and wife." And the authorities relied upon include, along with other Kansas authorities, the case of *Bebb v. Crouse* above cited, in which the Wisconsin, Minnesota, and Arkansas authorities are relied upon. In the case of *Layson v. Grange*, 48 Kan. 440, the supreme court cites, with approval, the case of *Stevens v. Hollingsworth*, 74 Ill. 203, to wit: "The intention of the legislature in enacting the homestead exemption law was not to save a mere shelter for the debtor and his family, but it was to give him full enjoyment of the whole lot of ground exempted, to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it or by the erection of buildings upon it, either for carrying on his own business or for deriving income in the way of rent." And then the court proceeds to say that it had recently held that "it makes no difference if a part of the homestead has been used for other purposes not inconsistent with the owner's homestead interests, where the part claimed as not being

a part of the homestead has not been totally abandoned by the debtor."

These announcements upon the subject of the extent and the absolute nature of the homestead right are fortified by reference, not only to all the Kansas cases herein referred to, but also to the law as it existed in Illinois, and as it was announced in the case of *Re Tertelling*, 2 Dill. 889, Fed. Cas. No. 18,842. The adoption in this case of the law as it has been declared in the state of Illinois leaves to the homestead claimant, not only a mere shelter for himself and family, but gives to him the full enjoyment of the whole lot of ground exempt, to be used in whatever way he might think best for the occupancy and support of his family, by carrying on his own business or for deriving income in the way of rent. It also expresses the same doctrine, in another form, when it says that the homestead claimant has not totally abandoned that part of the homestead sought to be subjected to the payment of his debts. These expressions of the law leave, in our judgment, no room for the doctrine that a building in a city, town, or village in this territory, occupied as a homestead, will not be exempt from seizure under execution if the principal use thereof be dedicated to business, or used for the purpose of deriving income by renting any portion of the property whatever, provided that some portion of such building be still used as a homestead by the debtor. We have dwelt upon the Kansas cases because the provisions of the statute of that state hereinbefore cited more nearly resemble the homestead exemption act of this territory than any other homestead act which we have found in this investigation. They are stated in their historical order; and it thus appears that, while Judge Brewer desisted from passing upon the question now under consideration, which was not in the case of *Hogan v. Mansers*, then before him, yet, when the question

afterward came up, the supreme court of that state, in *Bebb v. Crouse*, did meet the question, and pass upon it, as it has been herein set out. The same interpretation has been placed by Judge Dillon, while presiding as a circuit judge of the United States for the eighth circuit (2 Dill. 889, Fed. Cas. No. 18,842). In that case, the house occupied by the bankrupt debtor was held to be exempt, although a portion of it was used for a brewery. The court there declares that "the constitutional provision respecting the homestead exemption is exceedingly liberal to the debtor; but it may admit of some doubt whether it is just towards the creditor. The quantity of land exempted is limited, but there is no limitation on the value of the land exempted, or the value of the [homestead] improvements thereon. If the building is occupied as a residence by the family of the owner, it is exempt, whatever its value. . . . We only hold that the whole house occupied as a home is exempt, though a portion of it may be used, and may have been constructed with a view to be used, for other purposes."

It was assigned as error that the presiding judge interrogated witnesses during the trial of the cause, and that such interrogation was error. We understand the law to be that it is the duty of the judge, in the exercise of sound discretion, to elicit the evidence upon relevant and material points involved in the case. The record does not show that any error was committed by the judge in the interrogation as participated in by him. *Ferguson v. Hirsch*, 54 Ind. 837; *Blizzard v. Applegate*, 77 Ind. 516; *Lefever v. Johnson*, 79 Ind. 554; *Huffman v. Cauble*, 86 Ind. 591; *Sparks v. State*, 59 Ala. 82.

The whole building is exempt from forced sale, and the order of the District Court is reversed, and the injunction herein will be made permanent.

Burford, J., dissents.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

PAUSON,|

(70 Fed. Rep. 585.)

The failure of a carrier's agent to stamp the return coupon of a round-trip ticket in order to make it valid for use under the carrier's regulations will not justify the expulsion from a train of a passenger who had presented himself to the agent, and signed the ticket in the agent's presence, and delivered it to and received it from the agent under such circumstances as to justify the belief that the ticket had been properly stamped.

(October 31, 1895.)

NOTE.—As to effect of mistake or omission by carrier's agent upon validity of ticket, see also *Ellsworth v. Chicago, B. & Q. R. Co.* (Iowa) 29 L. R. A. 173.

30 L. R. A.

ERROR to the Circuit Court of the United States for the Northern District of California, to review a judgment in favor of plaintiff in an action brought to recover damages for alleged wrongful ejection from defendant's train. *Affirmed.*

Statement by Hawley, District Judge:

This is an action to recover damages for the alleged wrongful expulsion of the defendant in error from a passenger car of the plaintiff in error. It was commenced in the superior court of the city and county of San Francisco, and, upon motion of the plaintiff in error, was removed to the United States circuit court. The complaint alleges that on the 6th day of September, 1892, the plaintiff (defendant in error) became and was a passenger upon a train of cars operated upon the railroad of defendant (plaintiff in error), running from Seattle, Wash., to Portland, Or., for the purpose of being transported

from Seattle to Portland, and had paid to the defendant the fare for such transportation; that while he was a passenger upon said train the defendant wrongfully, maliciously, wantonly, and wilfully assaulted, insulted, and maltreated the plaintiff, and by force and arms ejected him from the said train; that by reason of said acts the plaintiff suffered both physical and mental injuries,—and prayed for damages in the sum of \$10,000. The answer denies these allegations of the complaint. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff for the sum of \$310.

Upon the trial, the plaintiff, to sustain the issues upon his part, introduced evidence to the effect that he was a merchant engaged in business at San Francisco, Cal., and at Seattle, Wash.; that he had purchased of the defendant a round-trip ticket from Portland to Seattle and return, which, among other things, required that the holder must be identified as the original purchaser of the ticket by writing his or her signature on the back thereof, or by other means, if necessary, in the presence of the ticket agent of the Northern Pacific Railroad at Seattle, Wash., who will witness the same, otherwise it will not be honored for passage; that he had made the trip from Portland to Seattle on this ticket; that on the 6th day of September he sent a messenger to the ticket office of defendant at Seattle to reserve a sleeper; that about 10 o'clock on the evening of said day he went to the ticket office, and asked the agent if he had a sleeper; that the agent replied, "What is your name?" and then asked him for his ticket; that he handed over the ticket in question; that the agent took it, and laid it on the board, and gave him a pen, and said to him, "Please sign that;" that he signed it, and handed it to the agent; that the agent took it to the rear end of the ticket office, and came back with a ticket berth for the sleeper; that the agent folded both tickets together, and handed them over to the plaintiff, who thereupon paid to the agent the sum of \$2 for the sleeper ticket; that plaintiff then put the folded tickets in his pocket, got on the train, and, after getting a check for his sleeper berth, went to bed. As to what occurred on the train the plaintiff testified as follows: "I was asleep when the conductor came around, and he asked for my ticket. I had put my ticket under a pillow, in order not to be annoyed, so I could get it when asleep,—under my pillow, in order to have it handy when the conductor comes. So I handed him the ticket, and he looked at it, and he told me that I could not ride on that ticket. I was surprised, and thought may be I gave him the wrong ticket or something, and I asked him what the trouble was with it, and he said, 'That ticket won't go,' and I explained the matter to him. I looked at the ticket,—examined the ticket,—and seen where there was a place where it says, 'Station agent stamp here,' and I seen there was no stamp on it. I explained the matter to him, and I says, 'I have done my part.' I presented the ticket in the presence of two of our men from the store, and I described to him what I had

done in regard to it, and that the ticket was all right; that I got the ticket, and paid for it, and signed it in his presence,—all that was required of me to do; and he says, 'That don't make any difference. I know my business, and the ticket ain't no good, and you cannot ride on it.' I told him I had positively paid for the ticket, and it was my own until I had used it up, and 'I am going to ride on it.' He says, 'You cannot; and I know my business; and you cannot ride on this ticket.' And we talked the matter over for some time, and I hated to get out of bed, and told him so. And he says: 'You have either got to pay your fare or get off.' I told him: 'You mean, according to that, I have got to get out of bed and dress myself?' He says, 'That is what you have got to do,' and I got up and dressed myself, and before I got through dressing the train stopped, and the conductor came to me, and I was not quite done yet, and he waited until I got through, and he says, 'Now get off the train.' I told him: 'No, I would not. I wanted to ride on the train, and I had paid my fare, and I did not want to get off.' He says, 'All right; I will put you off.' I says, 'All right; you will have to put me off. I won't go until I am put off.' He says, 'Have you any baggage,' and I says, 'Yes,' and I pulled a satchel from under the bed, and I am not positive, but I think the porter took my satchel, and he led me out of the train onto the platform. When I was on the platform, it looked really—I could not see any light—only a small station there, and asked him if he knew where I could find a hotel or place to stop over night, and he says he don't know; he don't care a damn. I looked around there, and did not like to lay out all night, and did not see any place where I could go to. I told him, 'I think I had better pay my fare and go on,' and I went on the train, and paid my fare, and went on. . . . I was excited, and felt bad on being put off of the train. Never had anything of that kind happen to me before, and I travel a great deal. I felt naturally insulted and degraded, and consider I was treated just like a tramp in being put off the train. I talked to the conductor in reference to the affair, and told him who I was, and told him I was certainly put off the train wrongfully; explained the matter to him; told him how the whole thing happened; told him the same thing over again before he put me off; and the conductor told me he was satisfied in his mind that I was the right man, that it was my ticket, and that I was the right party; and I told him that I belonged to the firm in Seattle, and he told me that he had his instructions, and he had to do according to his instructions." There was a conflict in the evidence as to what occurred at the ticket office between the agent and the plaintiff. The defendant, at the close of the case, moved the court to instruct the jury to find a verdict for defendant, which motion was denied. The court, after stating the conditions on the ticket, and the notice given to the passenger "that it will not be good unless so signed, witnessed, and stamped," and that this notice was substantially a part of the

terms of the ticket, charged the jury as follows: "Therefore it was the duty of the plaintiff to present the ticket to an agent for signing and witnessing and stamping. When so presented and signed, it was the duty of the agent to witness and stamp it. There is a controversy between the plaintiff and defendant as to what was done, which you are to decide from the testimony; and if you find from the testimony and evidence that the plaintiff did present himself to an agent, and sign the ticket in his (the agent's) presence, and the agent took the ticket, and returned it in such a way and under such circumstances as to justify plaintiff in believing that he, the agent, had witnessed and stamped the ticket, and plaintiff, so believing, entered the train, he was a legal passenger; and if you find from the evidence, further, that he explained to the conductor the circumstances, he had a right to refuse to pay or deposit a fare with the conductor; and his removal from the train, if you find from the evidence he was removed, was unlawful."

Mr. Joseph D. Redding for plaintiff in error.

Mr. George Lexinsky for defendant in error.

Hawley, District Judge, delivered the opinion of the court:

The disposition to be made of this case depends upon the question whether the charge of the court to the jury states a correct legal principle applicable to the facts and circumstances of this case. The authorities bearing upon this question are by no means uniform, some of the courts holding that it is the duty of the passenger, before going upon the train, to examine his ticket, and to ascertain therefrom whether or not any mistake has been made by the ticket agent; that the face of the ticket is conclusive evidence to the conductor of the train as to the contract between the passenger and the railroad company; that the conductor can look only to the ticket, and has no right to be governed by any statement or explanation of the passenger; that if the ticket is not upon its face such a ticket as entitles the passenger to ride, the conductor has the right, and it is his duty, to eject him from the train; and that his only remedy for the mistake, negligence, or carelessness of the ticket agent is by an action for breach of the contract to recover the extra amount he was compelled to pay for his fare, and he cannot recover for the tort of the conductor in expelling him,—others holding that the passenger has the right to rely upon the acts and statements of the ticket agents or conductors, and that, if expelled from the train when he has acted in good faith and is without fault, the carrier would be liable in damages for such expulsion, whether the action is brought for a breach of the contract or solely for the tort of the conductor. With this conflict in the decisions, state and national, we must examine the reasons given by the courts for the adoption of the rule upon which their decisions are founded, and endeavor to ascertain the controlling principle.

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ples of the law applicable to this case which are best established by the soundest reason and justice of the cases. In the view we take of the question of pleadings it is wholly immaterial whether the action is to be treated as founded upon a tort, pure and simple, as claimed by the plaintiff in error, or as an action upon a contract to recover damages resulting from a tortious breach of the contract. Under the system of practice prevailing in many of the states there ought not to be any special controversy as to the character of this action, as the formal distinctions which prevailed at common law are abolished. The action was instituted in California, and, being an action at law, is controlled by the provisions of the Code and decisions of the state court. In *Gorman v. Southern Pac. Co.* 97 Cal. 6, the court expressly held that, "when a passenger is wrongfully expelled from a train, it is a breach of duty on the part of the carrier, and an action in tort will lie to recover damages." *McGinnis v. Missouri P. R. Co.* 21 Mo. App. 407; *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 518, 519; *Hall v. Memphis & C. R. Co.* 15 Fed. Rep. 59. In all such actions the plaintiff is not to be confined in his recovery to the price of his extra tickets or fare or mere loss of time, but the jury may award damages for the humiliation or injury received by his wrongful expulsion from the train. *Zion v. Southern Pac. Co.* 67 Fed. Rep. 508, and authorities there cited. With reference to the principles enunciated in the charge of the court it is deemed proper to refer generally to many cases which discuss the relative rights and duties of a railroad company and of its passengers. It has been held that it is a reasonable regulation upon the part of the company to require passengers getting upon its railroad train without a ticket to pay additional fare, but in this connection the courts declare that a reasonable opportunity must be given to the passenger to enable him to purchase the ticket, and that, if the passenger fails to purchase a ticket solely on account of the premature closing of the ticket office, or of the failure of the railroad company to have an office for the sale of tickets, he cannot be required to pay additional fare, and, if expelled for the nonpayment of the additional fare, after paying or offering to pay the regular fare, he is entitled to recover damages for the expulsion. *Pools v. Northern P. R. Co.* 16 Or. 261; *State v. Hungerford*, 89 Minn. 7; *Everett v. Chicago, R. I. & P. R. Co.* 69 Iowa, 15, 58 Am. Rep. 207. The reason given is that, to allow a railroad company to enforce its rule for additional fare, under such circumstances, would be punishing the passenger for the railroad company's neglect of duty. Unless the railroad company furnishes the necessary conveniences or facilities for procuring tickets, the passenger cannot be considered to be in any manner at fault. *Ray*, *Negligence of Imposed Duties*, 181-183, and authorities there cited.

With reference to the right of a passenger to be carried on the wrong coupon, where the coupons are detached by the conductor on the going trip, and the returning coupon,

instead of the going coupon, is retained by the conductor, and the going coupon, instead of the returning coupon, given to the passenger, which the passenger retains without discovering the mistake until he presents it to the conductor on the return trip, and then makes his explanation as to how the mistake occurred, the courts have held that under such circumstances the passenger has the lawful right to be carried on his return trip on presenting the going coupon, with the explanation; and, if expelled for not paying his fare, he is entitled to recover damages for the expulsion. *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Lake Erie & W. R. Co. v. Fitz*, 88 Ind. 381, 45 Am. Rep. 484; *Baltimore & O. R. Co. v. Bambrey* (Pa.) 16 Atl. 67; *Wightman v. Chicago & N. W. R. Co.* 73 Wis. 169, 2 L. R. A. 185; *Philadelphia, W. & B. R. Co. v. Rice*, 64 Md. 63; *Rouser v. North Park Street R. Co.* 97 Mich. 565. These cases, as well as the others previously referred to, all proceed upon the broad ground that the passenger was wholly without fault; that he had done all that could reasonably be required of him to do; and that the railroad company, by the mistake, carelessness, or negligence of its agents or conductors, was itself at fault. This is the underlying principle of all the well-considered cases upon this subject. This principle is fair to both parties. It is sound, reasonable, and just. In further support of it we cite the following additional authorities: *Johnson v. Northern P. R. Co.* 46 Fed. Rep. 847; *Zion v. Southern Pac. Co.* 67 Fed. Rep. 506; *Head v. Georgia P. R. Co.* 79 Ga. 358; *Georgia R. & Bkg. Co. v. Dougherty*, 86 Ga. 744; *Central R. & Bkg. Co. v. Roberts*, 91 Ga. 514; *Pittsburg, C. & St. L. R. Co. v. Hennigh*, 39 Ind. 509; *Hufford v. Grand Rapids & I. R. Co.* 64 Mich. 631; *St. Louis, A. & T. R. Co. v. Macnie*, 71 Tex. 191, 1 L. R. A. 667; *Chicago & E. I. R. Co. v. Conley*, 6 Ind. App. 9; *Murdock v. Boston & A. R. Co.* 137 Mass. 293, 50 Atl. Rep. 307; *Muckle v. Rochester R. Co.* 79 Hun. 38; *McGinnis v. Missouri P. R. Co.* 21 Mo. App. 399; *Burnham v. Grand Trunk R. Co.* 63 Me. 298.

In a majority of the cases cited by the plaintiff in error in support of its contention, it affirmatively appears that the passenger was himself at fault, and that the railroad company was free from any fault, negligence, carelessness, or mistake. Especially is this true in the following cases: *New York, L. E. & W. R. Co. v. Bennett*, 1 C. C. A. 544, 50 Fed. Rep. 496, 6 U. S. App. 95; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 433, 10 Am. Rep. 711; *Chicago, B. & Q. R. Co. v. Griffin*, 68 Ill. 499; *Pennington v. Philadelphia, W. & B. R. Co.* 62 Md. 95; *Johnson v. Philadelphia, W. & B. R. Co.* 63 Md. 106; *Petrie v. Pennsylvania R. Co.* 42 N. J. L. 449. In *Mosher v. St. Louis, I. M. & S. R. Co.* 127 U. S. 390, 32 L. ed. 249,—upon which plaintiff in error principally relies, neither party seems to have been at fault. In that case there was a special contract in regard to a tourist's ticket sold by the St. Louis Railroad Company to Mosher at St. Louis, Mo., "good for one first-class passage to Hot Springs, Ark., and return, when officially stamped on back hereof, and 30 L. R. A.

presented with coupons attached." The St. Louis Railroad extended to Malvern, and a coupon on the ticket entitled Mosher to be carried from Malvern to Hot Springs, and back on the Hot Springs Railroad. The regulations upon the ticket provided that it was not good for return passage "unless the holder identifies himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark." When Mosher returned, he went to the ticket office of the Hot Springs Railroad, at Hot Springs, for the purpose of having himself identified in pursuance of the terms of the ticket, but failed to obtain such identification on account of the failure of the Hot Springs Railroad to have an agent at that place. He returned over the Hot Springs road to Malvern, and when he got upon the train of the St. Louis road the conductor called for his ticket, and refused to honor it, because its conditions had not been complied with. Another condition upon this ticket was "that in selling this ticket the St. Louis, Iron Mountain, & Southern Railway Company acts only as agent, and is not responsible beyond its own line." Upon these facts the court held that Mosher had no cause of action against the St. Louis Company for his expulsion. In the course of the opinion the court said: "By the first condition of the contract contained in the plaintiff's ticket, the defendant is not responsible beyond its own line. Consequently it was not responsible to the plaintiff for failing to have an agent at the further end of the Hot Springs Railroad. The agent who was to identify the passenger and stamp his ticket there was the agent of the Hot Springs Railroad Company, and is so described in the ticket, as well as in the petition. If there was any duty to have an agent at Hot Springs, it was the duty of that company, and not of the defendant. . . . The omission to have an agent at Hot Springs not being a breach of contract or of duty on the part of this defendant, the case is relieved of all difficulty."

This was the reason, and the sole reason, given for the decision. It will therefore readily be seen that the decision in that case does not support the views contended for by the plaintiff in error.

In *New York, L. E. & W. R. Co. v. Winter*, 148 U. S. 60, 73, 38 L. ed. 71, 80, there is a clear recognition of the fundamental principles which we have announced. The court, in the course of the opinion, said: "The reason of such rule is to be found in the principle that where a party does all that he is required to do, under the terms of a contract into which he has entered, and is only prevented from reaping the benefit of such contract by the fault or wrongful act of the other party to it, the law gives him a remedy against the other party for such breach of contract."

In the present case Pauson introduced testimony tending to show, and from which the jury were authorized to infer, that he had fully complied with all the conditions of the ticket upon his part; that he "did present himself to an agent, and sign the ticket in his [the agent's] presence, and the agent took

the ticket, and returned it in such a way and under such circumstances as to justify plaintiff in believing that he, the agent, had witnessed and stamped the ticket, and plaintiff, so believing, entered the train." The court

did not err in instructing the jury that, if they believed such facts to be true, then the plaintiff was a legal passenger, and his removal from the train was unlawful.

The judgment of the Circuit Court is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts

v.
Daniel F. MURPHY.

SAME

v.
E. Edward ENOS.

(.....Mass.....)

1. The provision as to cruel and unusual punishment, in the 8th Amendment to the Constitution of the United States, has no application to crimes against the laws of a state.
2. The punishment of imprisonment for life, under Stat. 1893, chap. 463, for criminal intimacy with a female child under the age of sixteen years, is not in violation of the constitutional provision against cruel or unusual punishments.
3. The legislature is ordinarily the judge of the expediency of creating new crimes and of prescribing penalties, whether light or severe, for prohibited acts.
4. One who intentionally commits a crime is responsible criminally for the consequences of his act, if the offense proves to be different from that which he intended.
5. Lack of knowledge or of good reason to believe that a girl is under sixteen years of age is no defense under Stat. 1893, chap. 463, providing the penalty of imprisonment for life in case of criminal intimacy with such a person.

(January 1, 1896.)

EXCEPTIONS by defendants to rulings of the Superior Court for Bristol County made during trial of indictments against defendants for abusing and carnally knowing a female child under the age of sixteen years. *OVERRULED.*

The facts are stated in the opinion.

Mr. H. J. Fuller, for defendant Murphy: To call the acts done in this case, with the consent and even procurement of one fully capable of consenting, a "violent and felonious assault," is absurd.

Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 855; *Evte v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754; *Hall v. State*, 40 Neb. 320; *Whitcher v. State*, 2 Wash 288 *Reg. v. Martin*, 9 Car. & P. 213; *Reg. v. Johnson*, 10 Cox, Crim. Cas. 114; *Reg. v. Woodhurst*, 12 Cox, Crim. Cas. 443.

The defendant ought not to have been convicted unless he knew, or had good reason to believe that the girl was under sixteen years of age. "Ignorance or mistake in point of fact is, in all cases of supposed offense, a sufficient excuse."

Myers v. State, 1 Conn. 502; 1 Bishop, Crim. L. § 801; *Com. v. Dreto*, 19 Pick. 179.

NOTE.—On the subject of cruel and unusual punishment, see also *Re Birdsong* (C. S. D. Ga.) 4 L. R. A. 623, and note; *People v. Durston* (N. Y.) 7 L. R. A. 715; *People v. Morris* (Mich.) 8 L. R. A. 685; and *Hobbs v. State* (Ind.) 18 L. R. A. 774. 30 L. R. A.

This is the common-law doctrine, and the statute should be construed with reference to it.

1 Bishop, Crim. L. § 291b; *Com. v. Presby*, 14 Gray, 65.

Messrs. H. J. Fuller and Fred V. Fuller, for defendant Enos:

The statute is in conflict with article 8 in the Amendments to the Constitution of the United States, and article 26 of the Declaration of Rights of Massachusetts, because it provides for the infliction of a cruel and unusual punishment."

Body of Liberties (1641); Anc. Charters, Col. Laws, 43; 1 Wm. & M. chap. 2, Bill of Rights, 1688; 1 Bishop, Crim. L. 946, 947.

Although it has been held that the amendment to the Federal Constitution does not apply to state legislation (*Pervear v. Massachusetts*, 72 U. S. 5 Wall. 475, 13 L. ed. 608; *Com. v. Hitchings*, 5 Gray, 482), the language is found substantially in most state Constitutions, and since the 14th Amendment it has been held otherwise by Justices Field, Harlan, and Brewer.

O'Neil v. Vermont, 144 U. S. 323, 36 L. ed. 450; *Ho Ah Kow v. Nunan*, 5 Sawy. 552.

Whatever the purpose of the statute was in the country where it originated, we think that its presence in the Constitution of this state confers power upon the court to declare void legislative acts prescribing punishments for crime in fact cruel and unusual. Cruel and unusual punishment may, although of a kind that is permitted, be excessive in degree and extent.

People v. Durston, 119 N. Y. 577, 7 L. R. A. 715; *Ex parte Kemmler*, 136 U. S. 436, 34 L. ed. 519; *Wilkinson v. Utah*, 99 U. S. 130, 25 L. ed. 345; *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450; *State v. O'Neil*, 58 Vt. 165, 54 Am. Rep. 557; *Ho Ah Kow v. Nunan*, *supra*; *Barker v. People*, 8 Cow. 700; *State v. Pettie*, 80 N. C. 867, 34 Am. Dec. 672; *Fraser v. State*, 8 Tex. App. 268, 30 Am. Rep. 181; *State v. Driver*, 78 N. C. 423; *State v. Danforth*, 3 Conn. 112.

The statute before the court attempts to define the crime of rape and create a felony punishable by life imprisonment where at common law a misdemeanor was at most committed.

Pub. Stat. chap. 202, §§ 27, 28; *Com. v. Roswell*, 143 Mass. 82; *Com. v. Burke*, 105 Mass. 376, 7 Am. Rep. 581.

Probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of a similar nature.

Cooley, Const. Lim. 329; *Re Bayard*, 25 Hun, 549.

This statute is in violation of the spirit if not the letter of the 25th article of the Declaration of Rights, which says: "No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature."

Pub. Stat. 210, § 1; *Com. v. Carey*, 12 Cush.

252; *Com. v. Smith*, 11 Allen, 257; *State v. Smith*, 83 Me. 369, 54 Am. Dec. 578.

Mr. Andrew J. Jennings, District Attorney, for the Commonwealth:

The assault could not be made with consent, because the law holds the child incapable of giving a valid consent to the completed act of carnal intercourse which includes an assault.

Com. v. Roosenell, 143 Mass. 82; *Givens v. Com.* 29 Gratt. 890; *State v. Tilmán*, 80 La. Ann. 1249, 81 Am. Rep. 286; *Hays v. People*, 1 Hill, 351; *State v. Wright*, 25 Neb. 88; *People v. McDonald*, 9 Mich. 150; *State v. Dancy*, 83 N. C. 608.

Knowledge of age is immaterial.

Bishop, *Statutory Crimes*, § 490, and cases cited; *Com. v. Savery*, 145 Mass. 212; *Com. v. Farren*, 9 Allen, 489; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Wentworth*, 118 Mass. 441; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Connelly*, 163 Mass. 539.

Knowlton, J., delivered the opinion of the court:

These cases may be considered together, as substantially the same questions are raised in both of them.

Under Pub. Stat. chap. 202, §§ 27, 28, the question whether an indictment for an assault with an intent to commit rape upon a female child under the age of ten years can be maintained, if the child consents to what is done, was very fully considered in *Com. v. Roosenell*, 143 Mass. 82, and decided in the affirmative. This case must be deemed to have settled the law in this commonwealth in accordance with the weight of judicial opinion, although there is some conflict of authority in other jurisdictions. The several acts in amendment of section 27, above cited, which raise the age of consent by girls to carnal connection, do not assume to change the nature of an offense to which they relate. One who unlawfully, carnally, knows and abuses a female child under the age of sixteen years, is guilty of the same crime, under Stat. 1893, chap. 466, as one who committed the offense upon a child under the age of ten years when Pub. Stat. chap. 202, § 27, was in force. Stat. 1886, chap. 805; Stat. 1888, chap. 891; Stat. 1893, chap. 466. There is no doubt of the intention of the legislature to treat the crime of having carnal connection with a girl under the age of sixteen years as rape, even if she gives her full consent so far as she is capable of consenting.

The defendants contend that the statute last cited is in conflict with article 8 of the Amendments to the Constitution of the United States, and of article 26 of our Declaration of Rights, because it provides for the infliction of a cruel and unusual punishment. The first of these articles has no application to crimes against the laws of a state. *Com. v. Hitchings*, 5 Gray, 482. Without implying that article 26 of our Declaration of Rights is applicable to the statute before us, it is clear that the punishment prescribed is not cruel or unusual in kind.

There is some ground for the contention that the statute is a departure from the principles which lie at the foundation of our ancient law in regard to rape, and which justify the treatment of it as one of the most heinous crimes that can be committed. The

legislation is different in character from Stat. 1886, chap. 829, and Stat. 1888, chap. 811, which were enacted for the punishment and prevention of seduction. But whatever we may think of the policy of a statute that treats a girl fifteen years and eleven months old, however mature she may be in body and mind, as if she were incapable of committing the crime of fornication, and subjects a boy of the same age, with whom she joins in sexual intercourse, to a possibility of the same punishment as if he were guilty of murder in the second degree, the legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe, for prohibited acts. We cannot say that the punishment prescribed for this offense, when the girl is nearly sixteen years of age, and voluntarily participates in it, is beyond the constitutional power of the legislature to inflict.

The presiding justice was asked to instruct the jury that unless the defendant knew, or had good reason to believe, that the girl was under sixteen years of age, he could not be convicted. How far a mistake of fact in regard to the nature of his act may be availed of by a defendant in a criminal case is sometimes a difficult question to answer. In general it may be said that there must be *malus animus*, or a criminal intent. But there is a large class of cases in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act. In such cases it is deemed best to require everybody, at his peril, to ascertain whether his act comes within the legislative prohibition. Among these cases are prosecutions for the unlawful sale of intoxicating liquor, for selling adulterated milk, for unlawfully selling naphtha, for admitting a minor to a billiard room, and the like. *Com. v. Savery*, 145 Mass. 212; *Com. v. Farren*, 9 Allen, 489; *Com. v. Wentworth*, 118 Mass. 441; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Raymond*, 97 Mass. 567; *Com. v. Connelly*, 163 Mass. 539. Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon every one the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is. The application of this rule to crimes like bigamy and adultery has led to some conflict of authority. *Com. v. Hayden*, 163 Mass. 457, 28 L. R. A. 818; *Queen v. Tolson*, L. R. 23 Q. B. Div. 168. See also *Com. v. Presby*, 14 Gray, 65. The defendants in the present cases knew that they were violating the law. Their intended crime was fornication, at the least. It is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act if the offense proves to be different from that which he intended. See *Reg. v. Prince*, L. R. 2 C. C. 154, 175.

Exceptions overruled.

ARKANSAS SUPREME COURT.

Ex parte S. D. HAWKINS.

(.....Ark.....)

A constitutional provision forbidding exile does not prevent the granting of pardons to convicts upon condition that they leave the state and never return.

(November 23, 1895.)

A PPEAL by petitioner from a judgment of the Chancery Court for Pulaski County denying his application for a writ of habeas corpus to procure his discharge from the penitentiary to which he had been committed for the violation of the terms of a pardon under which he had been released therefrom. *Affirmed.*

Statement by Riddick, J.:

S. D. Hawkins filed a petition in the Pulaski chancery court for a writ of habeas corpus. He alleged that in the year 1881 he was convicted of a felony in the Lonoke circuit court and sentenced by that court to be imprisoned in the state penitentiary for the period of four years. That afterwards, on the 7th day of June, 1881, and while he was serving his sentence of imprisonment, the governor of the state granted him a pardon upon the express condition following: "That the said Hawkins should immediately depart from and remain without the borders of the state of Arkansas, said pardon to be void if the said Hawkins was found within the borders of the state after the 12th day of June, 1881." He further alleged that, by virtue of said pardon, he was set at liberty and left the state before the 12th day of June, 1881, and remained out of the state for several years; that he then returned, and was rearrested and confined in the penitentiary. He alleged that the condition attached to said pardon was null and void, that his imprisonment was illegal, and prayed that a writ of habeas corpus be directed to E. T. McConnell, superintendent of the state penitentiary, etc. All formalities were waived. McConnell appeared and filed a demurrer to the petition, which demurrer was sustained by the court, the petition dismissed, and writ refused. From this order of the court an appeal was taken.

Messrs. Dan. W. Jones and W. S. McCain for appellant.

Mr. E. B. Kinsworthy, Attorney General, for appellee.

Riddick, J., delivered the opinion of the court:

The first question for us to determine is whether the condition upon which the pardon was granted was valid or not. In other words, did the governor have power to annex to his pardon the condition that the petitioner should "depart from and remain without the borders of the state?" It is said, in Bacon's Abridgment, that "It seems agreed that the King may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit,

whether precedent or subsequent, on the performance whereof the validity of the pardon will depend." 7 Bacon, Abr. p. 412; 4 Bl. Com. p. 401. It is now well settled that, when the Constitution gives an unrestricted power of pardon to the governor of the state, he has the right to annex to his pardon any condition, precedent or subsequent, provided it be not illegal, immoral, or impossible to be performed. *Ex parte Hunt*, 10 Ark. 284; *United States v. Wilson*, 83 U. S. 7 Pet. 150, 8 L. ed. 640; *Ex parte Wells*, 59 U. S. 18 How. 307, 15 L. ed. 421; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State v. McIntire*, 1 Jones, L. 1, 59 Am. Dec. 576; 1 Bishop, New Crim. L. § 914. Our Constitution provides that the governor shall have power to grant pardons "under such rules and regulations as shall be prescribed by law," and a statute expressly authorizes him to grant pardons on condition that the convicted person "shall leave the state and never again return to it." Const. 1874, art. 6, § 18; Sand. & H. Dig. § 2412. But it is said that this statute is in conflict with section 21 of article 2 of the Constitution, which provides that under no circumstances, shall any person be exiled from the state. We do not agree with this contention. This provision of the Constitution forbidding exile was intended as a protection to citizens and inhabitants of the state. Any statute of the legislature or order of the courts, or execution, inflicting upon a person banishment from the state would, under that section, be void. It forbids exile or compulsory banishment, but it does not say that a person may not, of his own volition, leave the state to escape punishment, or that the governor may not, by his pardon, permit him to do so. To hold that it did would be to construe a provision that was intended to protect the inhabitants of the state into one restricting the power of the governor when exercised in their behalf. Who can doubt that it would be esteemed a great boon by most of those unfortunates against whom a sentence of imprisonment in the penitentiary for a long term of years has been rendered to be allowed to escape it by leaving the state? When a citizen of another state or country commits a crime in this state, it might, under some circumstances, be to the best interest of all concerned that a pardon be granted on condition that he leave the state and never return. One can readily conceive of other instances when, to prevent the possibility of future strife between the convicted person and those against whose persons or property he had committed a crime, it would be proper to impose this as a condition of the pardon. We think the Constitution does not deprive the governor of the power to grant pardons on such conditions. As Hawkins accepted his pardon on this condition, and afterwards violated it, the pardon by its own terms became void. His subsequent arrest and imprisonment were therefore legal.

The judgment of the court dismissing his petition was, in our opinion, right, and is affirmed.

Bunn, Ch. J., concurred in the judgment only on the ground that, if the condition was void, the pardon was also void.

NOTE—For conditions in pardons generally, see note to *People v. Cummings* (Mich.) 14 L. R. A. 285, 30 L. R. A.

MINNESOTA SUPREME COURT.

Horatio HOULTON, *Appt.*,

v.

Charles H. DUNN, *Resp't.*

(.....Minn.)

*The plaintiff agreed with defendant to locate him upon a valuable quarter-section of pine land, which had been long withdrawn from market for railroad purposes, and to instruct him as to what he should do as such settler, and do all that was necessary or could be done to bring the land into the market, and enable defendant to acquire title thereto under the homestead or pre-emption laws of the United States. In pursuance and performance of this agreement, the plaintiff attended several sessions of Congress, and appeared before the Secretary of the Interior and the committees of the Senate and House of Representatives, and employed counsel to urge the passage of a bill declaring said lands forfeited to the government, and providing that parties who had settled on the land in good faith should have the preference to enter the same under the homestead laws, when the same should be restored to the market. For such services the defendant agreed to pay plaintiff when he (defendant) should acquire the right to make final proof for such land. *Held*, that the contract was void as against public policy.

(January 17, 1906.)

APPEAL by plaintiff from an order of the District Court for Sherburne County grant-

*Headnote by BUCK, J.

ing judgment on the pleadings in favor of defendant in an action brought to recover the amount which defendant had contracted to pay plaintiff for services in aiding defendant in establishing his title to certain government land. *Affirmed*.

The facts sufficiently appear in the opinion. *Mr. Robertson Howard*, with *Messrs. J. M. Gilman* and *C. D. O'Brien*, for appellant:

That a party may lawfully contract to do what the plaintiff undertook to do under the agreement, as alleged in the complaint, is perfectly well settled.

Powers v. Skinner, 84 Vt. 274, 80 Am. Dec. 677; *Burke v. Child*, 88 U. S. 21 Wall. 450, 22 L. ed. 624; *Barry v. Capen*, 151 Mass. 99, 6 L. R. A. 808; *Chesebrough v. Conover*, 50 N. Y. S. R. 463, affirmed, 140 N. Y. 332; *Beal v. Polhemus*, 67 Mich. 180; *Denison v. Crawford County*, 48 Iowa, 211.

Unless the agreement in express terms involved an illegal or an unlawful act, or an act against public policy, the court could not presume or infer that the parties intended or contemplated any such act.

Moyer v. Canisany, 41 Minn. 242; *Hunt v. Test*, 8 Ala. 718, 42 Am. Dec. 659.

The defendant was not a trespasser when he settled upon the land referred to in the complaint, even if the land was not then open to settlement under the homestead or pre-emption laws of the United States.

Quinn v. Chapman, 111 U. S. 445, 28 L. ed.

NOTE.—Validity of contract for services to procure legislation.

The line of demarcation between contracts for procuring legislation which are upheld and those which are condemned seems to be well drawn. All contracts for legitimate professional services for a fixed compensation are enforced, while those for a contingent fee or which require personal influence, personal solicitation of members, or any trickery or underhanded means to secure the legislation, are not enforced.

The whole subject is well covered by the decision in *Marshall v. Baltimore & O. R. Co.* 57 U. S. 18 How. 314, 14 L. ed. 953. There an agent undertook for the sum of \$15,000 to bring such influence to bear upon the legislators through their kind and social dispositions as to cause them to pass a railroad charter giving certain privileges. The means to be used were to be secret, and the sub-agents were to be stimulated to active partisanship by a high contingent fee. The language of the court covers the ground so thoroughly as to justify an extended quotation from the opinion as follows: "Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act and pronounce void every contract the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided. All persons whose interests may in any way be affected by any public or private act of the legislature have an undoubted right to urge their claims and arguments, either in person or by counsel professing to act for them, before legislative committees, as well as in courts of justice. But where persons act as counsel or agents, or in any representative capacity,

it is due to those before whom they plead or solicit that they should honestly appear in their true characters, so that their arguments and representations, open and candidly made, may receive their just weight and consideration. A hired advocate or agent, assuming to act in a different character, is practising deceit on the legislature. Advice or information flowing from the unbiased judgment of disinterested persons, will naturally be received with more confidence and less scrupulously examined than where the recommendations are known to be the result of pecuniary interests, or the arguments prompted and pressed by hope of a large contingent reward, and the agent stimulated to active partisanship by the strong lure of high profit. Any attempts to deceive persons intrusted with the high functions of legislation, by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public. Legislators should act with a single eye to the true interests of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors.

"Influences secretly urged under false and covert pretenses must necessarily operate deleteriously on legislative action, whether it be employed to obtain the passage of private or public acts. Bribes, in the shape of high contingent compensation, must necessarily lead to the use of improper means and the exercise of undue influence. Their necessary consequence is the demoralization of the agent who covenants for them; he is soon brought to believe that any means which will produce a beneficial result to himself are proper means; and that a share of these profits may have the same effect of

476; *Shepley v. Cowan*, 91 U. S. 331, 23 L. ed. 424; *Frisbie v. Whitney*, 76 U. S. 9 Wall. 187, 19 L. ed. 668; *Yosemite Valley Case*, 82 U. S. 15 Wall. 77, 87, 21 L. ed. 82, 85; *Atherton v. Fowler*, 96 U. S. 513, 24 L. ed. 732.

Messrs. Robt & Slack, for respondent:

All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments of public officers, or the ordinary course of legislation, are void, as to public policy, without reference to the question whether improper means are contemplated or used in their execution.

9 Am. & Eng. Enc. Law, p. 900, citing *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Sweeney v. McLeod*, 15 Or. 330; *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519; *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55; *Wood v. McCann*, 6 Dana, 366; *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 787; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314, 14 L. ed. 953; *Mills v. Mills*, 36 Barb. 474; *Weed v. Black*, 2 MacArth. 268, 29 Am. Rep. 613.

The illegality should not, then, be left to the jury, but should be decided by the court.

Pierces v. Randolph, 12 Tex. 290; *Thomp. Trials*, p. 849, § 1097; *Harris v. Roof*, 10 Barb. 489; *Rose v. Truax*, 21 Barb. 361; *Spalding v. Ewing*, 149 Pa. 375, 15 L. R. A. 727; *Ormerod v. Dearman*, 100 Pa. 561, 45 Am. Rep. 391; *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.* 75 Wis. 224, 6 L. R. A. 601.

The contract sued on is treated as an entirety, the alleged services are in fact insepara-

ble, and no attempt is made to separate the lawful, if any there be, from the unlawful. No recovery, then, can be had on any portion. *Bishop*, Cont. p. 185, § 487; *Bisby v. Moor*, 51 N. H. 402.

Buck, J., delivered the opinion of the court:

The plaintiff claims to have acquired valuable information in regard to certain pine lands in Bayfield county, Wis., and that the plaintiff and defendant entered into an agreement, by the terms of which the defendant was to enter into possession of 160 acres of such pine lands, belonging to the United States, not then in market, nor subject to entry, and to hold the same until it could be purchased from the government; and the plaintiff, for a consideration to be paid by the defendant, agreed to procure such legislation from Congress as would enable the defendant to secure the land in preference to any other party. The plaintiff performed his part of the agreement, and procured the promised legislation; and this action is brought by the plaintiff upon the agreement, to recover from the defendant the sum of \$3,500, the amount claimed by the plaintiff to be the value due him for his services, as well as for certain expenditures made by him pursuant to said agreement. There was an answer by the defendant, and reply thereto by the plaintiff, which we need not set out in detail. When the cause was called for trial at a general term of the district court for Sherburne county, the defendant moved for judgment upon the pleadings, upon the ground

quickenings the perceptions and warming the zeal of influential or careless members in favor of his bill. The use of such means and such agents will have the effect to subject the state governments to the combined capital of wealthy corporations, and produce universal corruption, commencing with the representative and ending with the elector."

Condemnation of such contracts generally.

There are many expressions in opinions of the courts which would lead to a general condemnation of all contracts to procure legislation, and some decisions tending also in that direction. But those expressions are not intended to apply to cases of legitimate services, and the decisions are usually in cases where some evil tendency or influence was apparent. There seems to be no case in which legitimate services for a fee payable absolutely have been condemned.

In *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 870, the question was as to the validity of an agreement to procure a contract from the government, but the court decides the case adversely to the agreement by analogy to the case of contracts to procure legislation, holding that it is settled that contracts to procure legislation are void.

A contract providing a compensation for obtaining legislation or to prevent legislative investigation into the affairs of a railroad company is void. *Usher v. McBratney*, 3 Dill. 885.

A contract by a railroad company to refrain from any effort to obtain a grant of public lands from the legislature and to aid another company to procure it by all reasonable and proper assistance in consideration of a share of the grant obtained by the latter, is void as against public policy. *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.* 75 Wis. 235, 6 L. R. A. 601.

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In *Wilday v. Collier*, 7 Md. 273, 61 Am. Dec. 344, it is said by way of argument that contracts by advocates cannot be enforced when the character in which they solicited the passage of the act is not disclosed.

To warrant a recovery the evidence should be required to establish the fact with reasonable clearness that the services alleged to have been performed were such as the law will sanction in aiding and promoting legislative action. *Harris v. Simonsen*, 28 Hun, 518.

Contracts for legitimate professional services upheld.

An agreement to draft a bill for the franchise and place it in the hands of some member of the legislature to be introduced in that body but containing no promise to work for it or its passage is not *contra bonos mores*. *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.

The Virginia statute against lobby services does not apply to contracts for legitimate professional services in preparing and arguing a case before the legislature. *Yates v. Robertson*, 80 Va. 473.

Contingent fee makes contract void.

A contract to give a percentage of a claim against the government for services in collecting it is void as against public policy, where the services in fact consisted largely in procuring legislation from Congress by which the postoffice department should be required to pay the claim. *Spalding v. Ewing*, 149 Pa. 375, 15 L. R. A. 727, affirming 9 Pa. Co. Ct. 471.

A contract for a contingent fee to procure or endeavor to procure an act of the legislature by any sinister means or by using personal influence with the members is void. *Clippinger v. Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519.

A contract for a contingent compensation to procure the passage of an act to reimburse a person for property taken from him for violation of

that the complaint did not state facts sufficient to constitute a cause of action; and the motion was granted by the court, upon the ground that the agreement was void as against public policy.

The principal controversy is over that part of the plaintiff's complaint which is as follows, *viz.*: "And the plaintiff further states to the court that, during the sessions of Congress of 1887-88 and 1888-89 and 1889-90 and 1890-91, he attended at Washington from three to six months each year, and appeared before the Secretary of the Interior and appropriate committees of the Senate and House of Representatives, and employed counsel, for the purpose to urge the passage of a bill declaring said lands forfeited to the government, and also that parties who had in good faith settled upon said lands should have the preference right to enter the same from the government under the homestead laws, when the same should be restored to the market; that by an act of Congress approved September 29, 1890, entitled 'An Act to Forfeit Certain Lands heretofore Granted for the Purpose of Aiding in the Construction of Railroads and Other Purposes,' the lands hereinbefore described, together with other lands, became forfeited to the United States, and by § 2 of the act the defendant has the prior right, over any one else, to prove up and acquire title to the lands hereinbefore described, by reason of his being a settler thereon." It is then further alleged that defendant did make final proof, and acquired title to said land, and that at the time he settled upon the same, and when he acquired the

right to make final proof therefor, the land was worth \$12,000 to \$15,000, and that the defendant sold the pine timber upon the land for \$12,000. The business relations between these parties will be better understood by our quoting further from the allegations in the complaint, which we do, one of which is as follows, *viz.*: "That the said defendant was wholly unacquainted with said business, but desired to settle upon a valuable quarter section of said lands, and acquire a title thereto, under the homestead or pre-emption laws of the United States, when said lands should be restored to the market, and desired the plaintiff to locate him (the defendant) upon some such quarter section, and instruct him as to what he should do as such settler, and to take charge of him, and do all that was necessary or could be done to bring the land into market, and enable the said defendant to acquire title thereto, and promised and agreed that he would do what was right with the plaintiff for such information and service, in the way of compensation therefor, when he (the defendant) should acquire the right to make final proof of such land."

The question here involved is a very important one, and we regret that we did not have the benefit of an oral argument by the very able counsel for the plaintiff. If there were services rendered and expenditures incurred by the plaintiff for the defendant, as he alleges, entirely disconnected with the services rendered in procuring congressional legislation, they would constitute a good cause of action; but, unfortunately for the plaintiff, he has included

the law cannot be enforced. *Gil v. Williams*, 12 La. Ann. 219, 68 Am. Dec. 767.

A contract for a contingent fee to procure the passage of a law annulling one marriage and legalizing another is void. *Wood v. McCann*, 6 Dana, 386. But in that case the court held that the evidence did not show that an illegal contract had been made, and therefore the contract was enforced.

In *Jones v. Blackledge*, 9 Kan. 502, 12 Am. Rep. 506, which was a case of the collection of a claim against the government, the court says, all contracts of the collection of claims, whether they are to be performed before courts, before Congress or the legislature, or before any of the executive departments for a compensation contingent upon success, are clearly against public policy; for the compensation in such cases being contingent is often very large in amount and holds out great inducements and temptations to the use of undue and even corrupt means for their collection.

Contracts for a contingent compensation or to use personal or any secret or sinister influence on legislation are void. *Coquillard v. Bearss*, 21 Ind. 482, 53 Am. Dec. 362.

A contract for compensation contingent on success in procuring the passage of the bill is void. *Foltz v. Cogswell*, 86 Cal. 542.

There are a few cases in which this rule does not appear to have been followed. In *DAVIS v. COM. post*, 743, it was held that the legislature may authorize the employment of an agent to prosecute claims on behalf of the state which require the procuring of legislation for a fee contingent on his success.

So, in Iowa a contract between a county and an agent to procure from the general government the swamp lands to which the county is entitled or indemnity therefor, his compensation to be one half

of what he procures, is upheld in *Denison v. Crawford County*, 48 Iowa, 211, although to effect the object certain congressional action became necessary. The court placed its ruling upon the ground that nothing was contemplated or done except what was legitimate in such cases, but there is no discussion of the effect of the provision for contingent compensation which so many of the other cases have condemned.

Also in *Chesebrough v. Conover*, 140 N. Y. 382, a contract containing the element of a contingent fee was enforced.

Contract for personal influence or lobby services.

A contract for lobby services is unlawful. *Sweeney v. McLeod*, 15 Or. 330.

An agreement in respect to services as a lobby agent or for the sale of personal influence and solicitations to procure the passage of a public or private law by the legislature is void. *Powers v. Skinner*, 34 Vt. 274, 80 Am. Dec. 677.

In *Mills v. Mills*, 40 N. Y. 540, 100 Am. Dec. 535, a contract to give all the "aid in his power, spend such reasonable time as may be necessary, and generally to use his utmost influence and exertion to procure the passage into a law of the bill heretofore introduced," was held to furnish a temptation to resort to corrupt means and improper devices to influence legislative action and to be void. And that decision affirmed the ruling in the lower court. *Mills v. Mills*, 36 Barb. 474.

All contracts for services generally, in procuring legislation, are void from public policy. If the contract is broad enough to cover services of any kind whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself. But contracts which provide for particular services to be rendered, such as the collection of evidence, the preparation of papers, or the delivery

the value of the whole services and expenditures in one lump sum, and seemingly as though the contract was entire. Evidently, the court below so treated the transaction, and, from a perusal of the pleadings, we do not see that it could have done otherwise. See *Burke v. Child*, 88 U. S. 21 Wall. 441, 22 L. ed. 628. The courts hold that there are two kinds of agreements relative to the matter of procuring legislation from our state and national legislatures and our municipal bodies, boards, or officers. One is the evil and mischievous agreement which tends to corrupt the lawmaking power, and is accomplished sometimes by subtle acts of personal importunity and intrigue, or by secret and insidious overtures, while at other times corrupt results are reached by startling boldness and daring. Some of the authorities which refuse to enforce this kind of agreements are as follows: *Clippinger v. Hepbaugh*, 5 Watts & S. 815, 40 Am. Dec. 519; *Harris v. Roof*, 10 Barb. 489; *Ross v. Truax*, 21 Barb. 361; *Mills v. Mills*, 36 Barb. 474; *Burke v. Child*, *supra*; *Spalding v. Ewing*, 149 Pa. 876, 15 L. R. A. 727; *Oceanyan v. Winchester Repeating Arms Co.* 108 U. S. 261-274, 26 L. ed. 539-545; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 268; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 648, 32 L. ed. 819. In the case of *Clippinger v. Hepbaugh*, 5 Watts & S. 815, 40 Am. Dec. 519, it was said by the court: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract; and that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an

important branch of the government. It may not corrupt all; but if it corrupts, or tends to corrupt, some, or if it deceives, or tends to deceive or mislead, some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." In the case of *Ross v. Truax*, 21 Barb. 361, the agreement was "to use his influence, efforts, and labor in procuring the passage of a law by the legislature;" and the agreement was held void, as against public policy, and that, as the contract was entire, it was wholly void, and that no recovery could be had for even legitimate services performed under the agreement. In the case of *Weed v. Black*, 2 MacArth. 268, 29 Am. Rep. 618, the court uses the following language: "If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself." In the case of *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 268, Mr. Justice Field said, in reference to agreements for compensation in procuring contracts from the government: "It [such principle] has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements." Further along in the opinion he says: "It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether im-

of arguments, are valid. *Weed v. Black*, 2 MacArth. 268, 29 Am. Rep. 618.

Common fairness requires that neither party shall be permitted to have secret consultations and exercise secret influences that are kept from the knowledge of the other party. The business of lobby members is not to go fairly and openly before the committees and present statements, proofs, and arguments that the other side has an opportunity of meeting, and refute if they are wrong, but to go secretly to the members and ply them with statements and arguments that the other side cannot openly meet, however erroneous they may be, and to bring illegitimate influence to bear upon them. If the lobby member is selected because of his personal or political influence it aggravates the wrong. The tendency and object of these influences are to obtain by corruption what it is supposed cannot be obtained fairly. *Frost v. Belmont*, 6 Allen, 162.

In *Buck v. First Nat. Bank*, 27 Mich. 228, 15 Am. Rep. 139, which arose under a note given to secure a recommendation of a convict for clemency, the court says that even in cases of petitions to the legislative department of government any promise to pay money to influence or secure official action in any form whatever other than by the use of open and legitimate evidence and argument will be entirely without consideration because opposed to public policy.

It is the tendency of judicial decisions to discountenance all attempts to influence the deliberations and determinations of public bodies other than by arguments which being openly made, bear directly upon the merits of the pending measure 30 L. R. A.

or application because in contravention of sound public policy. *Milbank v. Jones*, 137 N. Y. 370.

There can be no recovery upon a contract for lobby services. *Harris v. Roof*, 10 Barb. 489.

A contract for personal influence, efforts, and labor, to procure the passage of a law with a promise of a share of the results in case of success, is void. *Ross v. Truax*, 21 Barb. 361.

A contract for lobby services, for personal influence, for mere importunities to the members of the legislature, for bribery or corruption, or for influencing them by other arguments, persuasions, or inducements than such as directly and legitimately bear upon the merits of the pending application, is illegal and void. *Brown v. Brown*, 34 Barb. 533.

No compensation can be recovered for services rendered in personally soliciting members of the legislature to pass a bill. *Cary v. Western U. Tel. Co.* 47 Hun, 610.

A contract to prosecute and superintend a claim before the legislature is void. *Bryan v. Reynolds*, 5 Wis. 200, 68 Am. Dec. 55.

A contract to procure the passage of a bill by solicitation or other lobbying measures is illegal, but a contract for services such as drafting the petition to set forth the claim attending the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to the proper authority, is valid. *Burke v. Child*, 88 U. S. 21 Wall. 441, 22 L. ed. 628.

In California the court seems to have made an exception to the general rule. In one of the cases the exception is made to rest partly upon the legislative definition of lobbying. But such ground would seem to be insufficient to support the dis-

proper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country." It will be observed that many of the decisions are based upon the corrupt tendency of such contracts, rather than the particular wording of the contract itself.

There are very eminent courts holding that contracts for the performance of services in procuring legislation can be enforced, where only fair and honorable means have been used, and especially when such legislation results in great public benefit. The plaintiff seeks to bring his services within this rule, alleging that the plaintiff's services were not rendered for the benefit of any one individual, but that his services were rendered in securing the passage of a public act which restored lands to the public domain for the public benefit, to which the railroad companies had no right. It may well be doubted whether the legal effect of the passage of the law has been as alleged by plaintiff, *viz.*, beneficial to the public at large; but we think it is plainly evident from the pleadings that it was not the public weal that concerned the plaintiff, in what he did, but to secure the passage of an act which would secure to the defendant the right to enter and pay for 160 acres of pine land for the paltry sum of \$1.25 or \$2.50 per acre; while the land was actually worth from \$12,000 to \$15,000, and for which services and expenses in so doing he was to be paid, as he claims, the sum of \$3,500. Who was to pay this consideration? The plaintiff says that the defendant should do so, but, if the plaintiff was expending money and time and rendering services for the benefit of the

public, why should this defendant alone be responsible therefor? And how the public could be benefited by the passage of a law allowing settlers to enter pine land for the sum of \$200 or \$400 per quarter section, which was worth \$12,000 or more at the time, is not made to appear very satisfactorily. If there were a large amount of these lands which were taken in the manner secured by the defendant, through plaintiff's agency, we think it is safe to say that the public was robbed, instead of being benefited. Prolific as have been the schemes for robbing the government of its pine timber, it is seldom that cases have come to the knowledge of our courts where such a gigantic fraud has been practiced in the name of a public benefit. It may be that the defendant's pocket is sweating with ill-gotten gains and public plunder, but this gives no legal cause of action against him by the plaintiff. We are reminded by the plaintiff that these lands had been for many years withdrawn from market for the benefit of certain railroads; that the railroads had forfeited their rights; that the secretary of the interior had so declared; but that there was evidently some doubt as to whether settlers upon these lands would have a right to prove up and acquire title to them without an act of Congress so declaring. It was this doubt which led to the making of the contract sued upon in this action. It is immaterial that the courts subsequently decided that a certain settler upon these lands could hold them under the order of the Secretary of the Interior made in 1887. The vice of the whole transaction rests in the lobbying influence exerted by the plaintiff in procuring national legislation to remove this doubt, and to enable the defendant to secure forthwith this valuable land for a

tion since the courts in the other states have held that contracts such as are upheld in California are void whether they are properly lobbying contracts or not. It is there held that a contract to work for the passage of a bill in the legislature is not void as against public policy provided there is no concealment of interest in the matter, but such interest is known and understood by the members whose judgment is sought to be influenced. *Miles v. Thorne*, 38 Cal. 335, 99 Am. Dec. 384.

So, a contract is not illegal, although it contemplated the use of personal solicitation with the members of the legislature, if there is no personal influence brought to bear, or any dishonest, secret, or unfair means to be used to accomplish the object. *Folts v. Cogswell*, 38 Cal. 542.

Application of rules.

In a case relating to a contract with the government for the leasing of a building for postoffice purposes, the court says, an agreement to use personal influence for a compensation dependent on success will be void. *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 744.

An agreement to make the necessary statement of facts, and attend before the proper committees prepared to argue the case, and to do all that is necessary and proper to be done to insure the passage of the bill for the first \$1,500 that shall be received on the claim, is not illegal on its face, and the court will presume its legality until the contrary is made to appear. And the fact that the contractor actually performs lobby services will not defeat his recovery upon the contract if such services were not contemplated by the parties when

the contract was made. *Russell v. Burton*, 66 Barb. 539.

In *Chesebrough v. Conover*, 140 N. Y. 382, recovery upon a contract for services before the legislature in procuring the passage of a bill was upheld, although it appeared that the evidence might have warranted the jury in finding that there were lobby services rendered, where such finding was not made, although the contract provided for contingent compensation, the court saying nothing upon that feature of the case.

In *Lyon v. Mitchell*, 36 N. Y. 241, 36 Am. Dec. 503, it is said as argument by the court that it is allowable to employ counsel to appear before the legislative committee or the legislature itself to advocate or oppose a measure in which the individual has an interest. But that personal solicitation of legislators is not a subject of contract. And the principle of that case was followed in *McKee v. Cheney*, 52 How. Pr. 144.

In *Sedgwick v. Stanton*, 14 N. Y. 229, it is said that persons may no doubt be employed to conduct an application to the legislature as well as to conduct a suit at law. But they cannot with propriety be employed to exert their personal influence with individual members or to labor in any form privately with such members out of the legislative halls. Whatever is laid before the legislature in writing, or spoken openly or publicly in its presence or that of a committee, if false, may be refuted, or if such is whispered into the ear of individual members, is frequently beyond the reach of correction.

A contract for services as an attorney before a legislative body is valid, but for lobby services is

nominal sum, compared with its actual value. Neither party knew the defendant's legal rights to the land if he had any. The plaintiff was not a legal practitioner, competent to advise upon such matters, but a lobbyist seeking to influence the votes of members of the national legislature during a period of from three to six months each year for four years. It is true that he alleges that he employed counsel to urge the passage of a bill declaring these lands forfeited to the government, and that parties who had settled upon them in good faith should have the preference; but it nowhere appears that either plaintiff or his attorney ever prepared a petition, map, or collected documents or evidence of any kind, or prepared a written argument or made an oral one; yet he alleges that he agreed with the defendant to do all that was necessary or could be done to bring the land into market, and enable the defendant to acquire title thereto, and that for such purpose he spent several months each year, for four years, in Washington, endeavoring to procure the passage of a law by Congress giving the defendant the right to purchase the land occupied by him. The means employed are not particularly stated, but he accomplished his purpose. As it took the defendant several months each year, for a period of four years, to succeed, and the only means disclosed is that he went before the appropriate committees, we think that the unavoidable inference is that he solicited the personal aid of members of Congress in doing all that was necessary or could be done to secure the passage of the law. The earmarks and taint about the whole transaction are too plain to be ignored and disregarded, and public policy demands that such contracts shall not be enforced. The case of *Moyer v. Cantieny*, 41 Minn. 242, is cited by the plaintiff in support of his views of the law. Moyer was an attorney at law, and was employed by Cantieny to procure from the government a pardon for Cantieny's son, who was imprisoned in the penitentiary for a term of years. Cantieny

agreed to pay Moyer for his services, if successful in securing the pardon, the sum of \$200. Moyer performed the services, and was successful. The court upheld the contract upon several grounds; among others, that it would be proper, and often expedient, that an attorney at law examine the case upon which the conviction was based, and see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the extraordinary power of pardon. To the reasons given by the court in this case, we may add that the statute expressly provides that a person convicted of a crime may, by petition, apply to the governor for a pardon. Such petitioner is usually one who is confined in some prison, and unable to present the petition personally to the governor. Not only this, but it is very seldom that such petition is made by one learned in the law; and it is therefore a legal right which a prisoner has, under such circumstances, to employ an attorney to prepare his petition, present it to the governor for pardon, and have such argument made in behalf of the petitioner, as may be pertinent and advisable. As a petition and pardon are authorized by law, the presentation of a petition duly and legally prepared, accompanied by a legal argument in behalf of the petitioner showing the illegality of his confinement, or its injustice, and that public interests would not be violated by the granting to him of a pardon, cannot be a proceeding contrary to public policy, and certainly a contract for such purpose should not be declared void.

We do not condemn the attempts to secure legislation for legitimate purposes, and in a legitimate manner. Many laws are passed solely for the public good by reason of the presentation of the proper evidence, and arguments addressed to legislative bodies or the proper committees by outsiders, done openly, and without corrupting influences having been exercised. Frequently our educational, charitable, and humane laws are thus procured.

void. *McBratney v. Chandler*, 22 Kan. 682, 31 Am. Rep. 213. And the court refers for a definition of lobby services to the case of *Kansas P. R. Co. v. McCoy*, 8 Kan. 543, where it is said that if money be used directly in bribing or indirectly in working up a personal influence upon individual members, which omits to secure a member's vote without reference to his judgment, such use is illegal.

Analogous cases.

In England the question of employing agents to procure the passage of bills does not seem to have been expressly passed upon, but there are a few analogous cases in which contracts to withdraw opposition to the legislature have been passed upon. *Lord Howden v. Simpson*, 10 Ad. & El. 738; *Simpson v. Lord Howden*, 9 Clark & F. 61; *Vauxhall Bridge Co. v. Earl Spencer*, Jac. 64, 2 Madd. 356; *Edwards v. Grand Junction R. Co.* 7 Sim. 337, 1 Myl. & C. 650.

It has there been held that a promise by a corporation to pay the expenses of soliciting bills in parliament cannot be enforced, but these rulings are placed on the ground that it is not within the power of the corporation to make such a promise, rather than on the ground that the promise is *per se* void as contrary to public policy. *MacGregor v. Dover & D. R. Co.* 13 Q. B. 618; *East Anglian R. Co. v. Eastern Counties R. Co.* 11 C. B. 775, 21 L. J. C. P. 23, 16 Jur. 249.

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In this country there have been a few cases of contracts to withdraw opposition to bills. *Martin v. Second & Third Street Pass. R. Co.* 3 Phila. 316; *Pingry v. Washburn*, 1 Alf. (Vt.) 294, 15 Am. Dec. 76.

A town has no authority to expend money to send lobbyists to the legislature. *Frankfort v. Winterport*, 54 Me. 250; *Westbrook v. Deering*, 63 Me. 281.

A town cannot raise money to defray the expenses of a committee appointed to petition the legislature to annex its territory to that of another municipality. *Minot v. West Roxbury*, 113 Mass. 1, 17 Am. Rep. 52.

An agreement with a member of the legislature to give him a compensation for procuring the passage of a law is void. *Bank of Monroe v. State*, 28 Hun. 581.

In an Alabama case it is held that the confirmation of incomplete titles to land obtained from a foreign government is in its nature judicial and not legislative, and therefore a contract by an attorney to do all in his power to prevent the confirmation of one grant and the recognition of another is not void, since the legislature will be better able to act intelligently after hearing all that can be presented on both sides, than it will be if left to work out the problem unaided by the ingenuity of counsel. *Hunt v. Test*, 8 Ala. 712, 42 Am. Dec. 652.

H. P. F.

There are also many just and meritorious private claims, where, through the neglect or wrongful acts of the government, it would not be improper to present them for allowance and payment, and do so by fair argument and legitimate evidence. Many just individual claims have remained unpaid for years through the neglect of our legislative bodies to give them proper recognition, while corrupt legislation has enabled the lobbyist to succeed, to the injury of the public welfare, and deleterious to private morals. In the language of our Constitution, each person "ought to obtain justice freely and without purchase; completely and without denial; promptly and without delay, conformably to the laws" (art. 1, § 8); but hiring an agent to lobby a large portion of the year, during several years, in procuring legis-

lation securing to an individual government lands, for a comparatively small sum, worth more than \$12,000, does not come within that class of contracts which is sanctioned by the law, and does not meet with our approval. The prevalent iniquitous system of lobbying with members of our legislative bodies and public officials is fast becoming a menace to our capacity for self-government. Courts can do but little to stop this most pernicious vice, because it is seldom that such cases come before them; but, when they do appear, there should go forth from the judicial forum only rebuke and the ban of disapproval.

The order for judgment in behalf of the defendant upon the pleadings in the court below is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Theodore E. DAVIS

COMMONWEALTH of Massachusetts, *Appt.*

(164 Mass. 241.)

1. The legislature may authorize the employment of an agent to prosecute claims on behalf of the state which require the procurement of legislation, for a fee contingent on his success.
2. The trust imposed upon the states by the act of Congress refunding the direct tax levied in 1861, to hold the same for the benefit of the persons from whom it was collected, is not binding upon states which paid the tax out of their treasuries, and did not collect it by a levy upon its inhabitants.
3. A state cannot resist payment of compensation to its agent who has under his contract with it become entitled thereto, on the ground that it has promised the United States that it would not make the payment.
4. A waiver of claim to compensation, or estoppel from asserting it, under a contract to collect the direct tax returned by the general government for a state which had paid the tax out of its treasury, for a percentage of the amount received, is not worked by consenting to its receipt on condition that no part of it shall be used to pay the claimant, since such consent will at most amount to an agreement that he shall be paid in some other way.
5. The manner in which compensation shall be paid may be waived or modified without destroying the promise that a certain amount shall be paid where the latter is the principal part of the contract.

(September 6, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Suffolk County in favor of petitioner in a proceeding brought to enforce payment of compensation which defendant had agreed to give to plaintiff for collecting the amount due defendant from the United States as return of direct taxes levied in 1861. *Affirmed.*

On March 20, 1888, the following resolution by the legislature of Massachusetts was approved by the governor:

"Resolved, that the governor and council are hereby authorized to employ the agent of the commonwealth for the prosecution of war claims against the United States, to prosecute also the claim of the commonwealth for a refund of the direct tax paid under act of Congress approved August 5 in the year 1861, and of the interest paid upon war loans during the period from 1861 to 1865, also to fix his compensation, which shall be paid out of any amount received therefrom."

On February 5, 1890, the governor and council made the following order:

Ordered, that Theodore E. Davis, of Washington, D. C., agent of the commonwealth for the prosecution of war claims against the United States, be, and he is hereby, authorized to prosecute also the claim of the commonwealth for a refund of the direct tax paid under acts of Congress approved August 5 in the year 1861, and that his compensation be 2 per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom, and paid into the treasury of the com-

NOTE.—Attention is called to *Wallis v. Smith*, 157 U. S. 271, 39 L. ed. 603, in connection with the above case. In it the attorney who prosecuted the claim attempted to compel the comptroller to draw a warrant for the payment of his commission. The state courts decided against him and he appealed to the United States Supreme Court for relief. That court, however, held that having accepted the money upon the condition imposed by Congress he could not compel the state to violate its agreement and pay the money to him. There is a

distinction, however, between the two cases in that it does not appear from the *Wallis* Case where the money which was originally paid to the United States was obtained, while the *Davis* Case expressly holds that the trust is not binding because the money was originally paid from the treasury, and not raised by taxation.

Upon the subject of validity of contracts to procure legislation, see *note* to case immediately preceding this one.

monwealth; the same to be in full for compensation and expenses on account of said claim.

Further facts appear in the opinion.

Messrs. Hosea M. Knowlton, Attorney General, and **J. Mott Hallowell**, Second Assistant Attorney General, for appellant:

If a person is employed to secure the passage of a law appropriating the money for the benefit of the employer, upon a contract by the terms of which the compensation of the person employed is contingent upon the passage of the law, and is payable only out of the money so appropriated, such a contract is void as against public policy.

Barry v. Capen, 151 Mass. 100, 6 L. R. A. 808; *Mills v. Mills*, 40 N. Y. 546, 100 Am. Dec. 535; *Lord Houden v. Simpson*, 10 Ad. & El. 793; *Powers v. Skinner*, 84 Vt. 274, 80 Am. Dec. 677.

A contract for a fixed sum to perform legitimate services is legal; such as drafting a petition to set forth a claim, attending to the taking of testimony, collecting facts or preparing arguments and submitting them to the proper authorities.

Burke v. Child, 88 U. S. 21 Wall. 441, 23 L. ed. 628; *Frost v. Belmont*, 6 Allen, 182; *Sedgwick v. Stanton*, 14 N. Y. 289; *Lyon v. Mitchell*, 86 N. Y. 235, 98 Am. Dec. 502; *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co.* 75 Wis. 235, 6 L. R. A. 601.

A contract, although for contingent compensation, to prosecute a claim against the government, either before one of the executive departments or before a commission or a court of claims, is valid.

Manning v. Sprague, 148 Mass. 18, 1 L. R. A. 516; *Stanton v. Embury*, 93 U. S. 557, 23 L. ed. 985; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 220; *Wyllis v. Core*, 56 U. S. 15 How. 415, 14 L. ed. 753; *Sedgwick v. Stanton, supra*; *Burbridge v. Fackler*, 3 MacArth. 407; *Denison v. Crawford County*, 48 Iowa, 211. *Contra, Jones v. Blackledge*, 9 Kan. 562, 12 Am. Rep. 506.

But a contract to secure either legislation or the recognition of claims, through personal influence brought to bear upon individual members of the legislature, or through secret or corrupt methods, is illegal and void.

Burke v. Child, *Frost v. Belmont*, and *Lyon v. Mitchell, supra*; *Harris v. Roof*, 10 Barb. 489; *Fuller v. Dame*, 18 Pick. 472.

A contract to secure the passage of a law when payment is to be contingent upon the passage of such law is null and void; and especially is this so when payment is to be made solely out of the proceeds arising from the passage of the law.

Gil v. Williams, 12 La. Ann. 219, 68 Am. Dec. 767; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 814, 14 L. ed. 953; *Cocquillard v. Beares*, 21 Ind. 482, 88 Am. Dec. 862; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 54, 17 L. ed. 870; *Clippinger v. Hepbaugh*, 5 Watts & S. 815, 40 Am. Dec. 519; *Chippewa Valley & S. R. Co. v. Chicago, St. P. M. & O. R. Co. supra*; *Wood v. McCann*, 6 Dana, 366; *Jones v. Blackledge, supra*; *Spalding v. Ewing*, 149 Pa. 875, 15 L. R. A. 727.

There is no presumption of infallibility which prevents the state from pleading that its

acts were wrong or its contracts void, if such a plea could lawfully have been made by a citizen.

The doctrine of estoppel does not apply to contracts void from public policy.

Cardozo v. Swift, 113 Mass. 250; *Durham v. Presby*, 120 Mass. 285; *Cranson v. Goes*, 107 Mass. 440, 9 Am. Rep. 45.

It can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the operation and effect of such general law, leaving all other persons under its operation.

Lewis v. Webb, 3 Me. 326.

It was an implied condition, going to the very essence of the contract made between the petitioner and the commonwealth, that, if payment was to be made upon the terms agreed upon the sum should be secured and delivered in such a shape that payment upon such terms would be possible without involving the commonwealth in a breach of trust. The plaintiff was unable to procure such a delivery. The act which he secured contained the proviso that no part of the money appropriated should be paid out to any attorney or agent under any contract for services then existing or previously made. The petitioner therefore failed to perform the part which was to entitle him to his compensation.

The condition referred to may be construed as one of the trusts attached to this fund.

Urann v. Coates, 109 Mass. 581; *Lewin, Tr.* p. 109; *Dommett v. Bedford*, 8 Ves. Jr. 149; *Shee v. Hale*, 13 Ves. Jr. 405.

Messrs. John D. Long and William Schofield, for appellee:

This contract, having been expressly authorized by a resolve of the legislature, which was approved by the governor, cannot be declared void by the court as against public policy, unless the resolve is outside the constitutional powers of the legislature.

The legislature, acting within the Constitution, is the supreme power upon the question of what is good public policy.

Ackert v. Barker, 181 Mass. 436; *Fogg v. Supreme Lodge U. O. of G. L.* 156 Mass. 431.

The resolve is clearly within the power conferred upon the legislature by the Constitution, pt. 2, chap. 1, § 4.

Chitty, *Prerogatives of the Crown*, 95; 1 Hallam, *Court History*, chap. 8, p. 254.

The legislature may, and frequently does, enact a law for a particular case.

Rice v. Parkman, 16 Mass. 326; *Davison v. Johnnot*, 7 Met. 388; 41 Am. Dec. 448; *Sohier v. Massachusetts Gen. Hospital*, 3 Cush. 483; *Re Northampton*, 158 Mass. 299; *Norwich v. Hampshire County Comrs.* 18 Pick. 60; *Re Kingman*, 153 Mass. 566, 12 L. R. A. 417.

The action of the legislature must be presumed to have been taken upon full investigation and upon reasonable grounds.

Com. v. Huntley, 156 Mass. 236, 15 L. R. A. 889; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 228; *Davison v. Johnnot, supra*; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869; *Legal Tender Cases*, 110 U. S. 421, 33 L. ed. 204; 7 Harvard L. Rev. 129.

This contract cannot be declared void as *contra bonos mores*. All reasons urged in support of the contract upon the question of public policy apply with greater force upon the subject of morals.

Pollock, Cont. 6th ed. 286; *Holman v. Johnson*, 1 Cowp. 341; *State Treasurer v. Cross*, 9 Vt. 289, 31 Am. Dec. 626; *Brown v. Anderson*, 1 T. B. Mon. 198; *Greenwood v. Ourtis*, 6 Mass. 358, 4 Am. Dec. 145.

If this contract had been made by the governor and council alone, without a previous act of the legislature, it should not be declared void as against public policy.

A contract wholly between individuals may be void as against public policy, when a similar contract made by individuals with a public officer would be enforced.

Elkhart County Lodge v. Crary, 98 Ind. 238; *State Treasurer v. Cross*, *supra*; *Canal Fund Comrs. v. Perry*, 5 Ohio, 57; *Sterner v. Palmer*, 34 Pa. 181; *State v. Johnson*, 52 Ind. 197; *State v. Elling*, 29 Kan. 397; *Wisher v. McBride*, 49 Iowa, 220; *Pepin County v. Prindle*, 61 Wis. 301; *Hall v. Marshall*, 80 Ky. 552; *Beham v. Ghio*, 75 Tex. 87; *Odneal v. Barry*, 24 Miss. 9.

Even if this contract is to be governed by the rules which apply to contracts between individuals, it does not violate any rule of public policy which had been established at the time it was made.

Services rendered in procuring legislation may be legitimate, and a contract for legitimate legislative services is valid.

Chesbrough v. Conover, 140 N. Y. 882; *Fuller v. Dame*, 18 Pick. 472; *Frost v. Belmont*, 6 Allen, 152; *Blake v. Norfolk County Comrs.* 114 Mass. 583; *Burke v. Child*, 88 U. S. 21 Wall. 441, 23 L. ed. 623; *Simpson v. Lord Howden*, 9 Clark & F. 61; 10 Am. & Eng. Enc. Law, p. 793.

As the petitioner seeks to recover upon an express contract, the important question is, What kind of services were intended and contemplated as within the scope of the contract.

Barry v. Capen, 151 Mass. 99, 6 L. R. A. 106.

It must be assumed, as a principle of construction, in the absence of proof, that only lawful services were contemplated.

Fuller v. Dame, *supra*; *Beal v. Polhemus*, 67 Mich. 130.

The services were open services, and not secret, and this also must be taken as a fact upon the petition and demurrer.

Marshall v. Baltimore & O. R. Co. 57 U. S. 16 How. 314, 14 L. ed. 953.

Contingent fees for services in judicial proceedings before the court are lawful.

Blaisdell v. Ahern, 144 Mass. 393, 59 Am. Rep. 99.

Also for services before commissioners or courts of claims.

Manning v. Sprague, 148 Mass. 18, 1 L. R. A. 516; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Stanton v. Embry*, 93 U. S. 543, 23 L. ed. 933; *Taylor v. Bemiss*, 110 U. S. 42, 28 L. ed. 64.

The obligation of the commonwealth to the petitioner is not affected by the trusts imposed by the act of Congress of March 2, 1891, and 30 L. R. A.

accepted by the commonwealth, by the resolve of April 8, 1891.

The resolve of 1888 authorizes the employment of the petitioner absolutely, and by the employment and obligation to pay the stipulated sum was created. If the fund originally intended for his compensation is diverted by subsequent appropriation, the obligation to pay him is in no way affected.

United States v. Langston, 118 U. S. 389, 30 L. ed. 164; *Belknap v. United States*, 150 U. S. 588, 37 L. ed. 1191.

If a contract is valid when made, it is not rendered invalid by subsequent legislation.

Boyer v. Tabb, 85 U. S. 18 Wall. 546, 21 L. ed. 757; *Knight v. Lee* [1893] 1 Q. B. 41.

A state which consents to be sued cannot, by subsequent legislation, impair the obligation of its contracts.

Danolds v. State, 89 N. Y. 36, 42 Am. Rep. 277; *People v. Stephens*, 71 N. Y. 527; *Troy & G. R. Co. v. Com.* 127 Mass. 43.

Field, Ch. J., delivered the opinion of the court:

This is a petition against the commonwealth, under Pub. Stat. chap. 195, as amended by Stat. 1887, chap. 246. The commonwealth demurred to the petition. The superior court overruled the demurrer, and ordered judgment for the petitioner; and the commonwealth appealed to this court. The order of the governor and council passed February 5, 1890, seems to us within the authority granted by the resolve of March 20, 1889, chap. 39, and we have no doubt that the legislature had the constitutional power to pass the resolve. We cannot declare the contract made with the petitioner by the governor and council void as against public policy, because the legislature has sanctioned it. Whether a similar contract between private individuals, in which the compensation to be paid is made contingent upon success, would be deemed at common law void, as against good morals and public policy, we need not consider. The legislature can determine for itself what public policy requires or permits to be done in the prosecution in any form of claims of the commonwealth against the United States. It is not bound, in fixing the compensation of its agents, to conform to the rules of the common law as interpreted by the courts, or to pass a general law whereby individuals shall be put upon the same footing as the commonwealth in the prosecution of similar claims.

The more difficult question in the case is whether the obligation of the commonwealth to the petitioner is affected by the act of Congress of March 2, 1891, and by the acceptance of the money by the commonwealth from the United States under the resolve of April 8, 1891, chap. 46. By that resolve the commonwealth accepted in full satisfaction of all claims against the United States on account of the collection of the direct tax under the statute of the United States approved August 5, 1861, the money which had been credited to it by the secretary of the treasury of the United States, under the provisions of the statute of the United States, approved March 2, 1891; and the commonwealth further accepted all trusts imposed upon it by the provisions of the last-

named statute. The statute of the United States approved March 2, 1891, appropriated the money necessary to reimburse to each state and territory the amount of the direct tax collected under the statute of the United States approved August 5, 1861; and it provided in § 8 that "no money shall be paid to any state or territory until the legislature thereof shall have accepted by resolution the sum herein appropriated and the trusts imposed in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the governor to receive said money for the use and purposes aforesaid." The trusts imposed by this statute are "that where the sums or any part thereof credited to any state, territory, or the District of Columbia have been collected by the United States from the citizens or inhabitants thereof, or any other person either directly or by sale of property, such sums shall be held in trust by such state, territory, or the District of Columbia, for the benefit of those persons or inhabitants from whom they were collected or their legal representatives." In this commonwealth the tax was not collected by a levy upon the inhabitants, but was paid by the commonwealth out of its treasury, and therefore this commonwealth did not receive the money upon the trust above mentioned. This statute of the United States also provided as follows: "That no part of the money hereby appropriated shall be paid out by the governor of any state or territory or any other person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any state or territory and any attorney or agent. All claims under the trust hereby created shall be filed with the governor of such state or territory and the commissioners of the District of Columbia, respectively, within six years next after the passage of this act; and all claims not so filed shall be forever barred, and the money attributable thereto shall belong to such state, territory, or the District of Columbia, respectively, as the case may be." We consider the statute to mean that no part of the money received shall be paid out to any agent or attorney under any contract for services made before or existing at the time of the passage of the statute, but we doubt whether this provision can be regarded as a part of the trust created by the statute. We are inclined to think that the commonwealth, after it received the money, held it as its own absolute property. It may be doubtful whether this provision of the statute last cited was intended to apply to states which had paid the tax out of their treasuries; but, if it be construed as including all the states, then the reception of the money by the commonwealth under the statute may be held to imply a promise on the part of the commonwealth to the United States, that it will not pay out of the money so received any compensation to any agent or attorney under any contract for services made before the passage of the statute. Assuming this to be so, what is the legal effect of such a promise upon the claim of the petitioner against the commonwealth? If the petitioner has performed his contract with the commonwealth, according to the terms of the contract, has

become entitled to his compensation, we think that it would be no defense for the commonwealth that it had promised the United States that it would not pay to him his compensation. It may be conceded that Congress, in appropriating money to be paid out of the treasury of the United States to the states, can impose upon it any trust which it sees fit, and that the states, if they accept the money, are bound to carry these trusts into effect.

The most formidable argument is that as the original resolve provided that the compensation of the agent to be employed "shall be paid out of any amount received" from the United States, and as the order under which the petitioner was employed provided that "his compensation be 2 per centum of any amount he may collect, which shall be paid out of the proceeds received therefrom, and paid into the treasury of the commonwealth, the same to be in full for compensation and expenses on account of said claim," the petitioner, by assenting to the commonwealth's receiving the money under the act of Congress which in effect provided that no part of the money, when received, shall be paid to him, has waived his claim for compensation or is estopped from asserting it. The petitioner not only alleges that he helped to procure the passage of the act of Congress, but in the 8th paragraph of this petition, alleges also the following: "Your petitioner says that very soon after the passage of the said act of Congress of March 2, 1891, to refund the direct tax, the chief clerk of the state auditor's office under the direction of the then state auditor, Mr. W. D. T. Trefry, wrote to him at Washington, and requested him to prepare the form of a resolve for the legislature to pass, in accordance with the requirement of said act of Congress, accepting the sum therein appropriated, and also the proper form of a claim to be made upon the treasury department of the United States for obtaining the money, and that both of said forms were prepared by your petitioner and forwarded, and were used by the commonwealth in obtaining said money," etc. It is plain from these allegations that it must be considered that the petitioner assented to the commonwealth's receiving the money on the terms provided in the statute of the United States of March 2, 1891. The promise implied on the part of the commonwealth, if one is to be implied from its acceptance of the money under such a statute, may certainly be regarded as importing at least a moral obligation, which it may be the duty of the commonwealth to keep. Is it to be inferred that the petitioner, in procuring the passage of the statute, and in assenting to the commonwealth's receiving the money under it, intended to waive altogether his claim for compensation? We think not. Congress, in the statute, did not undertake to declare void any contracts theretofore made between the representative of any state and an agent or attorney. Congress only provided that the money appropriated should not be used to pay for the service of any such agent or attorney. If the money was to be held in trust by the state for the persons from whom the tax was collected, this was a necessary provision if these persons were to be paid in full out of it; but if the money was not held in trust by the state, but

belonged to the state absolutely, it is largely a matter of form whether the obligations of the state shall be discharged out of the money received from the United States or out of other funds of the state. We think that due effect can be given to the conduct of the petitioner if we hold that, at most, it amounted to an assent on his part that he need not be paid out of the money received from the United States, and that the commonwealth, so far as he is concerned, may keep its promise to the United States. But the petitioner has in substance performed his part of the contract, and the commonwealth has fully received the benefit contemplated by such performance; and, whether the contract was a provident one or not, the commonwealth ought, in substance, to perform its part of the contract, and we see

no legal difficulty in its doing so. The principal thing promised is a certain amount of compensation, to be determined in a certain manner. It is a subordinate and separable part of the contract that the compensation shall be paid out of the proceeds, and this last may be waived or modified by the parties without a cancellation or avoidance of the whole contract. We are of opinion that the commonwealth is bound to pay the amount of the compensation agreed upon from any appropriation that may be made for the purpose. See Pub. Stat. chap. 195, § 4. It was agreed by the attorney general at the argument that, if the demurrer should be overruled, judgment should be entered against the commonwealth.

Judgment accordingly.

WEST VIRGINIA SUPREME COURT OF APPEALS.

J. R. SMITH *et al.*

v.

Daniel CORNELIUS, Impleaded, etc.: *Appt.*

(.....W. Va.....)

*1. The property known as the "Berkeley Springs" is the property of the state of West Virginia, the legal title being in the corporation known as the "Trustees of Berkeley Springs" in trust for the public, as provided by chapter 202, Acts 1882.

2. Possession and claim of ownership undisputed by Virginia and this state, of said property for 119 years, raises a presumption of a grant or dedication by Lord Fairfax, as lord of the fee, for public use.

3. Long and uninterrupted possession of land with claim of ownership will justify a presumption of grant.

4. Long and uninterrupted possession of land by the state, with claim of ownership for public use, and user by the public, will raise a presumption of a dedication by the proper owner for such public use.

5. Where a public corporation vested with state property for public use makes a lease of it which is *ultra vires*, a private person cannot sustain a suit to contest it; this can be done only by the state or the corporation.

6. Directors, as such, of such corporation, cannot sustain such a suit.

7. Nature of office of directors discussed.

8. Liability of directors for wrongful acts referred to.

9. The lease involved in this case, of its property by the trustees of the Berkeley Springs, is *ultra vires*, and void.

10. A public corporation vested with powers by the state to be exercised for the public cannot transfer to another the exercise of such powers, and make a lease of its property necessary to enable it to execute its functions, without legislative consent.

*Headnotes by BRANNON, J.

NOTE.—As to the nature of public corporations owned by the state, see also *State v. Board of Regents* (Kan.) 20 L. R. A. 378, and *note*.
30 L. R. A.

11. Persons dealing with a corporation must take notice of what is contained in the law of its organization, and must be presumed to be informed of the restrictions annexed to the grant of power by the law by which the corporation is authorized to act.

12. A conveyance is made to one and his assigns. In a suit to annul it, until it appear that he has transferred the property such assigns need not be made parties as unknown assigns or otherwise.

13. In a suit to annul an act of a corporation as *ultra vires* the corporation must be a party.

(November 12, 1895.)

APPEAL by defendant Cornelius from a decree of the Circuit Court for Morgan County in favor of complainants in a proceeding brought to cancel a lease of the Berkeley Springs and to enjoin defendants from proceeding to act in accordance with its provisions. *Reversed.*

The facts are stated in the opinion.

Messrs. Flick & Westenhaver and *William H. Travers*, for appellant:

It was error to allow the amended bill to be filed.

The case was, when this bill was tendered, still at rules for all purposes except for the motion to dissolve.

Gilmer v. Baker, 24 W. Va. 72.

If the application to amend had been made at the right place and time it should have been denied, because the original injunction bill was under oath, the facts set forth in the amended bill were fully known to the plaintiffs when they filed their original bill, and they show no sufficient reason for not having stated the whole of their equity in the original bill, and not having made proper parties to it.

Matthews v. Dunbar, 8 W. Va. 188; *Rodgers v. Rodgers*, 1 Paige, 424; *Whitmarsh v. Campbell*, 2 Paige, 67; *Norris v. Kennedy*, 11 Ves. Jr. 565; *Carey v. Smith*, 11 Ga. 539; *Barton*, Ch. Pr. p. 324.

The court below should not have perpetuated the injunction on the hearing of the motion to dissolve it.

Ottawa v. Walker, 21 Ill. 605, 74 Am. Dec.

123; 2 Dan. Ch. Pr. 1682; 1 Barton, Ch. Pr. 468; High, Inj. § 95; 4 Minor, Inst. 902; Code, chap. 125, § 58; *Pecks v. Chambers*, 8 W. Va. 210.

It was error to dissolve the injunction because the corporation the "Trustees of Berkeley Springs" was not made a party, and to perpetuate the injunction in the absence of the "unknown assigns" of Daniel Cornelius.

The act of 1882, chapter 202, vests the control and management of the property in controversy in the trustees of Berkeley Springs.

Whatever, therefore, may be the rights of a minority of the individual trustees to sue in such cases as may stockholders in private corporations, the necessity for making the trustees of Berkeley Springs a party in its corporate capacity is the same as in cases involving the property of any private corporation.

Davenport v. Doves, 85 U. S. 18 Wall. 626, 21 L. ed. 938; 1 Morawetz, Priv. Corp. § 267; *Robinson v. Smith*, 8 Paige, 222, 24 Am. Dec. 212; *Hervey v. Veazie*, 24 Me. 9, 41 Am. Dec. 864; *Brewer v. Boston Theatre Props.* 104 Mass. 378.

The bill in this case makes the "unknown assigns" of Daniel Cornelius parties defendant, and both the temporary and the perpetual injunction runs against him and his unknown assigns.

These unknown assigns including the one who is named in the answer, were not brought before the court, either by an appearance or by an order of publication. In their absence it may not have been error to refuse to dissolve the injunction on this ground alone, but it certainly was error to hear the case on the merits and to perpetuate the injunction, and this error cannot be waived by the other parties to the suit.

1 Barton, Ch. Pr. pp. 225, 226; *Morgan v. Blatchley*, 88 W. Va. 155; *Hill v. Proctor*, 10 W. Va. 59; *Donahue v. Fackler*, 21 W. Va. 124.

The plaintiffs have no right to maintain this suit.

The facts establish, therefore, a complete, indefeasible, and unconditional title to this property in West Virginia as the successor of Virginia.

The true nature of the state's title is by dedication.

Cincinnati v. White, 81 U. S. 6 Pet. 431, 8 L. ed. 452; *Beatty v. Kurts*, 27 U. S. 2 Pet. 566, 7 L. ed. 521; *M'Connell v. Lexington*, 25 U. S. 12 Wheat. 582, 6 L. ed. 735; *New Orleans v. United States*, 85 U. S. 10 Pet. 662, 9 L. ed. 573; *Sarpy v. Municipality No. 2*, 9 La. Ann. 597, 61 Am. Dec. 221; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554, note; *Price v. Plainfield*, 40 N. J. L. 603.

As individuals the trustees are given no powers. They cannot act severally, but must act in meeting as a corporate body.

The title as well as the beneficial ownership, both at law and in equity, are in two persons either in the corporate body, the trustees of Berkeley Springs, or in its *cestui que trust*, the state of West Virginia, neither of which are concerned in the prosecution of this suit, but both of which are abundantly able to care for themselves.

1 Morawetz, Priv. Corp. § 260.

80 L. R. A.

Similar conditions have often arisen in the administration of what is known as charitable trusts.

To prevent a failure of the trust or to redress a wrong done by the trustee, the King of England, as *parens patriæ* the state in America, by its executive officers, may bring a suit in either the name of the attorney general or of the state for the administration of the trust, wherein all proper relief can be had.

Atty. Gen. v. Heelis, 2 Sim. & Stu. 76; *Jackson v. Phillips*, 14 Allen, 539; *Wesson v. Washburn Iron Co.* 13 Allen, 101, 90 Am. Dec. 181; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 91, 9 L. ed. 1012; *Western Lunatic Asylum v. Miller*, 29 W. Va. 326; High, Inj. §§ 747, 753, 755; 2 Morawetz, Priv. Corp. §§ 1041-1043; *Doolittle v. Broome County Supers.* 18 N. Y. 155.

Directors are simply the managing agents of the corporation. Their office alone gives them no interest in the corporate property; and they need not, unless a statute or the charter or the by laws so require, be stockholders.

1 Morawetz, Priv. Corp. § 505.

Directors of a corporation as such can act on behalf of the corporation only as a board.

1 Morawetz, Priv. Corp. §§ 531, 532; *Bultrick v. Nashua & L. Railroad*, 62 N. H. 413.

Like all other agents, they must act in the name of their principal.

Brewer v. Boston Theatre Props. 104 Mass. 385.

The suit must always at law, ordinarily always in equity, be in the name of the corporation; if the corporation cannot act or will not act,—that is, if its managing agents, the directors cannot or will not,—in the corporate name, then and only then may the stockholders sue in equity.

1 Morawetz, Priv. Corp. §§ 235-259, especially §§ 238, 240, 241, also 531, 532; *Park v. Petroleum Co.* 25 W. Va. 108, 111; *Park v. New York & E. Oil Co.* 26 W. Va. 436; *Washington Bank v. Lewis*, 22 Pick. 24; *Smith v. Hurd*, 13 Met. 371, 46 Am. Dec. 690.

The contract of January 23, 1895, was one proper to be made.

When a deed is executed under the official seal of the corporation, as was done here, this creates a strong presumption that those executing it on behalf of the corporation had full and legal authority so to do.

Devlin, Deeds, § 343; *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 32 W. Va. 244.

The term "to alienate" has a technical legal meaning, and any transfer of real estate short of a conveyance of the title is not an alienation of the estate.

1 Am. & Eng. Enc. Law, p. 466, note 1; *Conover v. Mutual Ins. Co.* 1 N. Y. 290; 1 Devlin, Deeds, § 247.

Of the necessity for the improvements the trustees are the sole judges.

Perry, Tr. § 511; 27 Am. & Eng. Enc. Law, pp. 140, 141.

Trustees in cases of that sort may make building leases with the popular covenants for repairs and insurance for a term of ninety-nine years; in fact, such is the usual term where the improvements to be made require a large outlay of money.

Hill, Trustees, 463; *Atty. Gen. v. Owen*, 10

Ves. Jr. 555, 560; *Atty. Gen. v. Cross*, 8 Meriv. 539; *Atty. Gen. v. Backhouse*, 17 Ves. Jr. 293.

If the trustees exercise their discretionary powers in good faith and without fraud or collusion, the court cannot be reviewed or control their discretion.

Perry, Tr. § 511; 27 Am. & Eng. Enc. Law, pp. 140, 141.

Mr. D. B. Lucas, for appellees:

The lease is in violation of the charter.

The lease grants to Cornelius special privileges, as the proprietor of a future hotel, in the use and enjoyment of the public springs and grounds. This is also a violation of the charter.

It is not only the right, but the duty, of the minority of the directory to restrain the majority from violating the charter or wasting, imperiling, or totally destroying the subject of the trust.

Thompson, *Liability of Officers of Corporations*, p. 453.

It is possible that the attorney general, had his attention been called to the matter, would have had the power to intervene, in the name of the state, to prevent the destruction and alienation of this property; but he having failed to take proper steps, it became the duty of the directors to interpose, and they, as a corporation, having refused to do so when requested to do so by a minority, such minority was in duty bound to go forward and save the subject-matter of the trust from utter destruction.

Park v. Petroleum Co. 25 W. Va. 103; *Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 623.

The violation of the charter is of itself irreparable injury in the eye of the law, and no further averment on that subject would have been necessary.

2 High. Inj. § 1213.

If the directors of a corporation are guilty of a breach of trust, injurious to the corporate property, or to the rights of the shareholders, or a portion of them, and if the corporation refuses to institute the proper proceedings to restrain or redress such injury, one or more of the shareholders may do it in their individual names.

Thompson, *Liability of Officers of Corporations*. 853, 885; Morawetz, *Priv. Corp.* §§ 246, note, 389, 392; *Park v. New York & E. Oil Co.* 28 W. Va. 486; *Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 623; *Boyce v. Montauk Gas Coal Co.* 37 W. Va. 73; *Sweeny v. Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 443.

In such case equity may grant relief at the suit of a single stockholder.

2 High. Inj. § 1203.

The trustees could not delegate their trust.

Morawetz, *Priv. Corp.* § 249.

Brannon, J., delivered the opinion of the court:

J. Rufus Smith, president of the board of trustees of Berkeley Springs, and C. P. Jack, A. R. Unger, and H. C. Harmon, trustees of said board, filed a bill of injunction in the circuit court of Morgan county against Daniel Cornelius and his assigns, unknown to the plaintiffs, alleging that the said board of trustees constituted a corporation with the usual incidents; that they were incorporated by act 30 L. R. A.

of the legislature of West Virginia passed March 27, 1882, it being chapter 203 of the Acts of 1882; that the plaintiffs had applied to all the trustees to unite with them in the bill, but only those who were plaintiffs consented to do so; that, before any general meeting of the board, irreparable injury might be done to the springs, baths, and other public property committed to the care and charge of said trustees; that certain of the trustees had assembled and undertaken to organize themselves into a special meeting, and, by a vote of four out of six trustees then present, made an agreement with Daniel Cornelius, or his assigns, to alien the said public property for the term of 99 years, and, for the improvement thereof and the public use and managing and controlling it, Cornelius and his assigns were by the agreement allowed to to tear down and remove the present bath houses, beautify the grounds, erect new bath houses and an hotel, and manage and control the public property, charging certain rates for certain baths, and certain other rates, to be fixed by Cornelius, for other baths, receiving the returns from the property, and paying the trustees 1 per cent of net profits from the baths. The bill alleged that, for certain reasons given, the meeting of the trustees at which the agreement was made was irregular and unauthorized to make it, and that it was an act in violation of the charter of said board, as found in said act of 1882, and against its prohibition, and that the action of the board, and the lease deed which had been executed under it (thus leasing the public property and its control, and granting Cornelius and his assigns special and peculiar privileges), were violative of the said act, and of the trust reposed in said trustees, and beyond the power of the trustees, and void. The bill prayed an injunction to restrain Cornelius and his assigns from proceeding under the lease, or taking possession of the property, and that the lease be declared void. An amended and supplemental bill was filed, alleging that, since the preparation of the original bill, a meeting had been called of the trustees to take into consideration the subject of enjoining Cornelius from going on with the lease, but that the meeting refused to take any action looking to an injunction. This amended bill made the corporation the board of trustees of the Berkeley Springs a party defendant. Such proceedings were had that a motion to dissolve the injunction awarded upon the bill was overruled, and the injunction was perpetuated, and Cornelius brought this appeal.

A question which at once calls for decision in this case is, Have the plaintiffs a right to maintain this bill? This renders it pertinent, if not indispensable, to ascertain the ownership of the grounds at the town sometimes called "Bath," sometimes "Berkeley Springs,"—the county seat of Morgan county, known as the "Public Grounds," containing those springs whose waters have been famous for their medicinal properties for 150 years,—since that ownership will indicate who is to prevent the illegal alienation of the property and its diversion from its proper use. At this date the court can have no difficulty in asserting that these grounds are the property of the state of West Virginia. Were we back in time near the act

of October, 1776, we likely could not assert the public right to this beautiful property with so much confidence. By that act the Virginia legislature (9 Hen. Stat. p. 247), it would seem, simply seized 50 acres of the land of Thomas, Lord Fairfax, the celebrated proprietor of the Northern Neck of Virginia, by vesting it in trustees to be laid off into quarter-acre lots, with convenient streets, and established them as a town by the name of "Bath," and authorized the trustees to sell the lots for building purposes, to "accommodate numbers of infirm persons who frequent those springs yearly for the recovery of their health." The act reciting no consent on the part of Lord Fairfax, nor providing for obtaining his consent, and from its mercifully reserving to him "one large and convenient spring, suitable for a bath," and exempting from sale any lot whereon he may have built a house, would seem to be an act of confiscation. Though it gave him, in mercy, the proceeds of sale, yet it took the fee—the land—from him forever. The act enacted that all the "Warm Springs," as they were then called, except the one reserved to Lord Fairfax, should be vested in the trustees, "in trust to and for the public use and benefit, and for no other purpose whatsoever." Under this clause the trustees marked out that square or plot of ground containing the celebrated springs, and reserved it for public use for the healing and pleasure of the people, as we find it in our day. It is a park of beauty, as well as a fountain of health and pleasure, used and enjoyed by thousands of people every returning summer. The public title cannot be shaken at this late day. Perhaps it was once questionable. Was that old act of 1776 one of forfeiture or confiscation, or did Lord Fairfax consent to it? We do not know. If he consented, it does not appear. Those were troublous times when that act passed. The stately and noble old Lord Fairfax, though the patron and unflinching friend of Washington, so much so that he is said to have declared that, if the American Revolution failed, he would save Washington's neck, was yet to the core loyal to King George, as well we might expect him to be when he bethought himself of the princely landed estate vested in him by descent from ancestors who had received it from royal grant. So loyal was he to the mother country, as Kercheval says, that when he heard at Greenway Court of the surrender of Cornwallis at Yorktown, and foresaw the loss of the English cause, he called a servant to put him to bed, saying, "It is time for me to die." He died December 10, 1781. Perhaps it was because of his known disloyalty to the colonies that this act of 1776 was passed. Was it valid? We need not inquire. The old lord, bent with age, made no resistance to it. Neither did the Reverend Denny Martin, his nephew and devisee, nor those who subsequently claimed under him. The commonwealth of Virginia claimed it to be, as it was in fact long held in actual possession for public use, its property. In March, 1857, we find an act of its legislature recognizing it as public property, as it declared that "the public property in the town of Bath, in the county of Morgan, known as the 'Public Square and Berkeley Springs,' shall be vested in and governed by a board of trustees, whom it

named, and whom it constituted a corporation by the name of the "Trustees of the Berkeley Springs," and made sundry provisions of regulation. Thus, the state of Virginia owned it. It passed to West Virginia by the legislative grant of Virginia to the new state, found in chapter 68 of the Acts of 1862-63 of the legislature of the reorganized government of Virginia. West Virginia has always claimed it. We find a resolution of the legislature of 1866 (page 171) calling on the trustees for a plan to secure to the state the revenue from the property, which, it is said, is the property of the state; and chapter 145, Acts 1872, declares: "The public grounds in the town of Bath, in the county of Morgan, known as the 'Public Square,' and the medicinal springs and improvements thereon, shall be and continue under the management and control of a board of trustees, in trust as heretofore, for the public use and benefit." It terminates at a fixed time the powers of the then trustees, and names others, and declares them and their successors a corporation by the name of the "Trustees of the Berkeley Springs," and makes divers provisions for management. By chapter 281, Acts 1872-73, the legislature assumes control over the property, authorizing a lease or mortgage. By chapter 202, Acts 1882, the legislature again declares that the property, in the language of the act of 1857, shall be held by trustees for public use, and appoints trustees, and declares them a corporation. Thus, we find, by the two states, unbroken possession for 119 years, with claim of title and ownership, and no one disputing it. Of course, under the statute of limitations, the state acquired indefeasible title. And so, from this great lapse of time, we would conclusively presume either a grant or a dedication from Lord Fairfax,—either or both, as might be requisite to sustain the state's title. *Wheeling v. Campbell*, 12 W. Va. 36; *Archer v. Saddler*, 2 Hen. & M. 370; 1 Lomax, Dig. p. 782, title *Prescription*; *Matthews v. Burton*, 17 Gratt. 812; *Cincinnati v. White*, 31 U. S. 6 Pet. 481, 488, 8 L. ed. 452, 456. See note on dedication in *State v. Trask*, 27 Am. Dec. 559, covering the whole subject; *Cole v. Sprout*, 35 Me. 161, 56 Am. Dec. 696; *Harris's Case*, 20 Gratt. 383.

Question might arise whether the act of 1882 vested title or only control in the body corporate; but as the act of 1857 used the word "vest," and clothed the corporation with title, and the corporation has had continuous being since, though its members have changed, and the act of 1882 continues it "under the management and control of the trustees in trust as heretofore, for public use," I think the dry title is in the corporation; the state being the beneficial owner, with power to resume all title at its will.

Thus, the state being owner, who but it shall, who but it can, through its law officer, the attorney general, or by some action of the legislature, assail the action of the trustees in making the lease to Cornelius? Here is a corporation—not a private joint-stock one, but a public one—managing public property for public ends, with no private interests in it. I here borrow language from Green's *Brice*, *Ultra Vires* (page 698), as pointedly expressive of the law on this point, and abundantly supported

by authorities from all quarters: "No person may institute proceedings with respect to wrongful acts which, if of a private nature, are not wrongs to himself, and, if of a public nature, do not specially affect himself." Same author says, on page 700, that the attorney general is the party to move, and, until he does so, no other one can. No refusal is here shown, and, if it were, these trustees could not do so for want of interest. This rule is applicable though the act be one *ultra vires*, says same author (page 708). See *Talbot v. King*, 32 W. Va. 6; High, Inj. § 747; 1 Beach, Pub. Corp. §§ 18, 351, 352; *Springer v. Walters*, 189 Ill. 419; *State v. Cunningham*, 81 Wis. 440, 15 L. R. A. 561; Grant, Corp. 188; 2 Dill. Mun. Corp. p. 1100, § 909, note 1; Id. § 910; *Seager v. Kankakee County*, 102 Ill. 669. See, especially, *Atty. Gen. v. Chicago & N. W. R. Co.* 85 Wis., on page 526. A suit to enjoin the sale and injury of a public park by a city cannot be brought by an individual, but only by the attorney general or properly authorized officer. *Moury v. Providence*, 16 R. I. 422. It surely cannot be that anybody and everybody can intermeddle in the affairs of the state. If so, where would be the end or limit of litigation and confusion? In some cases, where the attorney general has refused to act, courts have acted at the relation of a citizen, though not interested. *State v. Cunningham*, 88 Wis. 90, 17 L. R. A. 145, and Id., 81 Wis. 440, 15 L. R. A. 561. It appears that the corporation can contest an *ultra vires* act of its directory. But, though a private citizen may not do so, it is abundantly settled that where there is a corporate excess of power, which tends to the public injury or defeats public policy, it may be restrained in equity at the suit of the attorney general. *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97; Green's Brice, *Ultra Vires*, p. 706; Pom. Eq. Jur. § 1098; 2 Dill. Mun. Corp. 910; Beach, Inj. § 1844; *Atty. Gen. v. Chicago & N. W. R. Co.* syl. 4, 85 Wis. 425, particularly 526, 527; 2 Morawetz, Priv. Corp. § 1043.

But the plaintiffs, to sustain their right to sue, say they are not simply private individuals, but president and members of the board of trustees. This does not give them capacity to sue. Directors are only agents of the corporation to conduct its business, and not the corporation, and, as such, have not a shadow of interest in its property, and need not be stockholders, unless statute or by-law so requires, and cannot act individually, as they have no inherent power as agents, but only collectively as a board. *Pennsylvania Lightning Rod Co. v. Cass Twp. Bd. of Edu.* 20 W. Va. 860. They are but officers "representing the interests of that abstract legal entity, the corporation, and those who own shares of its stock." *Addison v. Lewis*, 75 Va. 702; *Burr v. M'Donald*, 3 Gratt. 215; 4 Thomp. Corp. § 4875; 3 Thomp. Corp. §§ 3904, 3905; 1 Morawetz, Priv. Corp. § 531. "They can act in behalf of the corporation only as a board. Their power is not joint and several, but joint." *Buttrick v. Nashua & L. Railroad*, 62 N. H. 413. They are not even proper defendants in suits against the corporation. 1 Morawetz, Priv. Corp. § 258. How, then, can we say that the act of the plaintiffs in bringing this

suit, without any authority from the board, is even an official act? The corporation could sue to enjoin this lease, but this is not a suit of the corporation. Here, I think, the case of *Stewart v. Thornton*, 75 Va. 215, very apposite, holding that, as a county school board is a corporation, suit to recover a fund belonging to it must be brought in the corporate name, and that a suit by persons styling themselves "directors of the county school board," could not be maintained. Judge Burks said the suit was not by the corporation, but by Thornton and others, who were members of the board, and acted under the erroneous impression that, because they were such members, they could maintain the suit in their names. He referred to a similar erroneous impression in the case of *People v. Fulton*, 11 N. Y. 94, where certain persons brought suit in their own names, as trustees of a religious society, instead of in its corporate name, to recover possession of property belonging to it. The court said: "Incorporated religious societies are aggregate corporations, and whatever property they acquire is vested in interest in the body corporate; and while the officers have it under their control or dominion, whatever possession they have is the possession of the artificial person whose agents they are. Though called 'trustees,' they do not hold the property in trust for the corporation or the religious society. The name is simply the title of their office, and their position respecting the corporate property would be the same if they were denominated 'directors' or 'managers.' Their right to intermeddle is an authority, and not an estate or title. They have no other possession than the directors of a bank have of the banking house. This would be so upon general principles relating to the legal nature of corporations, apart from the particular language of the act concerning religious corporations." Other cases are cited by Judge Burks.

The plaintiffs are not stockholders. The state is the only owner of the corporate property, though the technical legal title may be in the corporation. Stockholders of joint-stock companies may sue because of their interest as such, to vindicate corporate rights under certain circumstances stated in *Crumlish v. Shenandoah Valley R. Co.* 28 W. Va. 623; *Park v. New York & K. Oil Co.* 26 W. Va. 486; *Moore v. Schoppert*, 22 W. Va. 282; *Rathbone v. Parkersburg Gas Co.* 81 W. Va. 798. But those cases are not material in this case, as the plaintiffs do not and cannot sue as stockholders. These trustees are but directors. No matter about their denomination. Their status is that of directors. No authority is cited to sustain such a suit by directors but Thompson on Liability of Officers of Corporations (453), a work not in our library. An adverse brief states that it is based only on the English case of *Joint-Stock Discount Co. v. Brown*, L. R. 8 Eq. 381. I have examined this case, and it surely decides no such proposition. A judge said the director sought to be charged with liability for acts *ultra vires* should have called the stockholders together, and laid the matter before them, and requested them to sue, or to have sued himself. This is a mere incidental opinion or *dictum arguendo*, not authority. It is said this authority in directors to sue must ex-

1st, else they would be liable for wrongs of the directors, without means to protect themselves. But, surely, directors not parties to a wrongful act are not liable for acts of others. Without intending to state the rule accurately or fully, in the absence of close investigation, which I do not deem necessary in this case, I apprehend that directors are not liable for the wrongful acts of other directors, unless they connive at them, or the loss is the result of their own neglect of duty, when ordinary care would have averted the loss; and they are not liable for their own acts unless fraudulent or a misappropriation of funds; and they are not liable for error of judgment or want of knowledge. *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662; *Spring's Appeal*, 71 Pa. 11, 10 Am. Rep. 684; 8 Thomp. Corp. §§ 4019, 4109.

Another question very important in the case is whether the action of the board in making the lease to Cornelius transcended its powers, rendering that lease unlawful. For myself, I have had no question since the oral argument, and now, since I have carefully examined, I have no question, but that this lease is an act beyond the powers of the board, and void; and this whether we view the subject as under the common law of corporations or under the act which constitutes the charter of the corporation known as the "Trustees of the Berkeley Springs." View the matter first under the common law of corporations. A corporation is an artificial being, created by the state, for the attainment of certain defined purposes, and therefore vested with certain specific powers, and others fairly and reasonably to be inferred or implied from the express powers and the object of the creation. Acts falling without that boundary are unwarranted,—*ultra vires*. If the act sought to be done is foreign to the nature and design of the corporation, it is *ultra vires*; and, though the act be calculated to attain the purpose, yet it may be *ultra vires* because of the undue means of accomplishing it. "Corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the act creating them." "The statute, *quoad* the corporation, is an enabling act, not only in regard to the powers conferred, but also as to the mode prescribed for exercising those powers; and, unless the mode so prescribed is observed by the corporate body, its act will not bind the corporation." *Pennsylvania Lightning Rod Co. v. Cass Twp. Bd.*, 20 W. Va. 860. Here we find a public corporation, vested with valuable land, property of the state, to answer an object deemed to be of public utility by the state, and charged, by the plainest construction, with the duty of retaining in itself absolute possession of it, and commanded in words to manage and control it for public use and benefit, and receive the revenues arising therefrom, vested with these powers not beyond recall, but subject to recall or modification at the will of the legislature; the body composed of particular persons named by the legislature, because, as we must presume, of particular confidence in their personal management of the property and their fitness. We find the board of this corporation making a lease of the property to one individual, not able financially to perform his agree-

ment, for a term of ninety-nine years,—a term longer than the life of nearly every human being then living,—giving him exclusive possession with power to utterly change the grounds, tear down the bath houses, receive all revenues, fix his own charges on certain baths; in short, to hold, occupy, manage, and control, according to his will, the property, in place of the thirteen chosen agents of the state. If we say that any franchise existed in the corporation, and can say that it retained it notwithstanding this lease, yet it was a mere lifeless, hollow shell, as, by the lease, the board deprived itself for a century of the property and means of carrying out the charge committed to the corporation, and transferred the right to do just what it was charged with doing, which is the substance and soul of the franchise. If this lease be valid, what becomes of the right of the state to sell the property or change its policy or mode of managing it for the public use? Even a private corporation, unless authorized by charter to do so, cannot lease or dispose of its franchise or its property needful in the performance of its obligations to the state, without legislative consent; and I should think that, for a stronger reason, a public corporation cannot. *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 27; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.* 189 U. S. 24, 35 L. ed. 55. It cannot sell out its business and assets. 8 Thomp. Corp. § 3983; 2 Morawetz, Priv. Corp. §§ 512, 513; 1 Beach, Priv. Corp. §§ 361-363. The supervisors of Norfolk county and the council of the city of Norfolk leased a ferry for thirteen years, but it was held void. It was held that the right of disposal is not incident to the ownership of property held as a public trust. *Roper v. McWhorter*, 77 Va. 214. We cannot infer any such power as inherent in this corporation. As well might the directors of the hospitals for the insane or of the penitentiary assume to turn over to others the institutions and powers committed to them, so far as the power to do so is concerned. To allow such a total alienation of functions and property indispensable to execute them would be to enable a body of public agents chosen for fitness to avoid the doing of their duty, and delegate their powers,—create a deputy. In this instance, one man, not chosen by the state, becomes the deputy of thirteen, charged with all their capacities in matters requiring discretion and judgment, and to their exclusion. A public corporation cannot thus delegate powers committed to it. Could any other state institution do so? 1 Beach, Priv. Corp. § 536; 1 Morawetz, Priv. Corp. § 536. Apart from the question of the lease of the property, they cannot delegate the exercise of their judgment, discretion, and official functions. But this contract effectually does so, by giving Cornelius sole management, yielding only 1 per cent of net profits as a rental.

Another reason against the validity of this lease is that it is flatly in the teeth of a prohibition in the act giving life to this corporation, and direction to its trustees. That act, after creating the corporation, and vesting it with

its property and powers, inserts a proviso—I say a proviso—"that the said trustees shall have no power to mortgage or otherwise alien the public property aforesaid, nor shall they grant to the proprietor of any hotel, or any person, any special or exclusive privileges in the use or enjoyment of said springs or public grounds." The word "alien" is used. My search in Abbott's, Anderson's, Bouvier's, and Black's Law Dictionaries does not tell me that the word means anything in law but to transfer property, thus covering a lease as well as conveyance in fee. The transfer of an estate for years as much falls under the broad word "alien" as a transfer of the fee. The lease conveys the very title not in fee, but the whole title, for its term. It is absolute for that term, not a mere deed of trust, with power to end it by redemption. A particular estate is carved out of the fee, and title to it conveyed. Surely, a conveyance of the absolute possession for ninety-nine years is an alienation. It is certainly so within the sense of this proviso; for it cannot be thought that the legislature intended to forbid only the transfer of the fee, and yet allow an absolute lease, carrying the possession and use for so long a period as ninety-nine years. The word "otherwise" here has force. The language is "mortgage or otherwise alien," meaning in any wise alien. The act of 1857 contained this same prohibition. The act of 1878 gave authority to lease, notwithstanding any prior law; but the act of 1882 returned to the policy of the act of 1857, by reinserting the same prohibition as that found in the act of 1857, repealing all acts in conflict, thus affording a reason to say that by the late act it was meant to repeal the act of 1878. And this lease, besides giving Cornelius sole control, confers on him special and exclusive hotel privileges, contrary to the meaning of the act of 1882.

Thus, I am clear in the opinion that the trustees had no color of authority to make this lease. Whether it was advisable or not we have no right to say. No power could authorize it but the legislature. Of this want of power in the trustees, Cornelius and all others must take notice, for no one can plead ignorance of law; and "persons dealing with corporations must take notice of what is contained in the law of their organization, and they must be presumed to be informed as to the restrictions annexed to the grant of power by the law by which the corporation is authorized to act." *William v. Fredericksburg, O. & C. R. Co.* 27 Gratt. 119; *Haden v. Farmers' & M. Fire Assn.* 40 Va. 683; *Life Assn. of America v. Rundle*, 108 U. S. 222, 26 L. ed. 337.

Objection is made that the case was not matured as to the unknown assigns of Cornelius. The bill makes the unknown assigns parties, but does not aver any alienation by Cornelius. His answer does not aver any, or give any names of alienees, but, to the reverse, states a mere hope to effect one. I do not think that if a bill states and exhibits a deed from A. to B. and his assigns, no assigns appearing, it renders it necessary to make them parties. The title is yet in Cornelius, for aught that appears. Multitudes of old deeds convey to a person and his assigns. In a bill to set such a

deed aside, must assigns be made parties, it not appearing there are any? I should think not.

It is assigned for error that the court allowed an amended bill to be filed, first, because the original was yet at rules, and there had been no proceeding but a motion to dissolve made in term, at which time the amended bill was tendered, and the amended bill was allowed at a subsequent term, while the original was still at rules. We should construe the statute for amendment liberally. If there was reason for the amendment, I think it could be tendered in term, and allowed in term, though the case on the original be at rules. Was there need of the amendment? Surely, there was, as the corporation was not a party, and it was a necessary party. Like a natural person, if its rights are involved, it ought to be before the court; and, if the parties do not bring it in, the court ought to require it; and the party but did by this amendment what the court would require. Code, chap. 125, § 58. It was an indispensable party. Where the question is one of the validity of its acts, whether it is *ultra vires*, affecting the corporation itself, it is especially necessary that it be a party. *Green's Brice, Ultra Vires*, p. 653; *Hurst v. Coe*, 30 W. Va. 158.

Secondly, it is objected that all the matter of this second bill was known to the plaintiffs before it was filed, and therefore leave to file it ought not to have been given. I do not understand our liberal practice as debarring an amended bill simply because the party, when he filed the original, knew a fact which, by inadvertence, he omitted or did not deem it pertinent. That would be a harsh rule, exacting perfect recollection and judgment at the first step. It is within the discretion of the court. If unreasonable delay in asking to file it exists, and there is no excuse, doubtless leave might be refused.

But here there was no unreasonable delay in tendering it. This bill charged that the board had sanctioned the lease, by subsequent action, and it made the corporation for the first time a party. It was proper to charge this ratification, and absolutely indispensable to bring the corporation before the court, and this alone justified the amended bill.

It is objected that the defendant entered a motion to dissolve, and that, instead of passing on it alone, leaving the injunction standing, the court went on to perpetuate it, while the original bill was at rule, and the case not on the hearing docket. The case was in the court, though at rules. Cornelius filed his answer to the original bill on May 14, and on May 17 the motions to dissolve and to file amended bill were argued; and on June 25 leave to file amended bill was allowed, and the defendants appeared, waived further service of process, and adopted, as their joint and several answers to both bills, the answer already filed by Cornelius; and the case was heard on the bills, said answer, replications, depositions, and exhibits, and argument of counsel. No continuance asked. No objection to hearing, though that hearing, as just shown, was on the merits. No denial of the matter of the amended bill was made. No one wanted to take further steps in the case. Under these facts, as the bill was purely

an injunction, we cannot say it was error to perpetuate the injunction, instead of merely overruling the motion to dissolve. I do not see how any prejudice resulted to Cornellius, as all the facts were in. He made no show of presenting any, or altering the phase of the case.

There was a demurrer to the bill. It ought to have been sustained, and the bill dismissed, for want of capacity and interest in the plaintiffs to maintain it; and, as the only plaintiffs

had no interest, the bill was not amendable by the substitution or introduction of the state or corporation as plaintiffs. There was no community of interests between them to be brought in. Opinion in *Stewart v. Thornton*, 75 Va. 221.

We sustain the demurrer and dismiss the bill. It is needless to say that this is without prejudice to a suit by the state or the corporation.

FLORIDA SUPREME COURT.

WIGGINS & JOHNSON, *Appts.*,

v.

Robert WILLIAMS.

(.....Fla.....)

- *1. Where several interlocutory orders are made in a case, and only certain ones specified are appealed from, the appellate court will be confined to the orders mentioned in the appeal.
2. Constitutional provisions similar to that contained in the 3d section of the Bill of Rights of our Constitution were designed to preserve and guarantee the right of trial by jury in proceedings according to the course of the common law as known and practised at the time of the adoption of the Constitution.
3. The guaranty of the right of trial by jury was intended to provide for the future as well as the past, and to secure the right of such trial in all cases, whether then or thereafter arising, which would properly fall within those classes of rights to which by the course of the common law the trial by jury was secured.
4. The legislature may create new rights unknown to the common-law procedure of trial by jury, and may organize new tribunals without common-law powers to adjudicate such rights without a jury, but a mere change in the form of an action will not authorize the submission of common-law rights in the trial of which according to the course of the common law a jury was employed, to a court in which no provision is made to secure a jury trial.
5. Courts of chancery are not strictly courts according to the course of the common law, and the constitutional guaranty of trial by jury has no reference to such courts in their recognized sphere of equity jurisdiction, nor does such guaranty extend to all cases at law, as there are proceedings in many inferior courts, and many summary proceedings in *vis privus* courts, in which a jury was never employed.
6. Prior to the enactment of chapter 3884, act of 1889, the court of chancery in this state had no jurisdiction to enjoin a mere trespass upon land and boxing and scraping the trees thereon for the purpose of making turpentine, or the removal of turpentine therefrom, where no other element of irreparable injury, or recognized ground of equity jurisdiction, was alleged.

* Headnotes by MARRY, Ch. J.

NOTE.—For injunction against trespass to cut timber, see note to *Carney v. Hadley* (Fla.) 22 L. R. A. 233.

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7. Prior to the adoption of our first Constitution in 1839, securing and continuing the right of trial by jury, the court of chancery in this state did not exercise jurisdiction to enjoin the mere cutting and removal of the ordinary growth on timbered lands; but in order to give the court jurisdiction in such cases it had to be further shown that the injury was irreparable in the sense that full and adequate relief could not be obtained at law, or that the trespass went to the destruction of the property in the character in which it had been enjoyed, or that it was necessary to prevent a multiplicity of suits.
8. In a suit to enjoin a trespass upon land the complainant must have title, and, as a general rule, be in possession, in order to successfully invoke the aid of the court by injunction; and if his title is brought in question under facts showing a substantial dispute in reference thereto, the court ordinarily will not enjoin, or if an injunction has been already granted will not make it perpetual until there is a settlement of the title at law, unless in cases of serious and irreparable injury the aid of the court is invoked to preserve the property pending a legal suit already instituted to test the legal right.
9. The 2d section of the act of 1889 (chapter 3884) extends the powers of the court of chancery in the cases therein provided for beyond the limits of its jurisdiction as exercised when the right of trial by jury was first secured in this state by constitutional provision, in this, that claimants of timbered lands are given the right to have an injunction against the trespasses mentioned, without reference to the character of the injury as being irreparable, or the adequacy of the legal remedy for the wrong, or actual possession of the claimant.
10. When a court of chancery in the exercise of its general or concurrent jurisdiction assumes the right to dispose of a case for one purpose, it will proceed to the settlement of the entire case, even to the adjustment of legal rights connected therewith, which otherwise would be beyond its powers.
11. While in all cases in which a court of equity, prior to the adoption of the Constitution, assumed jurisdiction for one purpose and proceeded to a complete adjustment of the entire case, even to the settlement of strictly legal rights, the right of trial by jury as to the legal question cannot be invoked, still it is not in the power of the legislature to confer upon the court of equity jurisdiction to grant injunctions in matters with respect to which its jurisdiction did not extend before the adoption of the

Constitution, and draw to it a legal cause of action cognizable exclusively at law and triable by jury, and have both disposed of by the court without a jury.

12. To the extent of conferring jurisdiction on the court of chancery to enjoin the trespasses mentioned in the 2d section of the act of 1890, *supra*, by a mere trespasser without color of right or authority, the act can operate; but to the extent of awarding an account for damages for a mere trespass cognizable at law, and in respect to which the court of equity had no jurisdiction independent of the statute, it impairs the right of trial by jury according to the course of the common law and secured by the Constitution.

(January 4, 1896.)

A PPEAL by defendants from orders of the Circuit Court for Suwannee County enjoining them from taking turpentine from lands alleged to belong to plaintiffs and directing them to pay damages for injuries already committed by them. *First order affirmed, second reversed.*

Statement by Mabry, Ch. J.:

A bill in chancery filed in this case by appellee against appellants alleges, in substance, that the complainant and one Robert T. Hall, prior to the 20th day of September, 1890, were engaged in the business of producing and manufacturing naval stores, resin, and spirits of turpentine in Suwannee County, and became indebted to their commission merchants, Ellis, Young, & Co., in a sum of money which they could not at the time pay, and, in order to pay and fully settle said indebtedness, conveyed to said Ellis, Young, & Co. the interest of complainant and Hall in certain lands that were boxed for turpentine purposes. The interest conveyed, it is alleged, was the yield of turpentine from the boxed trees on the lands, situated in said county and described in the bill, and containing about 100,000 boxes. It is averred that Hall was settled with and went out of the business, and that the settlement with Ellis, Young, & Co. left the other turpentine lands and business of complainant unencumbered on account of any indebtedness to Ellis, Young, & Co., or other parties in Savannah, with whom complainant and Hall had traded; that after the settlement with Ellis, Young, & Co., which was on the 20th of September, 1890, complainant had, among lands boxed for turpentine, certain lands, the trees on which had lately been boxed—called virgin dips—containing about four and one-half crops, of 10,000 boxes to the crop; the lands containing the four and one-half crops being described in the bill. It is further alleged that complainant was the lessee of the turpentine timber and sole owner of the property described; that Ellis, Young, & Co. sold and conveyed their said interest acquired from complainant and Hall to the defendants about the 20th of September, 1890, and a few days thereafter they entered upon, took possession of, and worked the four and one half crops belonging to complainant, and had gathered the turpentine from the boxed trees thereon, carried it off the land, and appropriated it to their own use, and that they had continued to do so to the commencement

of the suit; also that they had been distilling the turpentine into resin and spirits with other turpentine from their own trees, and claim the whole as their own, and that they did so after being forbidden by complainant, and after they knew that they were not the boxed trees purchased from Ellis, Young, & Co.; that defendants may claim that their purchase from Ellis, Young, & Co. contains the land in section 82, which is true, but the same is township 8, R. 11 S. and E., and not in section 82, township 2, R. 11 S. and E., which contains the new boxes of complainant. The bill alleges the yield of the four and one-half crops and states the value of the spirits and resin at \$900 each dripping, and that the drippings should have commenced on the 20th of September, 1890, the boxes being then full and continued monthly thereafter. It is further claimed that defendants should account to complainant for the turpentine so wrongfully taken from his crops, and that they should be enjoined from interfering with his turpentine lands. It is also stated on the belief of complainant that defendants had no property in the county except what they procured from Ellis, Young, & Co. and their stock, fixtures, and what spirits and resin they had on hand gathered from their own and complainant's said crops. The prayer of the bill is for an injunction, an account, and for process. A demurrer to the bill was overruled.

The answer filed by defendants admits that complainant and Hall were engaged in the business stated; that they became indebted to Ellis, Young, & Co., and, in order to settle with them, conveyed the property as alleged in the bill, upon which there were about 100,000 turpentine boxes. It is alleged that the property alleged to have been conveyed to Ellis, Young, & Co. was not the only property sold and conveyed to them, but complainant and Hall failed in business and conveyed their entire turpentine interest as copartners, consisting of turpentine still, wagons, mules, and all utensils and equipments belonging to said turpentine business, to Ellis, Young, & Co., the purpose and intent of complainant and Hall being to surrender, without reservation, their entire copartnership interest in said business to Ellis, Young, & Co.; that complainant and Hall, having become greatly indebted and insolvent, and being desirous of settling their indebtedness, transferred to Ellis, Young, & Co. their entire turpentine interest, and by said transfer made a full settlement of their copartnership indebtedness to Ellis, Young, & Co. Further, that it was not true that complainant was the owner of the property which he claims in his bill; that the land was held by lease by the firm composed of complainant and Hall, and the trees thereon had been boxed for turpentine purposes, and worked by them in their turpentine business, together with all the balance of their turpentine farm which they conveyed to Ellis, Young, & Co. in settlement of said indebtedness to them, and that it was the purpose and intent of complainant and Hall to convey their entire interest in the land to which complainant lays claim, and that said land was left out of the deed to Ellis, Young, & Co. through inadvertence on the part of complainant; that complainant furnished the descrip-

tion of the property contained in the deed to Ellis, Young, & Co., and his purpose and intent were to give a full and complete description of all property owned by him and Hall as partners, whether held in fee, or by lease for years, and that when such description was given, complainant represented that it embraced the entire copartnership property of himself and Hall. It is then alleged that defendants purchased the same property from Ellis, Young, & Co., believing at the time, from representations of complainant, that they were purchasing the entire turpentine farm which had been owned and worked by complainant and Hall; and defendants allege that complainant himself believed at the time that the land which he now claims was described in the deed to Ellis, Young, & Co.; that discovering, sometime afterwards, the omission of the land from the description in the said deed, he set up a pretense that he had not conveyed it, and still had title to the same; that said pretense and claim on the part of complainant were a fraud upon the rights of defendants, as they were led to believe by complainant and Hall that said land was conveyed to Ellis, Young, & Co., and that they (defendants) had acquired by their said purchase the entire turpentine farm aforesaid. Also, that the purchase from Ellis, Young, & Co. by defendants comprised the same property sold to them by complainant and Hall, but the deed to defendants was not executed until a considerable length of time after they had taken possession of the land and worked the said turpentine farm. The allegations of the bill as to the yield of turpentine and the value of the same are denied. Replication was filed to the answer.

On the application of complainant an injunction was granted, and defendants moved to dissolve it. On the hearing of this motion the court ordered that upon defendants filing a bond in the sum of \$1,000 the injunction granted be so far modified as to allow defendants to dispose of the manufactured naval stores, spirits, and resin distilled by them from crude turpentine taken from the boxes claimed by complainant.

Certain proceedings were had in reference to a violation of the injunction, but they claim no attention on the present appeal.

At the hearing of the contempt proceedings the court made a further order permitting the defendants to file a bond in the sum of \$1,400, in lieu of the one already filed by them, and upon the filing of such bond, that the injunction be dissolved. The \$1,400 bond was filed, and subsequently complainant filed a petition setting forth that said bond was insufficient to indemnify him in the damages he had sustained up to that time, and that if the court was satisfied on the showing to be made that said bond was insufficient, that defendants be enjoined from shipping or disposing of any of the manufactured naval stores then in the county or state, and also that they be prohibited from shipping or removing said naval stores from the premises claimed by complainant, or in any way disposing of them until the final hearing of the case.

The cause was referred to an examiner named, to take the evidence in the cause and report it to the court. An order was also made
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that the question of the sufficiency of the bond as to amount be referred to the master, who was directed to take proof and report whether or not the bond for \$1,400 was sufficient to indemnify complainant against loss by reason of the alleged trespasses of defendants, should it finally appear that complainant was entitled to damages, and what amount of damages had accrued from the 20th of September, 1890, to the date of the order. Also whether or not said bond was sufficient, in the event complainant recovered at the final hearing, to indemnify him against loss to the date of the order, and such further damages as might result to him by reason of the continued hacking of the trees and removal of crude turpentine from the premises in question, from the date of the order to the first day of October, 1891.

The master reported his findings on the question of the sufficiency of the bond, and also the evidence upon which such findings were based. There was filed with this report of the master a written agreement of counsel for the respective parties to submit the evidence reported to the court on all the issues in the cause, reserving the right for either party to urge objections to testimony deemed to be improper. The cause was set down for final hearing, and at that time counsel for defendants made a motion to strike out and suppress certain portions of the evidence, and some of the evidence objected to was suppressed.

On the 11th of June, 1891, the day fixed for the final hearing of the cause, the court made an order directing the examiner, appointed to take the evidence in the cause, to forthwith report the evidence of the witnesses, or show cause why he failed to do so. On the 13th of June, 1891, the court proceeded to hear the cause upon the pleadings and the evidence reported, with the agreement of counsel, and decreed that complainant was entitled to recover damages for the removal by defendants of turpentine from the four and one half crops of turpentine boxes mentioned in the bill, both before and since the institution of the suit, and the master was ordered to take an account of the damages to complainant by reason of the removal of turpentine from said crops by defendants from the 20th of September, 1890, until the hearing, and that in taking said account he was to use the pleadings and proofs already taken, and such other evidence as he might deem advisable, or that the parties might offer.

In response to the order of June 11, 1891, to report the evidence of witnesses, or show cause for failure to do so, the examiner reported, on the 15th day of that month, that he proceeded to take testimony in the cause, and counsel for complainant offered no evidence before him as examiner, but postponed the taking of evidence until the testimony in reference to the sufficiency of the bond was taken, and that after such testimony had been taken, counsel for both parties entered into the agreement which had been reported with the testimony taken, and that after the receipt of the order of June 11 he notified counsel that he was ready to take the evidence as examiner, but none was offered. Under the reference in the decree of June 13, 1891, the master examined witnesses on behalf of complainant, and reported that defendants

had removed from the four and one-half crops of boxes claimed by complainant crude turpentine which, when manufactured into spirits and resin, would amount to \$5,235.16, on which the profit was \$1,500. The account stated by the master in favor of complainant was \$1,500, and the account and testimony upon which it was based were reported to the court. Motion was made by complainant to confirm the report of the master, and for decree for the amount reported, and that defendants be enjoined from further trespassing upon the boxes in question. On the hearing of the motion to confirm the report and for decree, the court, on application of defendants, granted ten days' time in which to file exceptions to the master's report, and also ordered that defendants be enjoined from further dipping crude turpentine from the four and one-half crops of turpentine boxes claimed by the complainant. This order was made on the 1st of July, 1891. Exceptions to the report were filed, and upon a hearing some were overruled and some sustained in part, and the cause was again referred to the master to take an account and report to the court. Such report was made and notice given to confirm it. Thereupon defendants entered an appeal from the decree rendered on the 13th of June, 1891, directing the master to take an account of the damage to complainant by reason of the removal of turpentine from the boxes claimed by him, and also from the decree rendered July 1, 1891, enjoining defendants from further dipping turpentine from said boxes.

Further facts bearing on the facts involved in the appeal taken are stated in the opinion.

Mr. B. B. Blackwell for appellants.

Messrs. J. L. Frases and **M. E. Broome**, for appellee:

Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere, but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts taken by itself may not be destructive or inflict irreparable injury, and the legal remedy may therefore be adequate for each single act if it stood alone, the entire wrong may be prevented by injunction.

Mills v. New Orleans Seed Co. 65 Miss. 391; 1 Pom. Eq. Jur. § 245; 3 Pom. Eq. Jur. § 1857.

An injunction will be granted against a trespass producing mischief which reaches to the very substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed.

White v. Flannigan, 1 Md. 525, 54 Am. Dec. 668; *Musselman v. Marquis*, 1 Bush, 463, 89 Am. Dec. 637; *Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216.

A court of equity having jurisdiction to enjoin a continuing trespass, this jurisdiction draws with it the power to award compensatory damages therefor.

1 Pom. Eq. Jur. §§ 236, 237; see note and authorities.

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Mabry, Ch. J., delivered the opinion of the court:

The interlocutory orders appealed from in this case are those made on June 13 and July 1, 1891, and we are confined to them at this time. *Mann v. Jennings*, 25 Fla. 780; *Lensjety v. Coe*, 26 Fla. 49. The order of June 13 determined that appellee (complainant below) was entitled to recover damages by reason of the removal by appellants of turpentine from the four and one-half crops of boxes on the lands, described in the bill of complaint, both before and since the institution of the suit, and the master was ordered to take an account of said damages from the 20th of September, 1890, when, it is alleged, appellants took possession of said turpentine boxes, until the hearing, and in taking the account the master was directed to use the pleadings and proofs then in the cause, and such other evidence as he might deem advisable, or that the parties might offer. After the cause was at issue, an examiner named was appointed to take the testimony therein, and there was also an order directing the master, but not designating any one as such, to take testimony and report as to the sufficiency of a bond that had been executed in the case by appellants under the order of the court. The examiner named acted, without objection of the parties, as master in taking testimony as to the sufficiency of the bond, and such testimony extended to the entire merits of the case. By agreement of counsel, the testimony taken on the question of the sufficiency of the bond was reported to the court as the testimony on all the issues in the case, and it was upon such testimony that the decree of June 13 was made.

It is insisted for appellants that the testimony did not authorize this decree, and further that the legislature could not confer upon the circuit court, exercising chancery jurisdiction, power to award damages for a mere trespass. The inhibition of such legislation, it is claimed, is found in the third section of the bill of rights, that "the right of trial by jury shall be secured to all, and remain inviolate forever." Counsel also claims that the court erred in that portion of the order directing the master to take further evidence in stating the account, in view of the agreement of counsel reported by the master.

The case arose since the adoption of the Act of 1889 (chapter 3384), the second section of which provides "that courts of chancery shall entertain suits by any person or persons claiming any timbered lands in this state to enjoin trespasses on said lands by the cutting of trees thereon or removal of logs therefrom, or by boxing or scraping the said trees for the purpose of making turpentine or by removal of turpentine therefrom; and in such suits the said courts shall cause an account to be taken of the damage to the complainant from any of said trespassing before or after the institution of the suit, and decree payment of the amounts shown due upon such accounting by the defendant or defendants." The title of this act is "An Act to Extend the Powers of the Courts of Chancery in This State." The testimony, conceded to be proper for the consideration of the court, sustains, in our opinion, the claim

of appellee to four and one half crops of turpentine boxes described in the bill. The deed from appellee and R. T. Hall to Ellis, Young, & Co. does not embrace the four and one-half crops, and the written leases, with the indorsements thereon, admitted to be proved, and in evidence, show title in appellee.

The answer sets up as a defense that appellee and Hall sold all the property employed by them in their turpentine business to Ellis, Young, & Co., who sold the same property to appellants, and that through inadvertence the four and one-half crops in question here were left out of the deed to Ellis, Young, & Co. Appellants' deed from Ellis, Young, & Co. does not embrace the said four and one-half crops, and while there is some testimony, brought out on cross-examination of a witness for appellee, tending to show that appellee intended to convey all of his property employed in the turpentine business, including the crops in question, to Ellis, Young, & Co., still the record evidence supports appellee's title, and there is no sufficient parol testimony to overcome it. Appellants did not testify in the case, and in fact offered no evidence to sustain their allegation that they purchased from Ellis, Young, & Co. the crops claimed by appellee. The testimony places appellants in the attitude of trespassers without claim or color of right upon the lands on which the boxed trees claimed by appellee are situated. The second contention for appellants under the decree of June 18 is, that the statute directing an account of damages for a mere trespass upon land in a court of chancery is unconstitutional, as such causes of action were triable by jury according to the course of the common law, and secured to the parties by the 3d section of the bill of rights in our Constitution. By the second section of the statute referred to it will be seen that claimants of timbered lands are given the right to invoke the injunctive power of the court to prevent the cutting of trees thereon, the removal of logs therefrom, the boxing or scraping the trees for the purpose of making turpentine, or the removal of turpentine from the land; and in such suits the court is directed to cause an account to be taken of the damage to the complainant resulting from the trespasses before or after the institution of the suit, and to decree payment of the amounts shown to be due upon such accounting. In the case of *Reddick v. Meffert*, 32 Fla. 409, the 2d section of the act in question, as applied to the facts of that case, was recognized as being valid, though its validity to any extent was not there questioned and no claim for damages was involved. The question presented in the present case demands a consideration of the constitutional guaranty of a jury trial for the assessment of damages under the conditions disclosed by this record. The 3d section of the bill of rights does not grant the right of trial by jury, but secures or guarantees such right existing at the time of the adoption of the Constitution. We said in *Buckman v. State*, 34 Fla. 48, 24 L. R. A. 806, that "when the right of trial by jury is secured by constitutional provision in general terms like ours, and without any qualification or restriction, it must be understood as retained in all those cases that were triable by jury ac-

ording to the course of the common law. The provision in the first Constitution, framed in 1838, 'that the right of trial by jury shall forever remain inviolate,' contemplated, without doubt, a continuation of jury trials in all cases where such was the practice at the common law, and there is nothing in the subsequent Constitutions to indicate a change of meaning in this respect." We have also held that the 10th section of the bill of rights was designed as a guaranty and protection of the citizen against a trial, except in certain enumerated cases, unless upon presentment or indictment by such grand jury as was known at the common law. *English v. State*, 31 Fla. 840; *Donald v. State*, 31 Fla. 255. The authorities with great uniformity hold that constitutional provisions like ours were designed to preserve and guarantee the right of trial by jury in proceedings according to the course of the common law as known and practiced at the time of the adoption of the Constitution. *Plant River S. B. Co. v. Roberts*, 3 Fla. 102, 43 Am. Dec. 178, and notes; *Blanchard v. Raines*, 20 Fla. 437; *Tabor v. Cook*, 15 Mich. 322; *Plimpton v. Somerset*, 33 Vt. 283; *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. 488, 33 Am. Dec. 580, and note; *Norris's Appeal*, 64 Pa. 275; *Watts v. Griffin*, 6 Litt. (Ky.) 244.

Courts of chancery were not, strictly speaking, courts of common law, their jurisdiction and practice being derived principally from the civil law where no jury was employed; hence the guaranty of a trial by jury has no reference to such courts in their sphere of equity jurisdiction, nor does it extend to all cases at law, as it is perfectly clear that there were many proceedings in common-law courts in which juries were not used. Proceedings in laying out highways and in assessing damages for the taking of private property for public use (*Beekman v. Saratoga & S. R. Co.*, 3 Paige, 45, 23 Am. Dec. 679; *Koppikus v. State Capitol Comrs.*, 16 Cal. 248; *Ross v. Irving*, 14 Ill. 171), the proceedings in many inferior courts and many summary proceedings in *ancient* courts, were without jury, and the guaranty of jury trial has no application to them. It is not necessary to go into an enumeration of such cases. A principle has been established in the jurisprudence of this country, that new rights unknown to the common-law procedure of trial by jury may be created, and provision made for their determination in the absence of a jury, without violating the constitutional provision we are considering. But while it may be competent for the legislature to create new tribunals without common-law powers to adjudicate new rights without a jury, the mere change in form of an action will not authorize the submission of common-law rights to a court in which no provision is made to secure a trial by jury. A statute in Michigan provided that any person claiming title to lands through the auditor general's deed, executed upon a sale thereof for nonpayment of taxes, may file a bill in chancery to quiet his title without taking possession thereof. It was claimed that the statute gave the right to file the bill against one in possession of the land, although at the time of the adoption of the Constitution under which the act was passed trials of titles to lands were at law. It was

held that the statute did not have such meaning, but if it did, the legislature was powerless to enact it. Judge Cooley, speaking for the court in *Tabor v. Cook*, *supra*, said: "The present is one of those cases where a right to a trial by jury existed when the Constitution was formed, and this right must therefore 'remain.' Whatever proceeding the legislature authorizes for the determination of adverse claims, the right of the party in possession to a jury trial must be kept in view, and some mode pointed out by which he can demand it. In civil cases at law, including ejectment suits, provision is made by statute and rule whereby either party may obtain a jury; but there is no such provision for cases in chancery, and it is only in special cases, where the court desires the verdict of a jury for its own guidance, that issues in chancery can go before a jury at all. A defendant in chancery, therefore, cannot waive a jury by failing to demand it, because no mode is provided by which any such demand can be made, and a statute which should authorize a bill in the nature of an ejectment bill, without at the same time providing some means by which a jury could be had at the option of defendant, would be in palpable disregard of the provisions of the Constitution which we have quoted." This court said in *Flint River S. B. Co. v. Roberts*, 2 Fla. 102, 48 Am. Dec. 178, that this guaranty of trial by jury "has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." The language of the court in *Plimpton v. Somerset*, *supra*, is that, "the Constitution was intended to provide for the future as well as the past, to protect the rights of the people by every safeguard which their wisdom and experience then approved, whether those rights then existed by the rules of the common law or might from time to time arise out of subsequent legislation. All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article. Hence it is not the time when the violated right first had its existence, nor whether the statute which gives rise to it was adopted before or after the Constitution, that we are to regard as the criterion of the extent of this provision of the Constitution, but it is the nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law, that must decide the question." This opinion also very properly states that the Constitution "should be construed in the spirit with which it was enacted, and that any restriction of its present application should come, not through legislation and judicial construction, but from the direct, constitutional, and considerate action of the people."

By looking into the jurisdiction of the court of chancery we find that originally it did not entertain jurisdiction to enjoin a trespass upon land, but in analogy to the remedy of injunction to prevent waste dependent upon privity of title between the parties, courts of equity extended the remedy to cases of trespass without privity of title under certain conditions. This extension of the remedy of injunction

took place prior to the formation of our first Constitution in 1839. The basis of the jurisdiction in such cases was the probability of irreparable injury, the inadequacy of a pecuniary compensation, the destruction of the estate in the character in which it had been enjoyed, or the prevention of a multiplicity of suits where the right to the property was controverted by numerous persons, each insisting on his individual right. The courts were practically unanimous in announcing the rule that something more than a mere trespass, susceptible of adequate remuneration, must be shown before a court of equity will exercise jurisdiction. *Carney v. Hadley*, 32 Fla. 344, 23 L. R. A. 283; *Indian River S. B. Co. v. East Coast Transp. Co.* 28 Fla. 387; *Burns v. Sanderson*, 13 Fla. 381; *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *McMillan v. Ferrell*, 7 W. Va. 223; *Gauss v. Perkins*, 3 Jones, Eq. 177, 69 Am. Dec. 728; *Powell v. Cheahire*, 70 Ga. 357, 48 Am. Rep. 572; 2 Beach, Inj. §§ 1125 *et seq.*; Kerr, Inj. pp. 112 *et seq.*

What will constitute irreparable injury, when a pecuniary recovery at law will be inadequate, or what will amount to a destruction of the estate in the character in which it has been held, has given rise to diversity of opinion. In England, after the court of chancery commenced to grant injunctions in cases of trespass, the remedy was eventually pressed to the extent of restraining the cutting of timber trees, on the ground that it was destruction and took away the substance of the land, but without some element of irreparable injury in addition to the mere destruction of the timber the court did not exercise such jurisdiction up to the time of the formation of our first Constitution in 1838, and in the early settlement of this country when forest timber was abundant, the court of chancery would not enjoin and dispose of the entire case unless irreparable injury, such as a verdict at law could not adequately atone for, was alleged and shown. It must be conceded that lately the jurisdiction of the court has been extended in some cases to the prevention of injury or destruction of the ordinary growth on timbered lands upon the theory that it is destructive of the estate, but an examination of the cases shows, in our opinion, that up to the time when the right of trial by jury in common-law cases was secured here by constitutional provision, an injunction would not be granted in chancery to restrain the cutting of ordinary growth on timbered lands unless the injury was irreparable, so that full and adequate relief could not be granted at law, or where the trespass went to the destruction of the property as it had been enjoyed, or where it was necessary to prevent a multiplicity of suits. In addition to the cases already cited, the following bear upon the jurisdiction of the court of chancery to enjoin the cutting of timber:

Green v. Keen, 4 Md. 98; *Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371; *Powell v. Rawlings*, 38 Md. 239; *Thompson v. Williams*, 1 Jones, Eq. 176; *Cowles v. Shaw*, 2 Iowa, 496; *Stevens v. Beekman*, 1 Johns. Ch. 318; *Tatler v. Humble*, 67 Ind. 444; *Hillman v. Hurley*, 82 Ky. 626.

It was a fundamental doctrine of the court of equity, as stated by Pomeroy (vol. 1, § 181,

Eq. Jur.) that when the court "has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." The decision of this court in the case of *Griffin v. Fries*, 23 Fla. 178, was based upon this principle. The same principle is announced in *Montgomery & F. R. Co. v. McKenzie*, 85 Ala. 546.

It may be safely stated that in all those cases in which a court of equity, prior to the adoption of the Constitution guaranteeing a trial by jury, and by virtue of its general or concurrent jurisdiction for one purpose, had proceeded to a complete adjudication of the entire case, even to the settlement of legal rights which otherwise would be beyond its powers, it cannot be successfully claimed that the guarantee of trial by jury exists as to the legal right. But while this is true, we are not prepared to recognize the power in the legislature to confer equity jurisdiction to grant injunctions in matters in respect to which such jurisdiction did not exist before the adoption of the Constitution, and draw to it a legal cause of action cognizable exclusively in a law court and triable by jury, and have both tried by the court without a jury. Should such a power be conceded in the legislature, it is not perceived where the limit of the power to abolish jury trials in cases existing according to the course of the common law would be placed. *Scott v. Neely*, 140 U. S. 106, 85 L. ed. 358.

Before reverting to the statute under which the bill was filed in the present case, further reference to the practice of chancery in granting injunctions to restrain trespasses is necessary. The complainant was required to have title and as a general rule be in possession before he could ask the aid of the court, and if his title was brought in question by the defendant, the court ordinarily would not enjoin, or, if an injunction had been granted, would not make it perpetual, until the title had been established at law. A mere denial of complainant's title was not sufficient, and to entitle the defendant to a trial at law his title must be based upon facts showing a substantial dispute of complainant's title. 2 Beach, Injunctions, §§ 1189, 1140. It was also early established that the court would interfere by injunction to prevent a trespass in some cases where the title was in dispute, but this was in aid of a suit at law, and the court interfered, not for the purpose of trying the legal title, but to preserve the property pending the suit over the title at law. *West v. Walker*, 3 N. J. Eq. 279, note A; *Shubrick v. Guerard*, 2 Desauss. Eq. 616; *Wadsworth v. Gorre*, 96 Ala. 227; *Bacon v. Jones*, 4 Myl. & C. 433.

It is evident, we think, that the statute had extended the powers of the court of chancery, 80 L. R. A.

in the cases provided for, beyond the limit of its jurisdiction as exercised when the right of trial by jury was secured in this state by constitutional provision. Claimants of timbered lands are given by the statute, not only the right of an injunction for the trespasses mentioned, but also to have an account taken of the damages resulting therefrom, and this without reference to the character of the injury as being irreparable, the solvency of the trespasser, or the adequacy of the legal remedy for the wrong. The bill, it is apparent, does not allege a case sufficient for the interposition of a court of chancery to assess damages independent of the statute, and while it may be conceded that in reference to the entire subject-matter of recognized equitable jurisdiction the legislature may modify or expand the powers of the court as to such matters, this cannot be done to the extent of depriving a party of a right guaranteed to him by the Constitution. No doubt can exist that the recovery of damages for a mere trespass was by legal remedy according to the course of the common law in which a jury was employed. The action of trespass was a well-recognized legal remedy, and at the time of the adoption of our first Constitution the court of chancery did not enjoin a mere trespass and assess the damages incident thereto, unless some recognized equitable ground for the court's interference was alleged and shown. The statute authorizes an injunction against certain specified trespasses on timbered lands, and to the extent of conferring the power to prevent, under the conditions prescribed, the unauthorized entry upon such lands and committing the acts mentioned, we see no good reason why it may not be done; but to the extent of authorizing a court of equity to assess damages for a trespass under the conditions prescribed by the statute, is unauthorized. It deprives a party of the right of trial by jury in a case according to the course of the common law when the Constitution was adopted. Of course where the court of chancery, in the exercise of either its general or concurrent jurisdiction, assumes the right to enjoin a trespass, it may, in order to do complete justice in the case, assess the damage resulting therefrom. But it is not competent, in our judgment, for the legislature to confer the power to enjoin in cases where it did not exist before, and at the same time draw to it the incidental power to assess damages in a case clearly triable at law by a jury.

Our conclusion is, that the order of June 13, directing the master to assess, was erroneous. We do not discover any error in the order of July 1, 1891, the only other order from which an appeal was taken. In the order of June 13, the court, in directing an account of the damages to be taken, restrained appellants from further trespassing upon the premises of appellee, and the order of July 1 was made on motion to confirm the master's report of the damages. As has been stated, the testimony placed appellants in the attitude of trespassers without color of title, and on such showing the court was authorized to arrest any further trespassing upon the premises in question. *This order will be affirmed. The order of June 13, 1891, directing an account of the damages to be taken, will be reversed, and it is so ordered.*

NEW JERSEY SUPREME COURT.

STATE of New Jersey, *as rel.* Albert RUSHWORTH,

v.

JUDGES OF INFERIOR COURT OF COMMON PLEAS OF HUDSON COUNTY.

(.....N. J.....)

*1. Congress is without power to interfere with or control state courts, except in so far as the Federal courts have appellate jurisdiction.

*2. Congress cannot, without the consent of the state, constrain the state courts to entertain or act upon applications for naturalization.

*3. It is competent for the state legislature to prescribe and limit the times when

*Headnotes by VAN SYCKEL, J.

and during which such applications may be heard in the state courts.

(August 30, 1895.)

APPPLICATION for a writ of mandamus to compel defendants to naturalize the relator. *Denied.*

The facts are stated in the opinion.

Before Van Syckel and Lippincott, JJ.

Mr. W. D. Daly for relator.

Van Syckel, J., delivered the opinion of the court:

An act of the legislature passed March 26, 1895, entitled "An Act Concerning Naturalization and Regulating Procedure in Cases of Naturalization in Courts of This State, and Establishing Uniform Fees of Clerks and Judges in Naturalization Cases," provides,

NOTE.—Powers of state legislatures and courts in respect to naturalization.

There has been some conflict in opinion upon the question how far state jurisdiction over naturalization remained after the adoption of the Federal Constitution. But it is now regarded as settled that except in relation to purely state citizenship the state is wholly subject to the Federal law upon the subject.

In one of the earliest cases it was held that the United States Constitution did not deprive the individual states of the concurrent authority to naturalize citizens, although such authority cannot be exercised so as to contravene the rules established by the authority of the Union. The true reason for investing Congress with power to naturalize was to guard against too rigid instead of too liberal a mode of conferring the rights of citizenship as states cannot exclude citizens who have been adopted by the United States, but they can adopt citizens upon easier terms than Congress may deem expedient to impose. *Collet v. Collet*, 2 U. S. 2 Dall. 294, 1 L. ed. 387.

But in *United States v. Villati*, 2 U. S. 2 Dall. 370, 1 L. ed. 419, *Iredell, J.*, says that, had the question not previously occurred, "I should be disposed to think that the power of naturalization operated exclusively as soon as it was exercised by Congress."

And in *Chirac v. Chirac*, 15 U. S. 2 Wheat. 259, 4 L. ed. 234, Chief Justice Marshall says, that the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be, controverted, and that ruling is referred to as a decision in *Houston v. Moore*, 13 U. S. 5 Wheat. 49, 5 L. ed. 30, but in *Holmes v. Jannison*, 39 U. S. 14 Pet. 593, 10 L. ed. 606, it is referred to as a *dictum*.

In *Scott v. Sandford*, 60 U. S. 19 How. 398, 15 L. ed. 691, it is stated that we must not confound the rights of citizenship which the state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. Nor have the several states surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each state may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that 30 L. R. A.

word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the state which gave them. The Constitution has conferred on Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no state, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges secured to a citizen of a state under the Federal government, although, so far as the state alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the state attached to that character. And that statement is quoted with approval in *Boyd v. Nebraska*, 143 U. S. 160, 36 L. ed. 109.

In *Golden v. Prince*, 3 Wash. C. C. 814, the court in speaking of bankruptcy laws stated the exercise of the power of the state governments to pass bankruptcy and naturalization laws as incompatible with the grant of power to Congress to pass uniform laws upon the same subjects.

If a state could superadd to the naturalization laws of Congress any requisites before the alien would be relieved from the incapacities of alienage and acquire the privileges and immunities of citizenship in the several states, then the Constitution has failed, notwithstanding its plain expressions, to give Congress the power to establish uniform rules of naturalization. *Com. v. Towles*, 5 Leigh, 743.

A state has no power to pass a law concerning citizenship which contravenes the acts of Congress on that subject. *Barzilas v. Hopkins*, 2 Rand. (Va.) 276.

The passage of the act of Congress nullified existing state regulations upon the subject. *Rouche v. Williamson*, 3 Ired. L. 141.

In *State v. Manuel*, 4 Dev. & B. L. 25, the court, in contrasting naturalization and emancipation, states that the former belongs to the government of the United States.

The power of passing laws on the subject of naturalization exclusively pertains to the general government. *Davis v. Hall*, 1 Nott & M'C. 232.

The right of citizenship in its enlarged sense was after the adoption of the Constitution, not only a national right, but from the nature of the case it must necessarily be governed by the law of the whole nation, and after Congress exercised the power conferred upon it, it no longer fell within

among other things, that "no person shall hereafter be naturalized or admitted to be a citizen of the United States by any court of this state within the thirty days next preceding any national, state, municipal, general, special, local, or charter election." The relator was refused naturalization by the Hudson county pleas solely upon the ground that his application was made within thirty days next preceding the election for municipal officers in the town of West Hoboken. The only question submitted to the judgment of this court is whether the above-recited provision of the act of 1895 is constitutional.

The Federal Constitution provides that Congress shall have power to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." Article I, § 8, cl. 4. Judge Story, in his Commentaries on the Constitution (vol.

2, § 1104), says: "It follows, from the very nature of the power, that, to be useful, it must be exclusive, for a concurrent power in the states would bring back all the evils and embarrassments which the uniform rule of the Constitution was designed to remedy. And accordingly, though there was a momentary hesitation, when the Constitution first went into operation, whether the power might not still be exercised by the states, subject only to the control of Congress, so far as the legislation of the latter extended, as the supreme law, yet the power is now firmly established to be exclusive." Mr. Hamilton, in the *Federalist* (No. 82), says that the power given to Congress to establish a uniform rule of naturalization throughout the United States must necessarily be exclusive, because, if each state had power to prescribe a distinct rule, there could be no uniform rule. It is entirely settled that

the scope of state legislation. *Lynch v. Clarke*, 1 Sandf. Ch. 584.

Since the authority which any state court can have on this subject is derived from the law of the United States, Congress alone can prescribe uniform rules of naturalization. *Re Gladhill*, 8 Met. 168.

A state cannot make a subject of a foreign government a citizen of the United States. This can only be done in the mode provided by the naturalization laws of Congress. *Lanz v. Randall*, 4 Dill. 425. In that case the court says: "I am of opinion that no state can make the subject of a foreign prince a citizen of the state in any other mode than that provided by the naturalization laws of Congress; that when the Constitution says that Congress shall have power to establish a uniform rule of naturalization, . . . it designed these rules, when established, to be the only rules by which a citizen or subject of a foreign government could become a citizen or subject of one of the states of this Union, and thereby owe allegiance to such state, and to the United States, and cease to owe it to his former government."

The grant by the states to the general government of power over naturalization vested the power exclusively in Congress, and no power remained in the states to change or vary the rules of naturalization Congress established, or to authorize any foreign subject to denationalize himself and become a citizen of the United States without compliance with the conditions Congress has prescribed. *Minneapolis v. Reum*, 56 Fed. Rep. 576.

But a state may confer such rights of citizenship as it pleases so far as relates to itself only. But it can make citizenship of the United States only according to the rules prescribed by act of Congress. *Re Wehlitz*, 16 Wis. 443, 84 Am. Dec. 700.

Power of Federal government to confer power on state courts.

There has been considerable doubt, which is not wholly settled yet, as to the position which the state courts occupy in the naturalization scheme. It is held by some judges that the Federal government can confer no power on the state courts, and that therefore the power which they exercise must have been derived from some other source. Other judges have held that state courts when acting as courts for naturalization are for this purpose courts of the United States. The true theoretical constitutional position of state courts when so acting is hard to define, but their practical position has been so long recognized and acted upon that it must be regarded as established if the courts have not defined it.

80 L. R. A.

In California it was held that the provision of the Constitution giving Congress the power to establish a uniform rule of naturalization means that the rule when established shall be exercised by the states. Congress has no power to confer jurisdiction upon state courts. *Ex parte Knowles*, 5 Cal. 804.

But an Arkansas case held that Congress after prescribing a uniform rule of naturalization may lawfully give state courts jurisdiction in cases arising under it. *State v. Penney*, 10 Ark. 621.

In *Re Ramsden*, 18 How. Pr. 435, the court holds that the state legislatures can confer no power upon the state courts in naturalization proceedings, but states that "the power of legislation upon this subject existed in the states prior to the Constitution. . . . The power has been superseded by an act of Congress passed under the Constitution. Congress adopts the state tribunals as the agents to exercise the power, as they would have performed it before. The concurrence of the state legislatures, expressed or fairly implied, adds the sanction of the state to this delegation of power. Whether such tribunals are bound to act may admit of controversy. That their acts are lawful, if they do so, seems undeniable."

In *People v. Sweetman*, 3 Park. Crim. Rep. 371, in a proceeding for perjury under the state laws alleged to have occurred in naturalization proceedings, the court holds the indictment cannot be maintained because the court was at the time a court of the United States, and that rule was followed in *Re Christern*, 11 Jones & S. 523.

But in other cases it has been held that state courts may punish for perjury committed before them in naturalization proceedings. *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 194.

In *Rump v. Com.* 30 Pa. 475, it is held that the statute of Geo. II., chap. 7, followed by the Pennsylvania act of 1743, made naturalization of foreigners a subject of judicial cognizance before the state courts; and this jurisdiction has never been taken away. The Constitution of the United States does not propose to change the jurisdiction but only the rule of its exercise, and the acts of Congress expressly leave it to the courts, so that false swearing in such a proceeding is perjury.

When we admit that Congress cannot authoritatively confer judicial powers on state courts, we only mean that Congress cannot compel them to entertain jurisdiction in any case, or to perform any judicial act. But we do not mean that Congress cannot empower them to perform any judicial act to which they are competent, and for the performance of which they have an adequate inherent jurisdiction. The argument which denies

no state can pass naturalization laws. *Houston v. Moore*, 18 U. S. 5 Wheat. 48, 5 L. ed. 30; 1 Kent, Com. § 424. The United States statute provides for the naturalization of aliens by application to a circuit or district court of the United States, or a district court or supreme court of record of any of the states, having common-law jurisdiction and a seal and clerk. The United States government has thus selected the state courts as one of its agencies to hear and act upon applications for naturalization.

While it must be conceded that the state can pass no law which regulates the subject of naturalization, or the order of business in the Federal courts, the solution of the controversy in this case, in my judgment, turns upon the question whether the state may not regulate the order of business in its own courts in relation to this subject, or refuse altogether to per-

to state tribunals the power to perform the process of naturalization erroneously assumes, for its premises, that the performance of that act renders it necessary for them to be invested with some jurisdiction in addition to that which they already possess. This, however, is an evident mistake, and hence the fallacy of all the reasoning that is based upon such an erroneous assumption. *Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735.

As to the duty of state courts to act, it has been held that—

The powers of naturalization given to the state courts are naked powers which impose no legal obligation on courts to assume to exercise them, and such exercise is not within their official duty on their oath to support the Constitution of the United States. And the state legislature may lawfully prohibit the courts from taking jurisdiction of such cases. *Re Stephens*, 4 Gray, 561.

Congress has no power to impose the duty of naturalization upon state courts. Special courts may absolutely refuse to act. And if they assume to act they may prescribe other conditions than those required by act of Congress, and may reject the application unless satisfied of the proper qualifications of the applicant. *Re Lab*, 3 Pa. Dist. R. 723.

In *State v. Penney*, 10 Ark. 621, the court says: "Whether the state courts are bound to exercise concurrent jurisdiction permitted to be retained by them even when enjoined upon them by act of Congress is not altogether well settled. Some strong intimations to the contrary have been given by the judges of the Supreme Court of the United States and in some instances the courts of the particular states have refused to exercise this jurisdiction."

In *State v. Managers of Elections*, 1 Bail. L. 215, it was held that under the state laws an Indian cannot be admitted to citizenship so as to be entitled to a vote. But the effect of the United States laws upon the subject are not discussed. And a like ruling seems to have been made in *State v. Bass*, 7 Yerg. 74, although there the question was not directly before the court but the case turned upon the question of the right to tax an Indian.

What state courts may act.

Congress has conferred power to naturalize, upon state courts having common-law jurisdiction and a seal and clerk (Act 1842, April 14). Under this statute it is not necessary that the court have all the common-law jurisdiction that pertains to all classes of actions, but simply that it exercise its powers according to the course of the common law; but it must have, in addition to a seal, a clerk distinct from the judge, charged with the duty of keeping a true record of its doings and afterwards

mit its courts to entertain applications for naturalization. Article 3, § 2, of the Federal Constitution provides "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made or which shall be made under their authority to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof, and foreign states, citizens or subjects." Whether Congress can permit the state courts to exercise jurisdiction over any of these subjects has been a source of much controversy. *Martin v. Hunter*, 14 U. S.

of authenticating them. *Re Dean*, 33 Me. 489, 13 L. R. A. 229.

A court which is authorized to hear and determine all complaints and prosecutions in like manner as justices of the peace, and has jurisdiction of all civil suits and actions cognizable by a justice of the peace, is a court of common-law jurisdiction. *Re Gladhill*, 8 Met. 168.

The court with some common-law jurisdiction may naturalize. So the city court of Lexington may do so. *Morgan v. Dudley*, 18 B. Mon. 693, 68 Am. Dec. 735.

In one Illinois case it was held that a court which is limited in its jurisdiction as to the action, the persons, and the amount, is not a court of common-law jurisdiction within the meaning of the act of Congress. *Knox County Supers. v. Davis*, 63 Ill. 421.

But in a later case it was held that courts need not possess general common-law jurisdiction, but they must be courts of record for all purposes. *People v. McGowan*, 77 Ill. 649, 20 Am. Rep. 254; *Dale v. Irwin*, 78 Ill. 170.

A court having power to punish misdemeanors at common law according to the course of the common law may entertain an application for naturalization. *United States v. Lehman*, 39 Fed. Rep. 49.

A state court in order to be able to entertain naturalization proceedings need not have all common-law jurisdiction. It is sufficient if it may exercise a part of that jurisdiction. *United States v. Power*, 14 Blatchf. 223.

In Texas the county court has power to naturalize aliens. *Ex parte Burkhardt*, 18 Tex. 470.

In New York county courts have jurisdiction of naturalization proceedings. *People v. Pease*, 30 Barb. 593.

In California county courts have power to naturalize. *Re Conner*, 39 Cal. 93, 2 Am. Rep. 427.

A court of record for special, and not general, purposes cannot naturalize. *Mills v. McCabe*, 44 Ill. 194.

A probate court having no common-law jurisdiction cannot entertain an application for naturalization. *Ex parte Tweedy*, 22 Fed. Rep. 84.

But *People v. Pease*, *supra*, cites the case of *Re Smith*, 3 Law Gaz. 237, to the effect that probate courts in Ohio have jurisdiction in naturalization proceedings.

In *Re Gladhill*, 8 Met. 168, the court was of opinion that the court had jurisdiction of naturalization proceedings, although it had no separate clerk. *Ex parte Cregg*, 2 Curt. C. C. 98; *State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196.

But the weight of authority is the other way. *State v. Webster*, 7 Neb. 492. H. P. F.

1 Wheat. 804, 4 L. ed. 97. Justice Washington, in *Houston v. Moore*, 18 U. S. 5 Wheat. 27, 5 L. ed. 25, said that "he held it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction on cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the Federal courts." In *Martin v. Hunter*, *supra*, this was accepted as a correct exposition of the Constitution; and the court in that case denied that Congress could vest any portion of the judicial power of the United States, except in courts ordained and established by itself. The contrary view was deemed irreconcilable with the context of the Constitution, "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish." Article 3, § 1.

The conclusion to be drawn from these declarations of the Federal courts, I think, must be that Congress is without power to interfere with or control state courts, except in so far as the Federal courts have appellate jurisdiction. It is immaterial to consider whether the granting of naturalization is strictly a judicial function. If Congress has, without the consent of the state, the power to impose such a duty upon the state courts, there is no legal limit to the authority of the national legislature to burden the state courts with such a volume of business as to essentially impair their capacity to exercise the judicial functions for which they were created by the state. The inability of Congress thus to fetter and disable the instrumentalities provided by the state for carrying on the operations of its own government was the ground upon which the power of the Federal government to lay an income tax upon the salaries of the state judiciary was denied in *Buffington v. Day*, 78 U. S. 11 Wall. 113, 20 L. ed. 122. Chancellor Kent, in his Commentaries, says that in *Houston v. Moore*, 18 U. S. 5 Wheat. 1, 5 L. ed. 19, the supreme court disclaimed the idea that Congress could authoritatively bestow judicial powers on state courts. In that case it is said that it is perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, although the state courts may exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the Federal courts. The learned author declares that in the case last cited the judges of the supreme court very clearly intimated that the state courts were not bound,

in consequence of any act of Congress, to assume and exercise jurisdiction in such cases, and he regards the doctrine as well founded that Congress cannot compel a state court to entertain jurisdiction in any case. 1 Kent, Com. 899, 400, 402. Such has been the view adopted by state courts, where the question has been involved. *Haney v. Sharp*, 1 Dana, 442; *Ex parte Pool*, 2 Va. Cas. 276. The national courts have recognized their want of authority, in cases not within the appellate jurisdiction of the United States, to issue injunctions to the state courts, or in any other manner to interfere with their jurisdiction or proceedings. *Diggs v. Wolcott*, 8 U. S. 4 Cranch, 179, 2 L. ed. 587. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." U. S. Const. Amend. 10. There has been no surrender by the states of the right to establish their own courts, to define and limit their jurisdiction and functions, and to regulate and control them in all respects, except as to appellate jurisdiction, and as to subjects within the exclusive jurisdiction of the United States. The state establishes its own courts, defines their jurisdiction, appoints its judges, and pays their salaries. Whether the judges of the state courts shall act in applications for naturalization, or execute any other like authority with which they may be lawfully invested, is, in my opinion, exclusively within, and subject to the will of, the legislative branch of the state government.

My conclusion, therefore, is that it is competent for the state legislature to forbid state courts, altogether, to entertain or act upon applications for naturalization; and therefore it could lay any restraint, regulation, limitation, or condition upon the practice in such cases which it might deem expedient or proper. No right is claimed, or could be conceded on behalf of the state, to interfere in any respect with the subject of naturalization in the Federal courts. This inability on the part of the Federal government to constrain the state courts to act in no wise impairs the exclusive power of the United States over the subject of naturalization. The power of Congress to create inferior courts and such other agencies as it may deem necessary for the complete exercise of this branch of its exclusive authority is not circumscribed. In my judgment, it was within the power of the state legislature to pass that section of the act which has given rise to this discussion, and the application for a writ of mandamus to the court below must be refused, with costs.

TEXAS SUPREME COURT.

ORIENTAL HOTEL COMPANY, and W.
G. Nieman *et al.*, *Plffs. in Err.*,

v.

John GRIFFITHS *et al.*

(.....Tex.....)

1. A petition to enforce a mechanic's lien is not insufficient because it fails to set forth plans and specifications which are made part of an alleged contract declared upon.
2. Holders of liens cannot be divested of them and their liens transferred to the proceeds of a sale on foreclosure of another lien to which they are not made parties.
3. Lien creditors are concluded as to the sufficiency of the completion of a building, in the absence of fraud or mistake, by its acceptance by the architect and the owner.
4. The description of the property in a decree foreclosing a lien which properly describes the lot and building is not made insufficient by adding "and except the land and the basement and foundation" of the building.
5. Failure to pay a debt in stock when stock was due and demanded makes the entire demand due in money.
6. A resolution of directors included in a deed of trust, to the effect that this shall constitute a prior and first lien, is inoperative to change the relation of that lien to others as fixed by law.
7. The time of the inception of mechanics' liens is the time to which they relate in giving them effect, under Sayles's Civ. Stat. art. 3171, as amended in 1889, saving mortgages and other encumbrances on the land at the time of the inception of other liens, and art. 3179, placing all liens upon an equal footing, so that a mortgage upon an incomplete building is subject to all mechanics' liens which accrue before its completion.

(November 4, 1895.)

ERROR by defendants W. G. Nieman, Herman N. Haeussler, St. Louis Trust Company, Oriental Investment Company, and William Spellman, to review a judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District affirming a judgment of the District Court for Dallas County in favor of plaintiffs in an action by John Griffiths, Baker & Smith Company, and Eaton & Prince Company, to enforce mechanics' liens against the Oriental Hotel in priority of claims against the same property held by the plaintiffs in error. *Reversed.*

The facts are stated in the opinions.

The following briefs were filed in the court of civil appeals:

Meurs. Barry & Etheridge, for appellants Nieman, Haeussler, Spellman, St. Louis Trust Co., and Oriental Investment Co.:

A petition seeking a foreclosure of a mechanic's lien which sets out *in hac verba* the contract made the basis of claim of lien is vulnerable to special exception for failure to set

forth, as a necessary part of such contract, the plans and specifications of the architect, the contract pleaded showing on its face that such plans and specifications formed a part thereof.

Phillips, *Mechanics' Liens*, § 184; *Lombard v. Johnson*, 76 Ill. 599; *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449; Burch, *Ins.* pp. 29, 80.

Whereas there are various liens filed, in conformity to the statute on the subject, by different mechanics and lumber and material men against the same house for work done and lumber and material furnished and used in the construction thereof, a proceeding and sale of the house upon any one of the liens will release it from the whole of them, and the purchaser at the sheriff's sale will accordingly hold it entirely discharged therefrom.

Rev. Stat. (Sayles' Addendum), arts. 3172, 3173, 3179; *Anshutz v. McClelland*, 5 Watts, 487; *Werth v. Werth*, 2 Rawle, 151; *Burt v. Kurtz*, 5 Rawle, 246; *Durham v. Mayo*, 82 Ga. 192; *Hoidritter v. Elizabeth Oil-Cloth Co.* 6 Fed. Rep. 188; Phillips, *Mechanics' Liens*, §§ 196, 253; 2 Jones, *Liens*, § 1492; *Betterton v. Eppstein*, 78 Tex. 448.

An instrument showing upon its face that another writing is made a part thereof is inadmissible as evidence of a contract unless accompanied by such other writing.

Burch, *Ins.* pp. 29, 80; *Farmers' & M. F. Ins. Co. v. Meekes*, 10 W. N. C. 806; *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. 108; *Byers v. Farmers' Ins. Co.* 85 Ohio St. 606, 35 Am. Rep. 623.

Joint creditors, whether by record, specialty, or simple contract, must all join in an action to recover the debt which they respectively hold together, and it is not competent for one or more, or any number less than the whole number interested, to sue.

Stachely v. Peires, 28 Tex. 329; *Houston & T. C. R. Co. v. Hollingsworth*, 2 Tex. App. Civ. Cas. (Willson) § 173; *Tate v. Citizens' Mut. F. Ins. Co.* 13 Gray, 79; *Middlebrook Bros. v. Zapp*, 78 Tex. 29; Phillips, *Mechanics' Liens*, §§ 392, 402; *McLean County Coal Co. v. Long*, 91 Ill. 617; *Yell v. Snow*, 24 Ark. 554.

Under a building contract stipulating that the value of the work shall "be paid for when the work shall be finished entire and complete, and accepted by the architect," an acceptance by the architect does not conclude the parties from proving that, as matter of fact, the work has not been "finished entire and complete" in accordance with the contract.

Glacius v. Black, 50 N. Y. 145, 10 Am. Rep. 449; 2 Sutherland, *Damages*, p. 520.

If appellee Griffiths, prior to entering into his contract and prior to the furnishing of any material or the performance of any labor thereunder, knew that the Oriental Hotel Company was then negotiating a loan from the St. Louis Trust Company, to be secured by a deed of trust upon its properties, the proceeds thereof to be held by the said St. Louis Trust Company, to be by it paid to various mechanics and materialmen toward the completion of the Oriental Hotel building as the work thereupon progressed urged upon the said St. Louis Trust

NOTE.—For superiority of mechanics' liens over prior mortgages, see *Wimberley v. Mayberry* (Ala.) 14 L. R. A. 805, and *note*.

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Company the consummation of such loan, or encouraged such consummation by acts and conduct sufficient to induce a reasonable belief on the part of said trust company, that appellee relied for payment or part payment upon the fruits of said loan rather than upon his mechanic's lien, and that the said trust company, so urged or so induced, made said loan, a part whereof appellee, knowing how the same was procured and secured, demanded and received, then the lien afforded by the deed of trust given to secure such loan is superior to any lien existing in favor of appellee.

McGraw v. Bayard, 96 Ill. 146; 2 Jones, Liens, § 1504; 1 Jones, Mortg. § 737; Phillips, Mechanics' Liens, §§ 273, 495; 2 Pom. Eq. Jur. p. 265, note; *Horsey v. Chew*, 65 Md. 555; *Lanahan v. Latrobe*, 7 Md. 268; *Frierson v. Branch*, 30 Ark. 453; *Harrison v. Mock*, 10 Ala. 185; *Irwin v. Tabb*, 17 Serg. & R. 422; *Geisse v. Beall*, 3 Wis. 391; 2 Perry, Tr. § 596; *Portsmouth Iron Co. v. Murray*, 38 Ohio St. 323; *Patterson v. Dushane*, 187 Pa. 28; *Roberson v. Tonn*, 76 Tex. 535.

A mechanic who contracts, performs labor, and furnishes material subsequent to the execution, delivery, and recordation of a valid mortgage, embracing, not only the land and improvements thereon, but the improvements to be thereafter placed thereon, does not acquire a lien on the improvements superior to the mortgage.

Newark Lime & C. Co. v. Morrison, 18 N. J. Eq. 138; Phillips, Mechanics' Liens, §§ 67, 282, 287; *Equitable L. Ins. Co. v. Nye*, 45 Iowa, 618; 1 Jones, Mortg. § 609; *Willsie*, Mortgage Foreclosure, § 725; Rev. Stat. (Sayles' Addendum) art. 8171; *Choteau v. Thompson*, 2 Ohio St. 127.

A judgment decreeing foreclosure of a mechanic's lien upon a certain lot and hotel building thereon, "save and except the land and the basement and foundation of said hotel building," is erroneous for want of such description as will enable a purchaser from the sheriff to identify and remove that portion of the building upon which the foreclosure is adjudged.

Allday v. Whitaker, 66 Tex. 670.

The promise of a corporation to make part payment for work and material in a specified amount of its own capital stock is not such an obligation as, if not specifically performed, becomes an absolute demand for money, but it constitutes the promisee a subscriber to the capital stock of the corporation, and entitles him, upon the performance of the contract, to compel the issuance of the certificates of stock or to recover of the corporation their value at the time of the demand.

Cook, Stock & Stockholders & Corp. Law, §§ 52, 60, p. 25, and note; 2 Sutherland, Damages, pp. 887-889; *More v. Hudson River R. Co.* 12 Barb. 156; 1 Waterman, Corp. pp. 165, 168; *Soule v. Daves*, 7 Cal. 576; *Porter v. Buckfield Branch Railroad*, 32 Me. 589; *Barker v. Troy & R. R. Co.* 27 Vt. 766.

Mr. H. A. Haessler, for appellants Neiman and Oriental Investment Co.:

The sale under the Spellman judgment and lien prevented any other sale or order of sale—the power of the court over the *rem* was ex-

hausted by the judgment and sale in the *Spellman Case*.

In no event could a judgment for sale of the property be made until the judgment and sale so made under the Spellman judgment had been set aside.

2 Jones, Liens, § 1492; Phillips, Mechanics' Liens, §§ 196, 252; *Anshuts v. McClelland*, 3 Watts, 487 (1836); *Re Donkel's Estate*, 1 Pearson (Pa.) 213 (1862); *Choteau v. Thompson*, 2 Ohio St. 114 (1853); *Moxley v. Shepard*, 3 Cal. 64; *Crowell v. Gilmore*, 18 Cal. 370 (1861); *Willamette Falls Transp. & M. Co. v. Riley*, 1 Or. 187; *Werth v. Werth*, 2 Rawle, 151; *Burt v. Kurze*, 5 Rawle, 246; *Durham v. Mayo*, 32 Ga. 192.

On petition for rehearing.

Messrs. Watts, Aldredge, & Eckford, for appellants, in support of petition:

The lien of the mechanic under our statute begins with the beginning of his work under his contract, and takes precedence over all claims fastened upon the property subsequent thereto.

Tammell v. Mount, 68 Tex. 215; *Keating Implement & Mach. Co. v. Marshall Electric Light & P. Co.* 74 Tex. 607; *Barber v. Reynolds*, 44 Cal. 533; *Welch v. Porter*, 63 Ala. 232; *Central Trust Co. v. Continental Iron Works*, 51 N. J. Eq. 605; *Kiene v. Hodge*, 90 Iowa, 212; *Henry v. Bruns*, 43 Minn. 295; *Choteau v. Thompson*, 2 Ohio St. 129; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.* 6 Wash. 122; *Crowell v. Gilmore*, 18 Cal. 370.

In the absence of some constitutional limitation or statutory prohibition, parties may contract in writing for a first and paramount lien upon property, either real or personal, and when such contracts are duly recorded, all parties thereafter dealing with the property are bound by such contracts.

Lippencott v. York, 86 Tex. 283; *Martin v. Roberts*, 57 Tex. 568; *Taylor v. Huck*, 65 Tex. 241; *Claes v. Dallas Homestead & L. Assn.* 53 Tex. 53; *Mundine v. Berwin*, 62 Tex. 343; *Berry v. Boggess*, Id. 241.

The statute provides: "Any lien, encumbrance, or mortgage on the land or improvement at the time of the inception of the lien herein provided for, shall not be affected thereby."

The mortgage under which appellants claim is not to be construed in the light of an ordinary mortgage. It is not a mortgage to secure an existing or pre-existing indebtedness, but it is a mortgage given for the purpose of raising a fund with which to build a house, and the trustee obligated and bound itself to receive that fund and pay it out only upon certificates of the architect as the work upon the building progressed. The equities that ordinarily exist in favor of the mechanic, upon the ground that he creates something that enhances the security, while recognized and conceded, cannot be greater than the equity of the bondholders in this case, whose every dollar went into the house, to which, as the mechanics knew, the bondholders looked for their security.

West v. Klotz, 37 Ohio St. 420; *Platt v. Griffith*, 27 N. J. Eq. 207; *Taylor v. La Bar*, 25

N. J. Eq. 222; *Macintosh v. Thurston*, Id. 242; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277; *Kien v. Hodge*, 90 Iowa, 212; *Huttig Bros. Mfg. Co. v. Denny Hotel Co.* 6 Wash. 122.

The mortgage when delivered relates back to the agreement for the loan.

2 Jones, Liens, § 1459; *Jaeger v. Bossicuz*, 15 Gratt. 83, 76 Am. Dec. 189.

Messrs. Coke & Coke, for appellees:

The petition in this case alleged a good cause of action without setting out *in hac verba* the plans and specifications in question. Said plans and specifications were no part of the contract pleaded, and if they had been it would not for that reason have been necessary to set them out.

Woolers v. International & G. N. R. Co. 54 Tex. 298; *Rollins v. St. Paul Lumber Co.* 21 Minn. 7; *Holman v. Criswell*, 15 Tex. 396; *Sydnor v. Hurd*, 8 Tex. 105; *Wells v. Fairbank*, 5 Tex. 584; *Boettler v. Tendick*, 78 Tex. 488, 5 L. R. A. 270; *Dingley v. Greene*, 54 Cal. 336; *Johnson v. White* (Tex.) 27 S. W. 174; *Wyckoff v. Meyers*, 44 N. Y. 148; *Texas & P. R. Co. v. Bayliss*, 62 Tex. 574; Phillips, Mechanics' Liens, §§ 136, 254.

A suit to foreclose a mechanic's lien is, in Texas, a proceeding in equity, and all persons holding mechanics' liens on the property sought to be affected are necessary parties to said suit, and the judgment had in said cause, and sale made thereunder, do not affect the right of any lienholder not made a party.

Texas Civ. Stat. (Sayles' Supp.) arts. 3164, 3171, 3173, 3175, 3179; Sayles' Stat. arts. 1340, 1340a, 3179a, § 2; Acts 1871, p. 29, § 3; *State v. Rhomberg*, 69 Tex. 220; *Waldroff v. Scott*, 46 Tex. 4; *Thomas v. Owenby*, 1 Tex. App. Civ. Cas. (White & W.) § 1212; *Schultze v. Alamo Ice & Brew. Co.* 2 Tex. Civ. App. 244; 2 Buckner, Dig. p. 618, art. 107, and authorities; *Delespine v. Campbell*, 52 Tex. 10; *Robertson v. Guerin*, 50 Tex. 323; Phillips, Mechanics' Liens, §§ 809, 401a; 2 Jones, Liens, § 1571; 8 Pom. Eq. Jur. § 1269; 15 Am. & Eng. Enc. Law, pp. 165, note 4, 171, 172, note 6; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Davis v. Alford*, 94 U. S. 546, 24 L. ed. 284; *Murray v. Rapley*, 30 Ark. 574; *McGraw v. Bayard*, 96 Ill. 153; *Hamilton v. Dunn*, 22 Ill. 261; *Whitelle v. Texas Loan Agency* (Tex.) 27 S. W. 815; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Hicks v. Scofield*, 121 Mo. 381.

Under the builder's contract in this case the acceptance of the work by the architect, and his certificate that the same had been done in accordance with the contract, were final and binding upon defendants, and they could not avoid the conclusive effect thereof, except by pleading and proving fraud, collusion, or mistake.

Boettler v. Tendick, 78 Tex. 492, 5 L. R. A. 270; *Dingley v. Greene*, 54 Cal. 336.

The Oriental Hotel Company having accepted said building from Griffiths as completed in accordance with his contract, such acceptance was binding upon appellants in the absence of pleading and proof of fraud or mistake.

Phillips, Mechanics' Liens, § 254.

Under the evidence adduced the jury would not have been justified in finding that plaintiff

Griffiths had waived his lien or was estopped from asserting its priority to the lien of the trust deed to the St. Louis Trust Company, trustee, hence there was nothing to submit to the jury and the court correctly instructed them to find for plaintiff.

First, as to estoppel.

Burleson v. Burleson, 28 Tex. 415; *Scoby v. Sweatt*, Id. 730; *Equitable Mortg. Co. v. Norton*, 71 Tex. 689; *Hamblin v. Knight*, 81 Tex. 851; *Page v. Arnim*, 29 Tex. 70; *Peters v. Clements*, 52 Tex. 143; *Edwards v. Dickson*, 66 Tex. 617; *Dynum v. Preston*, 69 Tex. 291; Bigelow, Estoppel, p. 570.

Second, as to waiver.

Irvine v. Garner, 50 Tex. 54; *Dean v. Hudson*, 1 Tex. Unrep. Cas. 370; *Merchants' Mut. Ins. Co. v. Lacroix*, 45 Tex. 168; *Jones v. White*, 72 Tex. 316; Phillips, Mechanics' Liens, §§ 117, 278.

Under the statute of Texas, if the owner of a lot begins the erection of a building thereon, according to given plans and specifications, and prosecutes the work continuously to completion according to said original design, all mechanics' liens growing out of the construction of such building are a lien on said house and lot superior to the lien or mortgage thereon executed and recorded after the commencement of the building, and the court, in foreclosing the lien of these appellees only on the building above the foundation, rendered in favor of appellants a judgment more favorable than they were entitled to.

Const. 1876, art. 16, § 87; Texas Civ. Stat. (Sayles' Supp.) arts. 3164, 3171, 3179; *Schultze v. Alamo Ice & Brew. Co.* 2 Tex. Civ. App. 242; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 106, 59 Am. Rep. 613; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 78; *Equitable L. Ins. Co. v. Slye*, 45 Iowa, 616; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 450, 25 L. ed. 1060; *Taylor v. Burlington, C. R. & M. R. Co.* 4 Dill. 575; *Getchell v. Allen*, 34 Iowa, 560.

Where one takes a mortgage on the lot on which a house is in course of construction, and requires the owner to complete the building according to the plans and specifications upon which it is being constructed, and permits the mortgagee to pay the money borrowed to the builders and contractors erecting the house, and in addition requires the owner to give to the mortgagee a bond of indemnity against any mechanics' liens said borrowed money falls to satisfy, said mortgage will not constitute a lien on said property prior to the lien of a contractor who has contributed to the carrying out of such plans and specifications.

Avery v. Clark, 87 Cal. 628; *Davis v. Bilsland*, 85 U. S. 18 Wall. 661, 21 L. ed. 969; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 452, 25 L. ed. 1060; *Fuquay v. Stickney*, 41 Cal. 587.

A judgment foreclosing a mechanics' lien on a definitely described lot and the six-story brick and stone building thereon, save and except the land and the basement and foundation of the building, is sufficiently definite.

Allday v. Whitaker, 66 Tex. 670; *Myers v. Maverick* (Tex.) 27 S. W. 950; Phillips, Mechanics' Liens, 379.

If a corporation promises to pay a given sum

of money at a given time, part of which can be paid in stock of the corporation at par, and fails to make said payment in stock at the time specified, the whole demand becomes one for money, and the payee cannot afterwards be required to accept the stock.

Hardin v. Titus, Dall. Dec. (Tex.) 622; *Dunman v. Strother*, 1 Tex. 91, 46 Am. Dec. 97; *Baker v. Todd*, 6 Tex. 274, 55 Am. Dec. 775; *Deel v. Berry*, 21 Tex. 468, 78 Am. Dec. 286; *Smith v. Falwell*, 21 Tex. 466; *Short v. Abernathy*, 42 Tex. 95; *Bummel v. Houston*, 68 Tex. 11; *Lawson*, Cont. § 449; 2 Whart. Cont. § 619; *Story*, Cont. § 969.

Messrs. Cobb & Avery, for appellee De Wolf:

In Texas a suit to foreclose a mechanic's lien is an equitable proceeding, and all mechanics' lienholders who have filed and recorded their lien should be made parties.

In such a suit other mechanics' lienholders who are not parties are not affected by a judgment and sale of the property therein, and can still enforce their liens against the property the same as if such judgment had not been rendered or sale made.

Buntyn v. Shippers' Compress Co. 68 Miss. 94; *Davis v. Alford*, 94 U. S. 545, 24 L. ed. 288; *Whiteoelle v. Texas Loan Agency* (Tex.) 27 S. W. 309; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Sayles' Stat.* art. 3179a, § 2; *Austin & N. W. R. Co. v. Rucker*, 59 Tex. 587; *Pope v. Graham*, 44 Tex. 198; *Thomas v. Ownby*, 1 Tex. App. Civ. Cas. (White & W.) § 1212; *Hicks v. Scofield*, 121 Mo. 381.

Where it appears on the face of the petition that there is a nonjoinder of proper parties plaintiffs, such fact can only be taken advantage of by special exception on that ground, and cannot be reached by general demurrer or objection to the evidence under a general denial, and if such fact does not appear in the petition, it can only be reached by a plea in abatement.

Rev. Stat. art. 1265; *Shelby v. Burtis*, 18 Tex. 645; *Galveston, H. & S. A. R. Co. v. LeGierse*, 51 Tex. 189; *Mott v. Ruenbuhl*, 1 Tex. App. Civ. Cas. (White & W.) § 599; *McGwire v. Glass*, 4 Tex. App. Civ. Cas. § 54; *Howard v. Britton*, 71 Tex. 286; *Gair v. Tuttle*, 49 Fed. Rep. 198; *Duncan v. China Mut. Ins. Co.* 129 N. Y. 287; *Clarion First Nat. Bank v. Hamer*, 49 Fed. Rep. 45, 7 U. S. App. 69.

In this state, where there is a mortgage on land and a building is afterwards erected on the land so as to create a mechanic's lien, the mortgage has a priority on the land only, and the mechanic's lien has priority on the building, which may be sold and removed from the land.

Crooker v. Grant, 5 Tex. Civ. App. 182; *Pope v. Graham*, 44 Tex. 198; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Taylor v. Burlington, C. R. & M. R. Co.* 4 Dill. 570; *Davis v. Bislard*, 85 U. S. 18 Wall. 659, 21 L. ed. 989; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 71; *Getchell v. Allen*, 84 Iowa, 559; *Equitable L. Ins. Co. v. Skye*, 45 Iowa, 615; *Hicks v. Scofield*, 121 Mo. 381; *Hartun Steam Heater Co. v. Gordon*, 2 N. D. 246.

When a lienor and the owner of the land enter into a contract whereby said owner agrees to erect on the land a building, and the owner

makes contracts with materialmen and thereby creates mechanics' liens, such mechanics' liens attach to the interest of both said lienor and said owner, and they are superior to the rights of said lienor.

Henderson v. Connolly, 123 Ill. 98; *Paulsen v. Manake*, 126 Ill. 73; *Bohn Mfg. Co. v. Kountze*, 30 Neb. 719, 12 L. R. A. 83; *Millcup v. Ball*, 80 Neb. 728; *Sheehy v. Fulton*, 38 Neb. 691; *Hill v. Gill*, 40 Minn. 441.

The mere recording of the mortgage without furnishing any money will not give the mortgage priority over a mechanic's lien contract made before any money was furnished.

Kupatrick v. Kansas City & B. R. Co. 83 Neb. 620; *North Presby. Church v. Jeans*, 32 Ill. 214, 88 Am. Dec. 281.

The opinion of the court of civil appeals was as follows:

Finley, J.:

"Appellants' first assignment of error applies to appellee Griffiths alone, and is as follows: 'The court erred in not sustaining the special exceptions of defendants to the second amended petition of plaintiff John Griffiths, to the effect that said petition was insufficient, in that the plans and specifications of the architect referred to in and made a part of the alleged contract declared upon were not set out in said petition. Such plans and specifications not being set out, defendants were not enabled from the petition of said plaintiff to determine whether or not said plaintiff had complied with his contract.'

"The contract set out by plaintiff Griffiths in his petition provided: 'That for the consideration hereinafter mentioned the parties of the first part agree and bind themselves . . . to erect, build, and complete a hotel building in the city of Dallas, state of Texas, on the corner of Commerce and Akard streets, according to drawings and specifications and addenda to specifications made for same by Isaac S. Taylor, architect; . . . the work to be done under the superintendence and according to the directions of said architect, he having power to reject any portion of the work or materials which in his opinion is not in accordance with said drawings and specifications, and his decision in all such matters shall be final and binding. . . . That the said architect shall be at liberty to make any deviation from or alteration in the plan, form, and construction described and shown in said plans and specifications without in any way affecting the validity of this agreement.' In consideration of the faithful performance of aforesaid work the hotel company agree to pay the contractor the sum of \$315,000. Payments to be made upon vouchers from said architect.

"The petition alleged that on August 24, 1891, the said work under said contract being practically done, the said Isaac S. Taylor, architect, did make and deliver to plaintiff his certain certificate in writing, in substance as follows:

"No. ———, St. Louis, Mo., August 24, 1891.

"To Oriental Hotel Company: I hereby certify that John Griffiths is entitled to the

payment of thirty-three thousand two hundred and fifty dollars, balance in full for all demands per agreement, for construction of hotel building on corner of Commerce and Akard streets, in city of Dallas, Texas. §83, 250.

Isaac S. Taylor.'

"That said certificate was the voucher of said architect, provided for in said contract, upon which plaintiff was entitled to payment. That the said architect did, on January 16, 1892, formally, and in strict accordance with the terms of said contract, accept said work, and give to plaintiff Griffiths the certificate therefor, which certificate was in words and figures as follows:

"St. Louis, Mo., January 16, 1892.

"John Griffiths, Esq.—Dear Sir: I consider your contract fulfilled on the Oriental Hotel Building at Dallas, Texas.

"Respectfully, Isaac S. Taylor.'

"That the acceptance, evidenced by the aforesaid certificate of January 16, 1892, was a formal acceptance under and in accordance with the terms of said contract. The petition further alleged that on February 4, 1892, at a regular meeting of the board of directors of said defendant, the Oriental Hotel Company, said board duly passed a resolution, and placed the same upon the minutes, accepting said hotel building from said petitioner and other contractors, as fully completed in accordance with said contract. Appellants (defendants below) excepted to said petition, because it failed to set forth the plans and specifications of the architect, the same being sworn to be part of the alleged contract, which exception was overruled. The plans and specifications referred to in the contract according to which the building was to be erected were not necessary to be set out in detail by the pleadings of the plaintiff. Especially is this true in view of the allegations that the work was accepted by the architect, and the Oriental Hotel Company as well, as being completed in accordance with the terms of the contract. If the work was accepted as coming up to the contract, as alleged, in the absence of allegations of fraud or mistake there was no issue rendering it proper to go into inquiry whether the work was performed according to the plans and specifications. Phillips, *Mechanics' Liens*, §§ 136, 254.

"The second and ninth assignments of error raise the same question, and are next presented by appellants. They are: 'Second. The court erred in sustaining the exceptions of plaintiffs to the eleventh paragraph of defendants' answer, in that the foreclosure and sale therein set forth discharged the premises described by plaintiffs from any and all mechanics' liens, and transferred the liens of the plaintiffs, if any they ever had, to the proceeds of said sale, and the purchaser under said sale took the premises unencumbered by any mechanic's lien. Said judgment was in no sense void, and the plaintiffs should not have been permitted to attack the same in this, a collateral, action.' 'Ninth. The court erred in sustaining the demurrers of the plaintiffs De Wolf, Baker, & Smith Co. and Eaton & Prince Co., to the eleventh paragraph of the defendants' answer, in that the judg-

ment of foreclosure and sale and purchase therein set forth had the legal effect of conveying the premises described by plaintiffs to the purchaser, Neiman, discharged of any and all claims of mechanics' liens, and same had the effect of transferring any liens said plaintiffs may have had from the property to the proceeds of said sale, and there could be no second sale to satisfy other mechanics' lien claims.' Appellants urge under these assignments this proposition: 'Where there are various liens filed in conformity to the statute on the subject by different mechanics, lumber and material men, against the same house, for work done and lumber and materials furnished and used in the construction thereof, a proceeding and sale of the house upon any one of the liens will release it from the whole of them, and the purchaser at the sheriff's sale will accordingly hold it entirely discharged therefrom.' The eleventh paragraph of defendants' answer and the exhibits attached thereto show that in a suit brought by one Spellman against the Oriental Hotel Company, wherein Spellman was the sole plaintiff and the hotel company the sole defendant, a judgment was entered on August 26, 1892, in favor of Spellman for \$15,719.51, with foreclosure of mechanic's lien on the property in question in this case; that thereafter, on November 1, 1892, the same was sold under order of sale issued on said judgment, and purchased by defendant Neiman for the sum of \$250; that after this purchase Neiman notified the sheriff that there were other mechanics' liens on the property sold, and that the sheriff should not pay the entire purchase price to the plaintiff in the writ, but should pay it into court, and ask the court's instructions in regard to the same; that he would claim that the property could not be sold again under another lien. Spellman's judgment was in the usual form of a judgment for foreclosure of lien in Texas, and the clerk of the court was ordered to issue to the sheriff or any constable of Dallas county, Texas, an order of sale, commanding him to sell said Oriental Hotel property as under execution, and to apply the proceeds so realized to the payment and satisfaction of the said Spellman's judgment, and, if there was a surplus, to pay said surplus to the defendant hotel company. The order of sale issued on said judgment conformed thereto, and was an order directing sale to be made for the benefit of said Spellman, and directing the proceeds, after satisfying his debt, to be paid to the hotel company. The record shows that the property in question cost over one half million dollars. To said eleventh paragraph of defendants' answer plaintiffs demurred, on the ground that the matters therein set up showed no defense to the action, and were irrelevant and immaterial, it appearing from said pleading and exhibits that plaintiffs were not parties to said judgment, and not affected or bound thereby, which demurrer the court sustained.

"The statutory law in force in Texas at the time of the making of the contracts filed as liens, and at the time of bringing the suits, and at the time of the trial of this

cause, bearing on 'this controversy, was, in substance, as follows:

"Article 8164: 'Any person or firm who may labor, or furnish material, machinery, or fixtures, or to erect any house or improvement, . . . under or by virtue of any contract with the owner thereof, upon complying with this act, shall have a lien on such house, building, fixtures, or improvement, and shall also have a lien on the lot necessarily connected therewith, to secure payment for labor, lumber, material, machinery, or fixtures. . . .

"Article 8165: . . . It shall be the duty of every original contractor, within four months . . . after the indebtedness shall have accrued, to file their contract in the office of the county clerk of the county in which the property is situated, and cause same to be recorded in a book to be kept by the county clerk for that purpose.'

"Article 8167: . . . The contracts . . . when filed and recorded as above provided shall be accompanied by a description of the lands, houses, and improvements made against which the lien is claimed.'

"Article 8171: 'The lien . . . shall attach to the building . . . in preference to any prior lien or encumbrance or mortgage upon the land. . . . and persons enforcing same may have such building . . . sold separately . . . provided any lien, encumbrance, or mortgage on land or improvement at time of inception of lien shall not be affected thereby, and holders of such liens need not be made parties.'

"Article 8172: 'When improvements are sold separately, the purchaser shall be, by the officer making the sale, placed in possession thereof, and he shall have the right to remove the same within a reasonable time.'

"Article 8179: 'The liens for work . . . shall be upon an equal footing, without reference to the date of filing the lien, and in all cases where a sale shall be ordered and the property sold, which may be described in lien, the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the lien, shall be paid *pro rata* on the respective liens. . . .

"The constitutional provision upon which the legislative enactments are based reads (Const. 1876, art. 16, § 37): 'Mechanics, artisans, and materialmen of every class shall have a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or material furnished therefor; and the legislature shall provide by law for the speedy and efficient enforcement of said liens.' The lien is created by the Constitution, and the statutes serve the purpose only of providing the means for its enforcement. In effecting this object, the statutes place the liens held by different persons for work or material upon the same building upon the same footing, without reference to the date of filing. They are made co-ordinate liens upon the same property. The statute is silent as to the matter of parties in the proceeding of foreclosure of

the mechanic's lien, and lays down no special procedure differing from other foreclosure suits. No special form of decree is provided, but the decree in this proceeding is left to be governed by article 1340, Rev. Stat., which prescribes the form of decree of foreclosure of mortgages and other liens without distinction. As there is no special procedure provided by statute for the foreclosure of mechanics' liens, and as the several liens are made of the same dignity and force, we must look to the law governing the foreclosure of other co-ordinate liens to determine the question of necessary parties. *Waldroff v. Scott*, 46 Tex. 4, 5; *Phillips, Mechanics' Liens*, §§ 309, 315. Foreclosure suits are equitable proceedings, and all parties whose rights are to be affected by the result must be made parties before they can be concluded by the decree. *Waldroff v. Scott, supra*; *Adams v. Cook*, 55 Tex. 165; *Whiteville v. Texas Loan Agency* (Tex.) 27 S. W. 309; 3 Buckner, Dig. §§ 107, 122; 3 Pom. Eq. Jur. § 1269; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Davis v. Alford*, 94 U. S. 546, 24 L. ed. 284; 15 Am. & Eng. Enc. Law, p. 173, note 6.

"We are cited by appellants' counsel in support of their proposition to the Pennsylvania case of *Anshuts v. McClelland*, 5 Watts, 487, and the Georgia case of *Durham v. Mayo*, 32 Ga. 192. These cases announce the proposition contended for, but they are based upon statutes materially different from ours. In Pennsylvania the proceeding is purely statutory. It is a proceeding, and is not governed by the principles of equity applicable to the ordinary equitable proceeding of foreclosure of liens. The Georgia case is based upon a statute which provides: 'Whenever any house and lot, or houses and lands, subject to encumbrances herein created, shall be seized and sold by authority of any process or decree of any court in this state, the same shall pass to the purchaser free from such encumbrance, which encumbrance shall attach to the proceeds in the hands of the officer making it, on a notice, as in cases of claims to money raised under execution, which notice with the money shall be returned to the court by the officer.' It is urged that article 8179 of our statutes, before quoted, in providing for the prorating of the proceeds of the sale of the property in a foreclosure suit, where the proceeds are insufficient to discharge all the liens, was intended and should be construed to have the effect of transferring all co-ordinate liens upon the property to the proceeds of the sale, and passing the property to the purchaser free from such liens, notwithstanding such liens are not parties to the foreclosure proceeding. That the legislative intent was to place all such liens upon an equal footing is quite clear; but that it was also intended that a foreclosure sale at the instance of one lienor should discharge the property from other co-ordinate liens, whose holders are not parties to the suit, and transfer such liens to the proceeds of sale, is certainly not expressed in the statute. Can such an intent be implied? No provision whatever is made for notice to co-ordinate lienors; no direction is

given as to any inquiry and adjudication of co-ordinate liens by the court, and the holding of the funds for distribution; and no method is pointed out to co-ordinate lienholders for proceeding against the fund. The Constitution commands the legislature to provide for the speedy and efficient enforcement of such liens created by that instrument, and it would seem that, if the legislature had intended that all liens should be discharged by the sale of the property procured by one lienor, it would have provided also the means of protecting the holders of other liens of the same character. All parties holding such liens are entitled to their day in court, and such liens cannot be divested out of them by a judicial proceeding to which such holders are not parties. The assignment is therefore not well taken.

"Appellants' third assignment of error complains of the court for admitting in evidence, over objection, the contract declared upon by appellee Griffiths: (1) Because the contract was not accompanied by the plans and specifications therein referred to. This point has already been noticed. (2) Because the contract appears to be between the hotel company as one party and John Griffiths, William E. Frost, Frank R. Alsip, Carl D. Bradley, and J. Foster Rhodes, as the other parties, while Griffiths is the sole party plaintiff. Griffiths and the hotel company were the parties who contracted, and the other parties were mere sureties; this clearly appears from the contract, and the objection to the evidence was properly overruled.

"The tenth and eleventh assignments raise the same question as to other parties, and, for the reasons above given, are untenable.

"Appellants' sixth, fourth, and fifth assignments of error announce this proposition: 'Under a building contract stipulating that the value of the work shall be "paid for when the work shall be finished entire and complete, and accepted by the architect," an acceptance by the architect does not conclude the parties from proving that, as matter of fact, the work has not been "finished entire and complete," in accordance with the contract.' The contract provided that the parties of the first part were to erect, build, and complete the building in question according to the drawings, specifications, and addenda to specifications made by Taylor, the architect, 'the work to be done under the superintendence and according to the drawings of said architect, he having power to reject any portion of the work or materials which, in his opinion, is not in accordance with said drawings and specifications, and his decision in all such matters shall be final and binding; . . . that the said architect shall be at liberty to make any deviation from or alteration in the plan, form, and construction described and shown in said drawings and specifications, without in any way affecting the validity of this agreement; and the said architect shall also be at liberty to make any addition to or omission in the work and materials of said building as he may think proper.' And, after providing for the time and manner of the payment of 85 per cent of the contract price for the work cov-

ered by said contract, said contract further provided that 'the remaining 15 per cent of the value of the work to be paid for when the work shall be finished entire and complete and accepted by said architect. Payments to be made upon vouchers from said architect.' The architect certified that Griffiths had fulfilled his contract, and was entitled to \$33,250, balance in full as per said agreement.

"The Oriental Hotel Company, by resolution of its board of directors, accepted the building from Griffiths as completed in accordance with his contract. Acceptance by the architect and acceptance by the hotel company were alleged by plaintiffs, while defendants' pleadings as to this point consisted of a general denial. The work having been accepted by the architect and the hotel company as well, and there being no allegations of fraud or mistake, there was no issue upon which evidence was admissible tending to show that the work was not performed according to the contract. *Boettler v. Tendick*, 73 Tex. 492-494, 5 L. R. A. 270; *Collier v. Betterton* (decided by this court at present term) 87 Tex. 440; *Dingley v. Greene*, 64 Cal. 386. There is no force in the further contention that the acceptance of the hotel company was not binding upon lien creditors. In the absence of fraud or mistake alleged and proved, such an acceptance could not be gone behind by other lien creditors. *Phillips, Mechanics' Liens*, § 254. None of the propositions presented under these assignments are meritorious.

"Appellants' eighth assignment is directed at the action of the court in directing a verdict for appellee Griffiths upon the alleged ground that the evidence tended to show that Griffiths had waived his lien in favor of the trust company, or that his conduct was such as to lead the trust company to believe that he would not assert a superior lien to its mortgage, and that it did rely upon such conduct and so believe, etc. This assignment is not sustained by the record; Griffiths did not waive his lien, and he said nothing and did nothing upon which the trust company was justified in relying as a waiver of his lien in its favor. While Griffiths knew that the loan would be made, it was made independent of him. He did not influence it, and no word or act on his part is shown to be in any degree the basis of the loan on the part of the trust company. The trust company must be held to have had notice that the laws of Texas gave such a contractor a prior lien upon the building for his work; and it made the loan knowing that Griffiths would have such lien prior to its lien, and it attempted to provide against it by requiring the hotel company first to expend \$250,000 on the building before its money should be paid over, and to give bond to keep the property free of liens. There is nothing in the evidence which would have justified a verdict against Griffiths upon the grounds of waiver or estoppel. As to waiver: *Irvin v. Garner*, 50 Tex. 54; *Dean v. Hudson*, 1 Tex. Unrep. Cas. 870; *Merchants' Mut. Ins. Co. v. Lacroix*, 45 Tex. 168, 170; *Jones v. White*, 72 Tex. 316; *Phillips, Mechanics' Liens*,

§§ 117, 278. As to estoppel: *Burleson v. Burleson*, 28 Tex. 415, 417; *Scoby v. Sweatt*, Id. 730; *Equitable Mortg. Co. v. Norton*, 71 Tex. 689; *Hamblin v. Knight*, 81 Tex. 351; *Page v. Annin*, 29 Tex. 70-78; *Peters v. Clements*, 52 Tex. 143, 144; *Edwards v. Dickson*, 66 Tex. 617, 618; *Bynum v. Preston*, 69 Tex. 291; *Bigelow, Estoppel*, p. 570.

"Appellants' twelfth assignment: 'The court erred in instructing a verdict in favor of the plaintiffs DeWolf, Baker & Smith Co., and Eaton & Prince Co., in that it was an undisputed fact that the contracts of each and every of said plaintiffs were entered into, and the labor performed and the material furnished thereunder, long subsequent to the execution, delivery, and recordation of the deed of trust under which defendants claim, which deed of trust embraced the lot and improvements then thereon, as well as all improvements thereafter placed upon the same, and the court erred in not giving in charge to the jury upon this question the second charge requested by defendants. Said plaintiffs' contracts being long subsequent to the execution and recordation of said deed of trust, said plaintiffs acquired a lien only upon such interest as the mortgagor then had, and the court erred in not so instructing the jury.' The hotel company, in August, 1889, began the erection of the building in question according to the plans and specifications prepared therefor by I. S. Taylor, architect, and had, prior to February 24, 1890, completed and paid for the foundation thereof. On February 24, 1890, the hotel company let to Griffiths a contract for the greater part of the construction of the building above the foundation. Griffiths began his work on April 4, 1890, and from that date until the work was completed he proceeded continuously, with a short cessation only in the fall of 1890. March 19, 1891, Baker & Smith Co. contracted with the hotel company to build and place in said hotel building a steam-heating and boiler apparatus, and on July 6, 1891, Eaton & Prince Co. contracted with the hotel company to furnish, supply, and erect in said hotel building three elevators, described in said contract. Baker & Smith Company and Eaton & Prince Company commenced work under their respective contracts at once upon making the same, and performed said contracts according to the terms thereof, and finished the same about October 19 and November 24, 1891, respectively. On February 6, 1890, the hotel company made a proposition to the St. Louis Trust Company to negotiate the hotel company's bonds, to be secured by a mortgage on the hotel property. This proposition referred to the plans prepared by Taylor, architect, under which the hotel building was being erected, and gave estimates of the cost of the various parts of the building; among others, of the work afterwards done by Baker & Smith Co. and Eaton & Prince Company. This proposition resulted in an agreement dated April 30, 1890, between the hotel company and the trust company as representative of the proposed bondholders, whereby the hotel company is bound to construct the building according to the aforesaid plans, specifica-

tions, and estimates. This contract likewise provided for the payment by the trust company of the money borrowed directly to contractors engaged in the construction of the hotel building. As part of this contract, and under the same cover, the trust company took from the hotel company a bond with security, to indemnify them against mechanics' and other liens not satisfied by the borrowed money in the hands of the trust company. Pursuant to this agreement, the hotel company executed its mortgage, dated May 1 and recorded May 20, 1890, on the hotel lot and improvements. March 19, 1891, Baker & Smith Company contracted with the hotel company to do certain of the contemplated work on the building, and did it. July 6, 1891, Eaton & Prince Company contracted to do certain of the contemplated work on the building, and did it. The contractors have never been paid in full for their work so done, and have filed their liens. The court instructed a verdict for these parties, and a foreclosure of the lien on the building above the foundation, and refused the following charge asked by appellants: 'It appearing that the contracts of the plaintiffs, DeWolf, Baker & Smith Company, and Eaton & Prince Company, with the hotel company, were entered into subsequent to the execution, delivery, and recordation of the deed of trust under which defendants claim, which deed of trust embraced, not only the land and improvements then thereon, but the improvements to be thereafter placed thereupon as well, and it appearing that neither of said plaintiffs performed labor or furnished material until after the execution, delivery, and recordation of said deed of trust, you are instructed that the lien afforded by said deed of trust was paramount and superior to the lien asserted by said plaintiffs, and the sale under said deed of trust extinguished any claim of lien said plaintiffs may have had; and you will so find.' This assignment presents a question of some difficulty. The legislative intent is not as plain as it might be expressed. We think, however, that a fair and liberal construction of the statute, keeping in view the constitutional mandate and the manifest object to be accomplished, leads to the conclusion that it was intended to give mechanics a lien upon the building which their labors and materials brought into existence as a building, superior to all other liens. But for such labor and material the building would not have been erected, and no mortgage lien could have attached thereto. The fact that their contracts were made and work performed after the execution and record of the mortgage upon the land and prospective building, under the facts of this case should not have the effect to subordinate their liens to that of the mortgage. *Const. 1876*, art. 16, § 37; *Sayles' Tex. Civ. Stat. arts. 8164, 8171, 8179*; *Schultze v. Alamo Ice & Brew. Co.* 2 Tex. Civ. App. 242, 244; *Hamburg-Bremen F. Ins. Co. v. Garlington*, 66 Tex. 106, 59 Am. Rep. 618; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 73-78; *Equitable L. Ins. Co. v. Sigs*, 45 Iowa, 616-618; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 450-452, 25 L. ed. 1060, 1061; *Taylor v. Burling-*

ton, O. R. & M. R. Co. 4 Dill. 575, Fed. Cas. No. 13,788; *Getchell v. Allen*, 84 Iowa, 560; *Aerry v. Clark*, 87 Cal. 628; *Davis v. Bilsland*, 85 U. S. 18 Wall. 661, 21 L. ed. 989; *Fugay v. Stickney*, 41 Cal. 587.

"The fourteenth assignment complains that the decree does not sufficiently describe the property upon which the lien of appellees other than Griffiths is foreclosed. The decree properly describes the lot and building thereon, and forecloses the lien on the property described, 'save and except the land and the basement and foundation of said hotel building.' This description we think sufficient. *Alday v. Whitaker*, 66 Tex. 671; *Myers v. Maverick* (Tex.) 27 S. W. 950-1088; Phillips, *Mechanics' Liens*, 379.

"Appellants' seventeenth assignment: 'The court erred in not requiring the plaintiff Griffiths to accept the \$5,000 stock tendered him in open court by defendants, and in not giving defendants credit therefor, because: First, said stock was tendered to Griffiths within a reasonable time after he procured the purported final certificate; and, second, because, by the terms of the contract Griffiths became and was a subscriber to the original capital stock of said hotel company, and it was not a contract to deliver or to pay him stock of any other company.' The hotel company promised to pay Griffiths for constructing its hotel building the sum of \$315,000, in manner and sums as follows: '\$5,000 of the above sum to be paid in stock of the said hotel company, at par value; \$35,000 to be paid when the second-story joists are on; \$14,000 to be paid when the third-story joists are on; 85 per cent of the value of the remaining work done and finished in the building to be paid for every thirty days. The first valuation after the first payment of 85 per cent must include all work done up to that time, the payments of \$35,000 and \$14,000 having been deducted from said valuation. The remaining 15 per cent of the value of the work to be paid for when the work shall be finished entire and complete and accepted by the architect. Payments to be made upon the vouchers from said architect.' On August 24, 1891, Griffiths received certificates from the architect that he was entitled to the stock. Griffiths demanded, but failed to get, the stock, October 10, 1891. On January 16, 1892, he received final certificates from the architect. The only tender of the stock made before the trial was made January 28, 1892. On failure to pay in stock at the time the debt became due, and when the stock was demanded, the entire debt became a demand for money. *Hardin v. Titus*, Dall. Dec. (Tex.) 622; *Dunman v. Strother*, 1 Tex. 91, 46 Am. Dec. 97; *Baker v. Todd*, 6 Tex. 274, 55 Am. Dec. 775; *Deel v. Berry*, 21 Tex. 463, 73 Am. Dec. 236; *Smith v. Falwell*, 21 Tex. 466; *Short v. Abernathy*, 42 Tex. 94; *Bummel v. Houston*, 68 Tex. 11, 12; Lawson, Cont. § 449, 2 Whart. Cont. § 619; Story, Cont. § 969. The assignment is without merit.

"We have considered all the assignments of error, and, finding none of them well taken, the judgment will be affirmed."

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The petition for rehearing having been overruled, an application for a writ of error was made upon the same arguments used in the lower court.

Brown, J., delivered the opinion of the court:

The Oriental Hotel Company, a corporation organized under the laws of Texas, owned a block of ground in the city of Dallas, and had entered upon the work of excavating and putting in the basement of a hotel building thereon. On the 6th of February, 1890, the said hotel company submitted a proposition, in writing, to the St. Louis Trust Company, of St. Louis, Mo., in which it was stated that the said hotel company proposed to issue \$250,000 first-mortgage bonds on the hotel building and ground to raise money for the purpose of completing the said building. Accompanying the proposition were the specifications and plans, prepared by the architect for the building then in course of erection and thereafter to be completed. The bonds were to be issued May 1, 1890, at a rate of interest to be agreed upon. The trust company was to receive and sell the bonds, and act as trustee under the deed of trust or mortgage to be given to secure the bonds. On the 15th day of February, 1890, Adolphus Busch, F. Herrold, Marquard Forster, Augustus Gehner, and Mrs. Joseph Schneider, submitted to the trust company a written proposition to take the bonds, which proposition was in these words: "We, undersigned, agree to take bonds of Oriental Hotel Company, of Dallas, Tex., on proposition as made, provided we get a bond, as suggested, making them beyond all controversy a first lien upon property when fully completed in all details. Such bonds to bear 7 per cent interest, payable semi-annually, at St. Louis, Mo. Amount of issue to be \$250,000, and stockholders to expend, with realty, at least \$250,000 before any of our money is used." The bonds were sold to the parties making the proposition. Afterwards, and on May 1, 1890, were delivered, and the deed of trust given in accordance with the proposition, which was duly recorded, May 20, 1890, in the records of Dallas county. The deed of trust was in the usual form of such instruments, and conveyed to the St. Louis Trust Company all the franchises, rights, and privileges of the Oriental Hotel Company, the lot or block of land upon which the building was to be erected, "together with all the improvements thereon, or that thereafter may be placed thereon." And the said deed of trust contained a provision binding the said hotel company to pay and discharge all taxes and assessments of every kind and description imposed upon the property mortgaged, free and clear of any lien or encumbrance by reason thereof. In the resolution adopted by the stockholders, authorizing the board of directors to make such mortgage, which resolution is copied into the deed of trust, it is provided that "said mortgage is to constitute a first and paramount lien on said property." On the 30th day of April, 1890, the Oriental

Hotel Company entered into a written contract with the trustee aforesaid, in which it was recited that the bonds of said company were subscribed for with the understanding that the building should be completed in accordance with the plans and specifications mentioned and described in the proposition made by the company to the trustee, and that the bonds should be lawfully authorized and issued, ready for delivery, secured by mortgage or deed of trust, to the satisfaction of the proposed stockholders, and properly recorded, and abstract of title furnished, showing the said deed of trust to be the first and only lien; the money for the bonds to be paid by the subscribers to the said trust company; the money so paid not to be paid out by the trustee on said building until the Oriental Hotel Company should have expended as much as \$250,000 upon said hotel, including the cost of the real estate on which said hotel is located and the amount already expended; the building and premises to be kept free and clear from any and all liens whatsoever, except the said lien under the said deed of trust, in which case the trust company was to pay out the money paid in for the bonds for the completion of the said building, as the work progressed, upon the estimates of the architect and superintendent of construction of the said building. On the same day, the 30th of April, 1890, the Oriental Hotel Company, as principal, and Thomas Field and Frank Field, as sureties, entered into a bond payable to the St. Louis Trust Company, conditioned that if the Oriental Hotel, then in the course of construction in the city of Dallas, should not be in all respects fully completed and ready for occupancy, free from all liens and charges whatsoever, except the deed of trust to secure the said bonds, that they, the said principal and sureties, should, within sixty days after the expenditure of the \$250,000 obtained by the sale of the bonds, pay to the said St. Louis Trust Company, for the benefit of the bondholders, a sum of money which would be sufficient to complete the hotel building and discharge the same from all liens and charges except the deed of trust.

During the time of the negotiations between the Oriental Hotel Company and the St. Louis Trust Company for the sale of the bonds, John Griffiths was negotiating with the hotel company a contract for the erection of the hotel building. Griffiths knew of the proposition to sell the bonds through the trust company, and, before closing his contract with the Oriental Hotel Company, inquired of the trust company as to the probability of completing the sale. Upon being informed that the bonds had been subscribed for by responsible parties, he entered into a contract with the hotel company, on the 28th day of February, 1890, to erect and construct the said building, in accordance with the plans and specifications, for the sum of \$315,000, and soon thereafter entered upon the work of constructing the said building, in accordance with the contract. The building was accepted by the architect and by the hotel company as having been completed in accordance with the contract. The hotel com-

pany failed to pay the last payment due upon the said building, amounting to \$——. Griffiths filed his contract in due time and form to secure a mechanic's lien upon the said buildings and grounds. At different dates, which are not material, the Western Electric Company (which transferred its claim to defendant in error De Wolf), Baker & Smith Company, Eaton & Prince Company, and W. H. Spellman, each furnished material and performed labor in the construction of the said hotel building of the Oriental Hotel Company, after the execution and record of the deed of trust given by the said hotel company to the St. Louis Trust Company. The claim of each of the said parties was duly filed and recorded within the proper time and manner to secure a lien upon the said building and premises. W. H. Spellman brought suit against the Oriental Hotel Company upon his claim, and foreclosed his mechanic's lien upon the premises, including the building. Under the judgment of the district court in that case the property was sold, and W. G. Neiman purchased it for \$250. None of the other claimants of liens were made parties to this proceeding. The St. Louis Trust Company sold the property under the deed of trust given to it by the Oriental Hotel Company, and it was bought in by the Oriental Investment Company. Both of these sales were made after the liens in favor of the defendants in error had been fixed according to law. The sales under the judgment in favor of Spellman and under the deed of trust were regular and sufficient to convey title as against the hotel company. The Oriental Investment Company, by special answer, claimed title to the property under the sale by virtue of the judgment in favor of Spellman, and also under the sale made by the St. Louis Trust Company under the deed of trust. The plaintiffs excepted to this portion of the answer, which exceptions were sustained by the court. Separate suits were brought in the district court against the Oriental Hotel Company in favor of the different plaintiffs in this suit, to recover their debts and foreclose the mechanics' liens. All of these suits were consolidated in the district court, and, thus consolidated, constitute the case now before us. There was a trial in the district court, and judgment in favor of the plaintiffs for their several amounts, with foreclosure of their liens and order of sale, from which judgment the defendants appealed to the court of civil appeals of the fifth district, which affirmed the judgment of the district court. The plaintiffs in error assigned the following grounds, in substance, upon which they seek a review and reversal of the judgment of the court of civil appeals: (1) That the court erred in sustaining exceptions to the defendants' answer, setting up title under the judgment rendered in favor of Spellman and sale thereunder. (2) That the court erred in sustaining exceptions to that portion of the defendants' answer which set up title acquired under the sale by the St. Louis Trust Company by virtue of the deed of trust given by the Oriental Hotel Company. (3) That the judgment of the court, foreclosing the lien

of the plaintiffs, except Griffiths, upon a part of the building situated upon the lots described, is erroneous. (4) That by the terms of the mortgage it had a first and paramount lien upon the property, and the court erred in decreeing priority of lien in favor of the plaintiffs over the claim of the Oriental Investment Company, the purchaser under said deed of trust. (5) That the court erred in refusing the special charge asked by the defendant, submitting to the jury the question as to whether or not Griffiths was estopped to assert his claim of priority of lien against the deed of trust to the St. Louis Trust Company. (6) That the court erred in excluding evidence offered by the defendant to show that Griffiths had not completed his work according to the contract. (7) Upon the trial the defendants tendered to John Griffiths, in open court, \$5,000 of the capital stock of the Oriental Hotel Company, which he declined to receive, and the court refused to compel him to accept, but instructed the jury to find for Griffiths for the amount of his claim, without deducting the \$5,000 in stock so tendered. This action of the court was assigned as error.

We have carefully examined the record in this cause, and find no error in the judgment of the court of civil appeals, upon any points set up in the petition for writ of error, except that specified in the third ground. We shall therefore not discuss any other question in the case, as the opinion of the court of civil appeals, as we think, clearly expresses the law applicable to the rights of the parties. By the judgment of the district court, which was affirmed by the court of civil appeals, the mechanic's lien of John Griffiths was foreclosed on all of the property described in the petition, including the lands and improvements thereon, and the mechanics' liens of Eaton & Prince Company, Baker & Smith Company, Wallace L. De Wolf, and W. G. Neiman were foreclosed on all of said property, "save and except the land and basement and foundation of the said hotel building," which liens were declared to be superior and paramount to the lien of any other party to the suit. The judgment directed that the clerk issue an order of sale to the sheriff or any constable of Dallas county, commanding him to sell the property in satisfaction of the judgment, and that he sell the lands and the basement and foundation of said hotel building separately from the balance of the said hotel building, applying the proceeds arising from the sale of "the land and basement and foundation of the building" to the satisfaction of the judgment in favor of John Griffiths, and if any surplus remain after paying the judgment of John Griffiths, that it be paid to the Oriental Investment Company; and that he apply the proceeds arising from the sale of the balance of the said hotel building in satisfaction of the judgments in favor of the Eaton & Prince Company, the Baker & Smith Company, Wallace L. De Wolf, and W. G. Neiman, and to payment of any balance which may remain unpaid on said judgment in favor of John Griffiths, in case his judgment had not been satisfied out of the proceeds of the

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"sale of the land and the basement and foundation of the said building." And if the proceeds realized from the sale of said property, except "the land and basement and foundation," be not sufficient to pay and discharge all said judgments, including the balance due on said Griffiths judgment, then said judgment and the balance of said Griffiths judgment shall be paid *pro rata*. If any surplus remain after paying all of the said judgments in full, the same to be paid to the Oriental Investment Company. In case the proceeds arising from said sale shall not be sufficient to pay all of said judgments in full, the respective plaintiffs to have execution against the defendant the Oriental Hotel Company for the collection of such balance. Article 3179 of the Revised Statutes provides: "All liens for work and labor done or things furnished, as specified in this act, shall be upon an equal footing, without reference to the date of filing the account or lien; and in all cases where a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the account or lien, shall be paid *pro rata* on the respective liens." It will be seen that, if we disregard the deed of trust made by the hotel company to the St. Louis Trust Company, all of the plaintiffs in this case would have participated equally with John Griffiths in the proceeds of the sale of the land, the foundation, and the basement of the hotel building. By the judgment entered, the plaintiffs, except John Griffiths, were denied the right of participation in the proceeds of the sale of such land, foundation, and basement, which could only be affected in case some superior right had intervened between the right of John Griffiths and the other plaintiffs.

In order, therefore, for us to decide upon the correctness of the judgment entered, we must determine as to the priority of the deed of trust over the liens of those plaintiffs who did work or furnished material under contracts entered into with the hotel company subsequent to the date of the deed of trust. It is claimed by the Oriental Investment Company, the purchaser under the deed of trust, that the said deed of trust held a prior and first lien upon the land and building so far as then constructed, and as it was to be thereafter completed, from the date of the making and recording of the said deed of trust, as against all claims arising thereafter out of the construction of the said building. This claim is based upon the language of a resolution of the board of directors of the hotel company, embodied in and made a part of the deed of trust. If the legal effect of the deed of trust would have been to give such prior lien without expressing it in the instrument, then the use of the language was wholly unnecessary, and conferred no right that would not have existed. If, on the other hand, the deed of trust, without the use of this language, would not have created such prior and paramount lien, as against subsequent mechanics' liens, then the use of that

language could not affect the rights of persons who were not parties thereto, and whose liens had their foundation in the laws of the state, and were not dependent upon contracts between the parties with reference thereto. It follows, therefore, that a proper consideration of the rights of the parties and the question involved demand that the language relied upon should be disregarded, and that the legal effect of the instrument should alone be considered. The proposition made by the hotel company to the trust company—the deed of trust and the bond given by the hotel company to the trust company—show that the erection of the hotel building had been begun and its continuance to completion was fully contemplated by the parties. Specifications of the work to be done accompanied the proposition, and the proposition upon which the deed of trust itself was based provided that the money received from sale of the bonds should remain in the hands of the trust company, to be paid out by it to persons who might furnish material or perform labor in the prosecution of the work; and the bond given by the hotel company to the trust company provided that in case any liens created upon the said building should not be discharged within 60 days after the expenditure of the \$250,000 procured by the sale of the bonds, then the hotel company should furnish sufficient funds to discharge such liens. The facts clearly indicate that the parties, at the time of making the trust deed, understood that liens superior to that of that instrument might accrue thereafter, and carefully provided for protection against them. The law in force in Texas at that time gave to all persons who might furnish material, fixtures, or tools, or who might labor in the construction of the said building, a lien upon the lands and the building to secure payment therefor. The parties contracted with reference to and in view of the law as it then existed, and must be charged with notice of such rights as might accrue in the course of constructing the building, even if they had not been actually contemplated by the parties. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 451, 25 L. ed. 1060. When a building or other improvement is in course of construction, and any person takes a mortgage on the land upon which such building or improvement is situated, or on the improvement itself, he does so with the knowledge that it may be necessary for the completion of the building that other contracts should be made for labor and material, and it is clearly the policy of this state, as shown by its statute law, that an intervening mortgagee shall not destroy the statutory rights of persons that may be acquired thereafter in the course of constructing such building. The deed of trust in this case expressly reserved a lien upon the building thereafter to be constructed, and it is evident from the facts that the principal security for the bonds which were being sold was to be created by the completion of the contemplated hotel building. If the position taken by the counsel for the Oriental Investment Company be correct, then an intervening mortgagee could arrest the progress of such work, destroy the 80 L. R. A.

statutory rights and liens of all persons who might be engaged in the work, and assert a lien by contract which would be superior to that given by the law under which the contract was made. This, we believe, cannot be maintained.

It is claimed, however, that the lien given by the statute (Sayles' Civ. Stat. art. 3171) does not give priority to mechanics' liens over mortgages and encumbrances existing upon the land or improvements at the time that the work is done or material furnished for which the statutory lien is claimed. To sustain this position reference is made to *Trammell v. Mount*, 68 Tex. 210, in which Judge Willie, in delivering the opinion of the court, uses this language: "The lien of a mechanic, though not fixed before the record of the contract or bill of particulars, when it is fixed relates back to the time when the work was performed or the material furnished, and hence takes precedence of all claims to the property improved which have been fastened upon it since that time." In that case the question was as to priority between the lien of a materialman and an attaching creditor. The only question before the court was whether or not the materialman's lien was prior to that of the attachment, the material having been furnished before levy of the attachment. It did not involve the question now before this court. Besides, that decision was made under the act of 1885 (Sayles' Civ. Stat. art. 3171), which reads as follows: "The lien herein provided for shall attach to the buildings, erections, or improvements for which they were furnished, or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land on which said buildings, erections, improvements, or machinery have been put or labor performed, and the person enforcing the same may have such building, erection, or improvements sold separately; provided, any lien, encumbrance, or mortgage existing on the land or improvements at the time of the accrual of the lien herein provided for shall not be affected thereby." In 1889 the legislature amended article 3171, as above quoted, there being no material difference in the language used in the first clause of that section as amended, from that used in the original article. The proviso in the article, as amended in 1889, reads thus: "Provided any lien, encumbrance, or mortgage on the land or improvement at the time of the inception of the lien herein provided for, shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for." The language of this proviso differs from that embraced in the original article only in the omission of the word "existing," which does not change the meaning of the law, and in the use of the word "inception," in lieu of the word "accrual." In view of the fact that the former act had been by the supreme court of this state construed as fixing the time when the lien began at the date when the work was done or material furnished, and the further fact that the word "accrual," as used in the former statute, and upon which that deci-

sion must have been based, is replaced by the word "inception," we must conclude that the legislature intended to make a change as to the time at which the lien given by the statute should begin; otherwise, the amendment would have been useless. What is meant by the "inception of the lien," as used in the statute, we must determine from a consideration of the language of the proviso in connection with other provisions of the law. The Constitution of this state secures to mechanics, artisans, and materialmen a lien upon the buildings and articles made or repaired by them for the value of their labor done thereon, or the material furnished therefor, and commands the legislature to provide by law for the speedy and efficient enforcement of said liens. Const. art. 16, § 37. In obedience to this mandate the legislature has enacted the laws referred to, which will be liberally construed in order to secure the rights guaranteed by the Constitution. By article 8179, Rev. Stat. heretofore quoted, all liens are put upon an equal footing, and each mechanic, materialman, or laborer participates in the lien created by the statute, from the foundation to the final completion of the structure. The man who lays the foundation has an equal claim upon the whole structure with all others, and the man who completes the work has an equal claim upon the foundation with him who does the work thereon or furnishes the material therefor. The lien, then, which is secured by statute, extends in favor of each, from the beginning to the completion of the work, and if it so extends and embraces all that has been done from the beginning to the completion, its "inception" must be the time to which it is made to relate in giving effect. The word "inception" means "initial stage." Century Dict. It does not refer to a state of actual existence, but to a condition of things or circumstances from which the thing may develop. When the building has been projected, and construction of it entered upon,—that is, contracted for,—the circumstances exist out of which all future contracts for labor and material necessary to its completion may arise, and for all such labor and material a common lien is given by the statute; and in this state of circumstances the lien to secure each has its "inception." Under a statute in the state of Iowa by which the mechanic's lien is made to attach from "the commencement of the building, erection, or other improvement" (Revision 1860, § 1853), it has been held that "all persons furnishing material or labor in the construction and completion of any building, erection, or improvement acquires a lien upon the entire building or improvement, superior to the lien of any mortgage which may be given by the owner upon the lands or improvements subsequent to the beginning of the work on such building or improvement." *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 73; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057. In *Brooks v. Burlington & S. W. R. Co.* it was held that where a railroad was built by sections, and after the completion of one section of the road a mortgage was given and bonds issued, con-

stituting a first-mortgage lien upon the entire road built and to be constructed, contractors and laborers who furnished material and labor in the construction of the subsequent sections of the road, and after the record of the mortgage and issue of the bonds, had a lien upon the entire road for the work so done. The reasoning in that case is very conclusive as to the right and justice of this construction of the statute. It is true that the language of the statute of Iowa is more definite in its terms than the statute of this state, but we believe that a proper construction of our statute, as above shown, gives to it the effect that was given to the Iowa statutes in the cases cited.

If the construction claimed by the plaintiffs in error be given to the statute of this state it would result in many absurd and unjust consequences. For example, let us suppose that Griffiths's contract called for the completion of the hotel building, except the portions for which the other plaintiffs furnished material or upon which they performed labor, and that Griffiths's contract had been complied with and the building completed, except the portions last named, and that after this was done Griffiths's claim remaining unpaid, the deed of trust had been executed, as it was in this case, before the contracts were made under which the other plaintiffs acquired their rights. Now, by the construction claimed, Griffiths would have a prior lien upon the entire building, including all that the other plaintiffs had furnished, either in material or labor, and yet they who furnished the material or labor would have only a second lien thereon, for the reason that the mortgage intervening would take precedence over them. If we adopt the construction of the statute which seems to have been applied by the district court and approved by the court of civil appeals, the result will be, in such case as that stated above, that Griffiths would have his lien upon all the work completed by him, and would be allowed to participate in the proceeds of that which had been added by the other plaintiffs, while they would be denied their statutory right to participate with him in the portion completed before the mortgage was given. Suppose that Griffiths had the entire contract for building the house, except the plastering and painting, and that, before the plastering and painting were done, the mortgage had been given; then the result would be that Griffiths would have his lien upon the entire building, painted and plastered, while the other parties, who did the plastering and painting, and furnished the material therefor, would have a lien, equally with Griffiths, only upon the plastering and painting as it might be upon the walls, woodwork, or other parts of the house. Would it be practicable to separate these, in case of a foreclosure of the lien and sale, so as to adjust the rights of the parties in the proceeds of that portion consisting of the plastering and painting? In fact, it would be almost impossible to construct a house of any considerable value, except upon cash payments, without making such complications between the parties as would render it im-

practicable, if not impossible, to adjust their equities under any such rule of construction as that upon which this judgment is based. When a statute is plain and unambiguous in its terms, and not susceptible of more than one construction, courts are not concerned with the consequences that may result therefrom, but must enforce the law as they find it. But when a statute is ambiguous in its terms, or susceptible of two constructions, then the evil results and hardships which may follow one construction may be properly considered by the court, and it is right that the court shall place upon the statute that interpretation, of which it is fairly susceptible, which will attain the just solution of the questions involved and protect the rights of all parties. Sutherland, Stat. Constr. § 324. The construction that we place upon the statutes of this state, to the effect that when the erection of any building or construction of any improvement is begun, that constitutes the inception of all subsequent liens, is consistent with the entire body of the statute laws of this state on the subject, preserves the equality of all those who contribute to the construction of the building, and affords an easy solution and just result in case of intervening liens; for it is but just that he who acquires a lien upon property under such circumstances, and seeks to derive to himself the benefits of the improvement to be made, enhancing in value the security thus obtained, should be charged with notice that those who thereafter perform labor upon or furnish material for the completion of such improvement will be protected, under the law, in the liens created by the statute. *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057.

We therefore hold that, under the facts in this case, John Griffiths, Eaton & Prince Company, Baker & Smith Company, Wallace

L. De Wolf, and W. G. Neiman, as assignees of W. H. Spellman, were entitled to have their liens foreclosed upon the lot upon which the building was situated and the entire building, and that the same should have been sold as a whole, and the proceeds applied to the discharge of their several claims, if sufficient, and, if not sufficient, that they then be paid *pro rata*; and if there should be any surplus of such proceeds after payment of all of the said liens, then such surplus to be paid to the Oriental Investment Company, but in case the proceeds of such sale should not discharge the claims of the said parties, then that execution should issue against the Oriental Hotel Company for the balance remaining unpaid. The district court erred in ordering the sale of the land, foundation, and basement separately from the balance of the building, and in ordering the proceeds of such sale to be applied to the payment of Griffiths's claim, to the exclusion of the other lienholders, and also in ordering the building, other than the land, foundation, and basement, to be sold separately, and the proceeds distributed among the several lienholders; and the court of civil appeals erred in affirming the said judgment for that reason.

It is therefore ordered that the judgments of the District Court and of the Court of Civil Appeals be reversed, and that judgment be here rendered in favor of the plaintiffs below and W. G. Neiman for the several amounts for which judgment was rendered by the district court, and that the liens of all the said parties be foreclosed upon the land and the entire building, and the proceeds distributed in accordance with this opinion. It is further ordered that the plaintiffs in error recover from the defendants in error all costs of the court of civil appeals and of this court, and the defendants in error from the plaintiffs in error the costs of the district court.

WISCONSIN SUPREME COURT.

William F. VILAS, *Resp't.*,

v.

McDONOUGH MANUFACTURING COMPANY, Impleaded, etc., *Appt.*

(.....Wis.....)

A mechanic's lien for machinery placed in a mill is superior to a prior mortgage taken on the premises when the mill was unfinished and substantially without machinery, under Rev. Stat. § 3314, making such liens "prior to any other lien which originates subsequent to the commencement of the construction . . . or work" for which the lien is claimed.

(December 17, 1895.)

APPEAL by McDonough Manufacturing Company from a judgment of the Circuit Court for Ashland County in favor of plaintiff

NOTE.—See preceding case of Oriental Hotel Co. v. Griffiths (Tex.), *ante*, 765, and footnote thereto.
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in a proceeding to foreclose a mortgage to the exclusion of an alleged mechanic's lien claimed by appellant for machinery furnished and attached to the property mortgaged. *Reversed.*

Statement by **Newman, J.:**

This is an action to foreclose a mortgage on a lumber mill and other property in the city of Ashland. On the 31st day of December, 1890, the plaintiff lent to one Donald A. Kennedy, who was then the owner of the mill and land, \$10,000, and took a mortgage thereon, dated the same day, and recorded on the 10th day of January, 1891, for security for its repayment. Before making the loan, the plaintiff made inquiry as to the title to the property, and as to encumbrances upon it, and was assured that there was no lien or encumbrance upon the property, and that there was no outstanding contract wherefrom any lien or encumbrance could arise. Kennedy had recently built the mill, which was still unfinished, and substantially without

machinery. Afterwards he put in it machinery which he bought of the appellant. The appellant is a manufacturer of sawmill machinery, at Eau Claire, Wis. Between the 14th day of February, 1891, and the 4th day of May, 1891, it manufactured for, and sold and delivered to, Kennedy, sawmill machinery to the amount and value of \$5,259.25, which was put into the mill, and became a part thereof. This machinery was manufactured and furnished to Kennedy pursuant to a verbal order or agreement made about November 5, 1890, whereby appellant agreed to manufacture the machinery, and ship it as ordered. The appellant commenced immediately to manufacture the machinery, and had some of it completed before the date of plaintiff's mortgage, and manufactured and shipped it all as ordered and previously agreed upon. The appellant filed its petition for a mechanic's lien October 26, 1891, claiming \$4,259.25. The plaintiff made the appellant and other lien claimants defendants in his foreclosure action. The appellant set up its claim of lien, which it claimed to be prior and paramount to the lien of plaintiff's mortgage. The trial court decided against this claim, holding the plaintiff's mortgage to be the prior and paramount lien, and gave judgment accordingly. From this judgment the appeal is taken.

Mr. T. F. Frawley, for appellant:

The mechanic's lien of appellant for sawmill machinery and material, manufactured for and furnished to Kennedy under and in pursuance of the contract of November 5, 1890, to complete and equip his sawmill, theretofore commenced and then in the process of erection, attached to the 1 acre of land, upon which said sawmill is situate, from the date of the commencement of such sawmill, September 1, 1890, and is superior and paramount to plaintiff's said mortgage.

Sanborn & Berryman, Anno. Stat. § 3314, 15 Am. & Eng. Enc. Law, p. 88; *Apperson v. Farrell*, 56 Ark. 640; *McCrea v. Craig*, 23 Cal. 522; *Marston v. Kenyon*, 44 Conn. 350; *Hartun Steam Heater Co. v. Gordon*, 2 N. D. 246; *Monroe v. West*, 12 Iowa, 119, 79 Am. Dec. 524; *Neilson v. Iowa Eastern R. Co.* 44 Iowa, 71; *Gardner v. Leck*, 52 Minn. 522; *Miller v. Stoddard*, 54 Minn. 486; *Merrigan v. English*, 9 Mont. 118, 5 L. R. A. 837; *Morris County Bank v. Rockaway Mfg. Co.* 14 N. J. Eq. 189; *Manhattan L. Ins. Co. v. Paulson*, 28 N. J. Eq. 804; *Hewson-Herzog Supply Co. v. Cook*, 53 Minn. 534; *American F. Ins. Co. v. Pringle*, 2 Serg. & R. 188; *Pennock v. Hooser*, 5 Rawle, 292; *Hahn's Appeal*, 39 Pa. 409; *Parriah & H.'s Appeal*, 83 Pa. 111; *Bassett v. Swartz*, 17 R. I. 215; *Davis v. Bilsland*, 85 U. S. 18 Wall. 659, 21 L. ed. 969; *Brooks v. Burlington & S. W. R. Co.* 101 U. S. 443, 25 L. ed. 1057; *Meyer v. Egbert*, 101 U. S. 728, 25 L. ed. 1078; *Hall v. Hinckley*, 32 Wis. 862; *Lampson v. Bowen*, 41 Wis. 484; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277.

The appellant having made a binding contract to manufacture and furnish certain material for Kennedy's mill, and having entered upon the construction of such machinery and material prior to the execution of the mortgage,

its lien for such machinery and material is prior to that of the mortgage, though none of the machinery and material was delivered on the ground until after the recording of such mortgage.

Carew v. Stubbs, 155 Mass. 549; *Parriah & H.'s Appeal*, *supra*; *Edwards & McC. Lumber Co. v. Mosher*, 88 Wis. 672.

The machinery and material having been furnished by appellant to Kennedy as a part of a continuous account, the contract therefore must be regarded as an entirety, and its character is neither changed nor the right of appellant affected because such machinery and material were furnished from time to time, as the progress of the building required.

15 Am. & Eng. Enc. Law, pp. 74, 151; *Mellor v. Valentine*, 8 Colo. 255; *Squires v. Fithian*, 27 Mo. 135; *Hahn's Appeal*, 39 Pa. 409; *Hofer's Appeal*, 116 Pa. 360; *Spruhen v. Stout*, 52 Wis. 517.

Plaintiff knew that although material might thereafter be delivered to complete and equip such mill, that although the same was not actually used and employed therein, still a lien therefor would attach of the date of the commencement of the building.

Odd Fellows' Hall v. Masser, 24 Pa. 508, 64 Am. Dec. 875; *Singerly v. Doerr*, 62 Pa. 9; *Cooper v. Cleghorn*, 50 Wis. 113; *Spruhen v. Stout*, *supra*.

He knew that, although Kennedy, after the giving of such mortgage, might make alterations in the mill as originally designed, and, though not then contemplated either by Kennedy or himself, provided such alterations did not change the design and purpose of the building so that the whole when finished was not substantially a different building from the one first commenced, that a lien for the work and material so done and furnished would relate back to the period when the building was commenced, to the exclusion of the intervening encumbrance.

Phillips, *Mechanics' Lien Law*, 220; *Hartun Steam Heater Co. v. Gordon*, 2 N. D. 246.

In determining the right of the materialman, under a mechanic's lien claim, the question is not whether the original contract is binding, but whether the material was furnished in the ordinary progress of the building, with an understanding that it should be so furnished.

Hofer's Appeal, 116 Pa. 360.

Though the original contract were but a mere understanding, and the various items of machinery were furnished from time to time, and some not specified were so furnished, still, under the mechanic's lien law, it will be treated as one contract.

Spruhen v. Stout, 52 Wis. 517.

If the work be done for and on the credit of the building, the place where it is done can make no difference.

Singerly v. Doerr, 62 Pa. 9; *Parriah & H.'s Appeal*, 83 Pa. 111; *Spruhen v. Stout*, *supra*.

Neither this court, nor any other court, in construing this or like statutes, discriminates against a materialman who furnished materials for the construction of a building because such material may have been machinery.

Stockwell v. Campbell, 39 Conn. 362, 12 Am. Rep. 393; *Parriah & H.'s Appeal*, *supra*; *Girard*

Point Storage Co. v. Riehle (Pa.) 11 Cent. Rep. 156; *Bodley v. Denmead*, 1 W. Va. 249; *Cooper v. Cleghorn*, 50 Wis. 118; *Spruhen v. Stout*, *supra*; *Lampson v. Bowen*, 41 Wis. 484.

Messrs. Winkler, Flanders, Smith, Bottum, & Vilas, for respondent:

The statute for mechanics' liens proceeds upon just principles in entire consistency with the registry laws, and thus imposes notice of a possible lien only when the changed condition of the premises, by reason of the lien claimant having begun to apply labor or materials thereto, fairly and naturally puts one interested to inquiry.

Attachment to the realty is the essential, and with its beginning commences the lien.

Jessup v. Stone, 18 Wis. 467; *Rees v. Ludington*, 18 Wis. 277, 80 Am. Dec. 741; *Chapman v. Wadleigh*, 33 Wis. 273; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277; *Kendall Mfg. Co. v. Rundle*, 78 Wis. 150; *McLagan v. Brown*, 11 Ill. 528; *Gaty v. Casey*, 15 Ill. 189; *Williams v. Chapman*, 17 Ill. 428, 65 Am. Dec. 669; *Smith v. Moore*, 26 Ill. 392; *Lomax v. Dore*, 45 Ill. 879; *Denmead v. Bank of Baltimore*, 9 Md. 179; *Farmers' Bank v. Winslow*, 8 Minn. 86, 74 Am. Dec. 740; *Knox v. Starks*, 4 Minn. 20; *Wentworth v. Tubbs*, 68 Minn. 388; *Monroe v. West*, 12 Iowa, 121, 79 Am. Dec. 524; *Welch v. Porter*, 63 Ala. 225; *Tritch v. Norton*, 10 Colo. 337.

Were the appellant's theory correct, it has proved no such completed contract, prior to the mortgage, as would justify the court in referring the lien to its date.

Spruhen v. Stout, 52 Wis. 517.

The appellant is not entitled to date back its lien to the commencement of the building, but it begins with the commencement of the work of erecting or constructing such machinery so as "to be or become part of the freehold on which it is to be situated."

Phillips v. Stone, 25 Ill. 81; *Hahn's Appeal*, 39 Pa. 409.

In *Dugan v. Scott*, 37 Mo. App. 663, and *McAdow v. Sturtevant*, 41 Mo. App. 220, a statute which by its terms seemed to subject all prior encumbrances to liens, was construed inapplicable to mortgages so far as to affect their claim on the property as mortgaged.

Decisions which go upon statutes so different from ours are inapplicable. The words of our statute applicable to the subject of machinery bring it within a different class of cases.

Huttig Bros. Mfg. Co. v. Denny Hotel Co. 6 Wash. 122; *Barber v. Reynolds*, 44 Cal. 519; *Root v. Bryant*, 57 Cal. 48; *Soule v. Davies*, 7 Cal. 575; *Welch v. Porter*, 63 Ala. 225; *Tritch v. Norton*, 10 Colo. 337; *Irvine v. Hovey*, 3 Phila. 373.

Newman, J., delivered the opinion of the court:

The question is whether the appellant's lien for machinery supplied to Kennedy's mill after the date of the execution of the plaintiff's mortgage upon the mill property is prior and paramount to the lien of the mortgage. This question must be determined upon the proper interpretation of the statute which gives the lien. It is section 3314 of the Revised Statutes. So far as material to the question to be decided, it reads

as follows: "Every person who, as principal contractor, architect, civil engineer, or surveyor, performs any work or labor, furnishes any materials, or prepares any plans or estimates for, in, or about the erection, construction, repair, or removal, of any dwelling house or other building, or any machinery erected or constructed so as to be or become a part of the freehold upon which it is situated, . . . shall have a lien thereupon, and upon the interest of the owner of such dwelling house, building, machinery, . . . in and to the land upon which the same is situated. . . . Such lien shall be prior to any other lien which originates subsequent to the commencement of the construction . . . or work aforesaid of, or upon such dwelling house, building, machinery, . . . and shall also attach to and be a lien upon the real property of any person on whose premises such improvements are made."

The object of the interpretation of a statute is to ascertain what the legislature intended to accomplish by it. When that intention is ascertained, that is the law. Statutes giving what are called "mechanics' liens" provide new remedies not given by the common law. They are supplementary to the common law, and remedial in their nature, and are to be fairly, even liberally, interpreted, so as to make the remedial purpose of the legislature effectual. The statute recited above, so far as relates to the question involved, gives liens in two classes of cases. It gives liens to persons who furnish materials for the construction of buildings, and to persons who erect machinery on the lands of others. The latter case is not included in the former, but is supplementary or additional to it. It provides for cases which are not within the former provision. The mechanics' lien statute, as at first enacted and in force, had only the former provision. The latter was subsequently added for the purpose of including within the benefits of the statute cases not already within it. While the statute as it now stands, with both cases included within it, was re-enacted as a whole in the revision of 1878, it no doubt bears the same interpretation as if the two provisions were contained in separate statutes. The case of one who furnishes the machinery for the construction of a new mill is the case of one who furnishes materials for the construction of a building. The machinery, when attached, becomes a part of the building, and is real estate. The building without the machinery is no mill. The building with the machinery attached becomes a mill, but still is described by the generic term "building." It is subject to the liens which the statute gives to such as furnish materials for the construction of a building. This seems to be elementary, and to require no amplification. But it may be confirmed by citation of authority. Phillips, *Mechanics' Liens*, 3d ed. § 177, says: "Fixtures, machinery, etc., when necessary to the original purposes of the structure, and erected with it, may become responsible to the lien, when they would not otherwise have been without express enactment, if put up independently. As between the owner and mechanic, every-

thing put into and forming part of a building, or machinery for manufacturing purposes, and essential to the manufactory, is a part of the freehold, as wheels of a mill etc., . . . and are subject to the mechanics' lien law." In *Summerville v. Wann*, 87 Pa. 182, it was held that a statute which provides that "every building erected . . . shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same" gives a lien against the building for engines and machinery constituting a part of a new mill. In *Dimmick v. Cook Co.* 115 Pa. 578, it was held, under the same statute, that a lien was given on a new hotel for furnishing such articles for its construction as "heating, laundry, and cooking apparatus." In *Dickey's Appeal*, 115 Pa. 78, it was held that a battery of boilers, imbedded in brick and stone and mortar, a funnel chimney or stack, built on firm foundation, and extending through the roof, the engines, cranes, wire mills, furnace trains, and other fixtures firmly attached to the realty, all a part of the realty, and all together constituting one plant, are all part of the building, within the meaning of the law which gives a lien upon the building for materials furnished in its construction. So, it must be considered that the appellant has a right to a lien upon the mill building and the freehold, as one who has furnished materials for its construction. It is within the former class,—a lien upon the building itself. Being a lien upon the building itself, it is not a lien upon machinery otherwise provided for. This being established, there is little occasion to consider what cases come within that provision which gives a lien to the person who erects machinery on the lands of another. Probably it will be found that all are cases where the machinery erected does not become a constituent part of a building, upon which a lien might be had. The wind-mills found upon so many of the farms are samples. Where a lien is given on the building itself, there can be no lien upon the details or constituent parts of the building. The greater includes the less. This seems to be evident.

The appellant's lien, being upon the building itself, is prior and paramount to any other lien which has originated subsequently to the commencement of the construction of the mill, by express provision of the statute itself. It is prior and paramount to the plaintiff's mortgage, which was executed since the commencement of the building. The fact that the plaintiff had not begun to furnish the machinery for which his lien is claimed, at the mill, at the time when the plaintiff made his loan and took his mortgage, is irrelevant to the question. This was so decided in *Lampson v. Bowen*, 41 Wis. 484. That case was, in some of its features, very much like the present case. It can almost be said to be a precedent for this case. Granted that furnishing machinery is furnishing materials for the building, and it is on all fours with this case. It was a question between the holder of a mortgage executed while a dwelling house was in pro-

cess of erection on the premises, and a line claimant for labor and materials furnished subsequently to the execution and recording of the mortgage. It arose on a motion of the mortgagee to be let in to defend against the lien claimant. The motion was based upon an affidavit which alleged that none of the work was done or materials were furnished prior to the execution or recording of the mortgage. The court says: "To construe the statute to mean that such lien should commence to run from the time the mechanic commenced work on the house, or the materialman commenced to furnish materials therefor, and should only be paramount to liens which originated after that time, but subject to liens which originated before that time and after the erection of the building was commenced, would be to pervert the language and plain meaning of the statute." The condition of the building, its unfinished state, was notice to the plaintiff, within the contemplation of the law, that further expenses for the completion of the building, for its original purpose as a mill, were in contemplation, which in some contingency, not remotely likely to happen, might eventuate in a lien which would be prior and paramount to the lien of his mortgage. *Chapman v. Wadleigh*, 83 Wis. 267.

That part of the judgment appealed from is reversed, and the cause remanded, with direction to modify the judgment in accordance with this opinion.

Cassoday, Ch. J., dissenting:

It is found by the trial court, and remains unchallenged, that on or about September 1, 1890, the defendant Kennedy commenced the erection of his mill in Ashland, and that the "building was practically completed" by him before he gave the note and mortgage to the plaintiff. It is conceded by my brethren that the mere "order or agreement," made about eight weeks prior to the execution of the plaintiff's mortgage, whereby the defendant company "agreed to manufacture the machinery and ship it as ordered," did not of itself create a lien upon the building or land in favor of the company. It is, moreover, conceded that the mere fact that, in pursuance of that order or agreement, the company commenced to manufacture at its shops in Eau Claire some of such machinery, and actually had some of it completed at such shops, prior to the making or recording of that mortgage, did not of itself create a lien upon the building or land in favor of the company. The trial court found, and it remains unchallenged, that the first machinery shipped by the company from Eau Claire to Kennedy, at Ashland, was on January 22, 1891,—twenty-two days after the plaintiff, relying upon assurances that there was no lien or encumbrance upon the property, loaned the money and took the mortgage, and twelve days after that mortgage had been recorded. From what has been stated, it logically follows, and must be conceded, that the lien in favor of the company was wholly created by what took place between January 22, 1891, and May 4, 1891, inclusive, as mentioned in the opinion filed.

This being so, the company is in no more favorable position than it would have been if the "order or agreement" for the machinery had been made after the recording of the mortgage, and the same had all been subsequently manufactured. It follows, as a necessary sequence, that, at the time the plaintiff loaned his money and took the mortgage, the building and land in question were free and clear from any encumbrance in favor of the company, and that the same continued to be true, not only up to the time of recording of the mortgage, but for several days thereafter. All this is, in effect, conceded by my brethren; but, as they construe our statute, they feel constrained to hold that, although the lien in favor of the company was wholly created after the recording of the plaintiff's mortgage, yet that, when so created, it related back to the commencement of the building, September 1, 1890; and thus became "prior and paramount to any other lien which has originated subsequently to the commencement of the construction of the mill, by express provision of the statute itself," and hence "is prior and paramount to the plaintiff's mortgage, which was executed since the commencement of the building." Under such construction of the statute, the company's lien would have so related back and become prior and paramount to the plaintiff's mortgage, even had the lien not been created for several months or even for several years after the recording of the mortgage; and this would be so even if Kennedy borrowed the money with the avowed purpose of paying for such machinery, and otherwise keeping out of debt. The decision is to the effect that the company and Kennedy were, by transactions which occurred wholly after the recording of the plaintiff's mortgage, enabled, by virtue of the statute, to divest the plaintiff's lien, and render the same subordinate and subject to the lien in favor of the company for machinery thereafter sold and delivered, to the amount of \$5,259.25; and that, too, without the consent or knowledge of the mortgagee, and without any notice to him, actual or constructive. True, it is said in the opinion filed, in effect, that the completed building, without the machinery in it, was notice to the plaintiff, within the contemplation of law, that further expenses were in contemplation, which "might eventuate in a lien which would be prior and paramount to the lien of his mortgage." The fact that Kennedy had completed the construction of the building, and that the same and the land upon which it was situated were free and clear of all liens and encumbrances at the time he borrowed the \$10,000 and gave the mortgage thereon, as security, would seem to indicate to the ordinary mind that he did not contemplate running in debt for the machinery. But the mortgagee was not bound to take notice of things which at the time of taking and recording his mortgage had no existence, except in the "contemplation" of the mortgagor; and there only, in the language of the opinion filed, in case of "some contingency not remotely likely to happen."

The statute, as construed by the majority 30 L. R. A.

of the court, is in my judgment repugnant to that provision of the Constitution of the United States which declares that "no state shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Amend. art. 14, § 1. That provision was ordained and established for the very purpose of taking away from every state and its legislature every one of the powers thus prohibited. A majority of this court have just held, in an opinion by my Brother Newman, that notice of forty days by publication in case of street assessments is not such due process of law as to conclude and bar the lot owner. *Hayes v. Douglas County* (Wis.) (not yet officially reported) 65 N. W. 482. But here, as indicated, the plaintiff is divested of substantial property rights without any notice. True, the validity of the statute, as thus construed, was not discussed at the bar, and is not mentioned in the opinion filed. Nevertheless, the effect of the decision is to divest the plaintiff of a vested right of property, without any notice, and by reason of transactions which occurred wholly after the recording of the mortgage, and which transactions had no existence at the time of recording the mortgage, except as mere contingent possibilities in the contemplations of the mortgagor and the company. But it is unnecessary to extend this discussion in a mere dissenting opinion on a point not mentioned, but necessarily decided, in the opinion filed. Besides, four years ago, my views upon a similar question were expressed, and numerous authorities cited in support of them, in dissenting opinion in *Mallory v. La Crosse Abattoir Co.* 80 Wis. 180-186. That decision gave a lien to a subcontractor without regard to the contract price or the sum due from the owner to the principal contractor. As there indicated, the validity of such legislation must finally be determined by the Supreme Court of the United States, and that, until so determined, the question is open to the expression of opinion. In addition to the authorities cited in that opinion in support of the views here expressed, see *St. Louis & S. F. R. Co. v. Gill*, 158 U. S. 649, 39 L. ed. 567; *Ritchie v. People*, 155 Ill. 98, 29 L. R. A. 79; *Wallace v. Georgia, C. & N. R. Co.* 94 Ga. 782; *State v. Julow* (Mo.) 29 L. R. A. 257. The opinion in the case at bar, like all other decisions of this court in support of the validity of such legislation, fails to meet the objection upon which this dissent is based. It purports to be based upon the letter of the statute, assuming it to be a valid statute. The construction given is certainly far-reaching in its effects, and strikes at the fundamental right of parties to make their own contracts, and deal with property without being embarrassed by secret liens to be subsequently created. It frustrates and renders nugatory the salutary statute known as the "Recording Act." The plaintiff here had the right to rely upon the statute which made all prior and unrecorded conveyances void as against his mortgage, taken and recorded in good faith, and for full consideration paid. Rev. Stat. § 2241. A mortgage

is a "conveyance," within the meaning of that section. Id. § 2242. Since that is so as to existing secret liens and conveyances, it must, for a much stronger reason, be so as to a lien not created until weeks after the plaintiff recorded his mortgage. In my judgment, the statute may be fairly construed as giving the lien only from the time the machinery began to be put into the building. And especially should it be so construed since the rule is well settled that where a statute is open to two interpretations, one of which would render it nugatory, and the other valid, that construction should be adopted which makes it valid. For the reasons given above and in my opinion in the *Mallory Case*, cited, I am compelled to dissent from the decision in this case.

J. F. FAUST, *Appt.*,

AMERICAN FIRE INSURANCE CO. of
Philadelphia, *Resp't.*

(.....Wis.....)

1. A written special description of the subject-matter must control the printed clauses of an insurance policy whenever they are inconsistent.
2. Keeping a small quantity of benzine necessary for use in a furniture repair shop does not forfeit a policy of insurance thereon although the printed portion of it declares that it shall be void if benzine is kept on the premises, where the written portion of the policy insures the building as a "furniture store and repair shop."
3. An adjuster's visit to insured premises soon after a fire and his taking away a list of the property destroyed, which is not returned, with a denial of liability for the loss on the ground that the policy had been avoided, is a waiver of provisions of the policy requiring proofs of loss.

(October 22, 1895.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Dane County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

Statement by Marshall, J. :

This action was brought to recover loss sustained by the plaintiff under a standard insurance policy of the state of Wisconsin, issued by defendant. The written portion of the policy reads as follows :

"Joseph Faust: Four hundred dollars (\$400) on his two-story frame, shingle-roof building and one-story frame addition thereto, occupied as a furniture store and repair shop, situated on the corner of East and River streets, village of Christiansa, Dane county,

Wisconsin. Four hundred dollars (\$400) on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store, while contained therein."

The printed portion of the policy contained, among other things: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . If (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine . . ."

The policy also contained in the printed portion a provision requiring immediate notice in writing to the company in case of loss, and sworn proofs of loss within sixty days after date of fire. Also the following: "The company shall not be held to have waived any provision or condition of this policy, or of any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for. This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, and conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or added hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The answer alleged a breach of the condition prohibiting the keeping or use of benzine on the premises; also the failure on plaintiff's part to furnish proofs of loss as required by the policy. The evidence shows that the assured, at the time the policy was issued, and at the time of the fire, had a small amount of benzine on the premises, kept solely for use in the repair shop, and that it was necessary for such use. The evidence also shows that notice of the loss was given to the company the next morning after the fire; that soon thereafter the company's adjuster visited the scene, and was furnished by appellant with a list of the goods burned; that he then discovered that benzine had been kept on the premises, and thereupon notified the plaintiff that such fact rendered the policy void; that he took away with him the list of the property destroyed, furnished by plaintiff, and the same has ever since been retained by him or some one for the company. From that time on the defendant has refused to communicate with plaintiff with respect to the loss. The trial court granted defendant's motion for nonsuit upon the ground that the contract of insurance was rendered void by a violation of the provision prohibiting the keeping or use of benzine on the premises, and judgment was rendered accordingly.

NOTE.—In connection with the above case as to implied exceptions to condition against keeping hazardous articles on insured premises, see *Marl v. Connecticut F. Ins. Co. (Ga.) post, 895.*

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Messrs. Burr, W. Jones and E. Ray Stevens, for appellant:

The fact that there were two gallons of benzine on the premises, used for the purposes stated in the testimony, was not a ground for forfeiture.

Hall v. Insurance Co. of N. A. 58 N. Y. 292, 17 Am. Rep. 255; *Harper v. New York City Ins. Co.* 23 N. Y. 441; *Mears v. Humboldt Ins. Co.* 92 Pa. 15, 87 Am. Rep. 647; *Archer v. Merchants & Mfrs. Ins. Co.* 43 Mo. 434; *Vie's v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 88; *Collins v. Farmville Ins. & Rkg. Co.* 79 N. C. 219, 28 Am. Rep. 822; *Lounsbury v. Protection Ins. Co.* 8 Conn. 459, 21 Am. Dec. 686; *Rafferty v. New Brunswick F. Ins. Co.* 18 N. J. L. 480, 88 Am. Dec. 525; *Leggett v. Aetna Ins. Co.* 10 Rich. L. 202; *Niagara F. Ins. Co. v. DeGraff*, 12 Mich. 124; *Citizens' Ins. Co. v. McLaughlin*, 58 Pa. 485; *Moore v. Protection Ins. Co.* 29 Me. 97, 48 Am. Dec. 514; *Steinbach v. La Fayette F. Ins. Co.* 54 N. Y. 90; *Phenix Ins. Co. v. Taylor*, 5 Minn. 499; *Bryant v. Poughkeepsie Mut. Ins. Co.* 17 N. Y. 200; *Com. v. Hyde & Leather Ins. Co.* 112 Mass. 186, 17 Am. Rep. 73; *Pindar v. Kings County F. Ins. Co.* 86 N. Y. 648, 98 Am. Dec. 544.

If there is any inconsistency or conflict between the printed and the written clauses, the latter must prevail.

Harper v. New York City Ins. Co. supra; *Benedict v. Ocean Ins. Co.* 81 N. Y. 889.

The court is bound to construe the contract as strongly against the insurer and as favorably for the insured, as its terms will reasonably permit.

In order to work a forfeiture, a substantial breach must be established.

Kircher v. Milwaukee Mechanics' Mut. Ins. Co. 74 Wis. 470, 5 L. R. A. 779; *Morse v. Buffalo, F. & M. Ins. Co.* 80 Wis. 534, 11 Am. Rep. 587; *Redman v. Hartford F. Ins. Co.* 47 Wis. 89, 82 Am. Rep. 751.

The defendant waived the alleged forfeiture. Wis. Rev. Stat. § 1977; *Alkan v. New Hampshire Ins. Co.* 53 Wis. 186; *Schomer v. Hekla F. Ins. Co.* 50 Wis. 575; *Devine v. Home Ins. Co.* 32 Wis. 471; *Renier v. Dwelling House Ins. Co.* 74 Wis. 94; *Bourgeois v. Mutual F. Ins. Co.* 86 Wis. 402; *Palmer v. St. Paul F. & M. Ins. Co.* 44 Wis. 201; *Oshkosh Gas-light Co. v. Germania F. Ins. Co.* 71 Wis. 454; *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.* 40 Wis. 446; *Dohlantry v. Blue Mounds F. & L. Ins. Co.* 88 Wis. 181; *Jerde v. Cottage Grove F. Ins. Co.* 75 Wis. 845; *Wester v. Phenix Ins. Co.* 86 Wis. 87, 17 Am. Rep. 479; *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108, 28 Am. Rep. 535.

The proofs of loss were waived.

Zielke v. London Assur. Corp. 64 Wis. 442; *Palmer v. St. Paul F. & M. Ins. Co. supra*; *Renier v. Dwelling House Ins. Co.* 74 Wis. 89; *Badger v. Phenix Ins. Co.* 49 Wis. 896; *Killins v. Putnam F. Ins. Co.* 28 Wis. 472, 9 Am. Rep. 506; *VanKirk v. Citizens' Ins. Co.* 79 Wis. 627; *Vangindertaelen v. Phenix Ins. Co.* 82 Wis. 112.

The adoption of the standard fire insurance policy has not abolished the rule of law which holds that insurance policies are to be construed most strictly against the company.

Bourgeois v. Northwestern Nat. Ins. Co. 86 30 L. R. A.

Wis. 606; *Quilan v. Providence Washington Ins. Co.* 138 N. Y. 356; *Wilcox v. Continental Ins. Co.* 85 Wis. 193; *Moore v. Hanover F. Ins. Co.* 141 N. Y. 219; *Germania F. Ins. Co. v. Home Ins. Co.* 144 N. Y. 195, 26 L. R. A. 591; *Parker v. Rochester German Ins. Co.* 162 Mass. 479; *Kyle v. Commercial Union Assur. Co.* 144 Mass. 43.

Messrs. Bashford, O'Connor, & Aylward, for respondent:

The insurance was effected under the standard policy established by chapter 195, Laws of 1891; and the plaintiff was bound to know the conditions and contents of the contract accepted by him.

Wilcox v. Continental Ins. Co. 85 Wis. 193; *Bonneville v. Western Assur. Co.* 68 Wis. 293; *Herbst v. Lowe*, 65 Wis. 316; *Sanger v. Dun*, 47 Wis. 615, 82 Am. Rep. 789; *Germania F. Ins. Co. v. Home Ins. Co.* 144 N. Y. 195, 26 L. R. A. 591.

The prohibition in the policy against the keeping or use of benzine or other inflammable materials upon the premises affected the risk, and is to be more strictly enforced in favor of the insurer than the provisions relating to the mode of establishing and adjusting the loss. This is not a question of forfeiture, but what the contract really is, what risk the defendant assumed.

Binman v. Hartford F. Ins. Co. 36 Wis. 159; *McNally v. Phenix Ins. Co.* 137 N. Y. 839.

The condition of the policy prohibiting the keeping or use of benzine or other inflammable materials was a part of the contract and in full force and effect, unless the provision in respect thereto was waived or modified in the manner prescribed in the policy.

Bourgeois v. Northwestern Nat. Ins. Co. 86 Wis. 606; *Wilcox v. Continental Ins. Co. supra*; *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L. R. A. 267; *England v. Westchester F. Ins. Co.* 81 Wis. 588; *Stevens v. Queen Ins. Co.* Id. 835; *Knudson v. Hekla F. Ins. Co.* 75 Wis. 198; *Hankins v. Rockford Ins. Co.* 70 Wis. 1; 1 Wood, Fire Ins. § 58, pp. 148-159; *Steinbach v. Relief Ins. Co.* 80 U. S. 18 Wall. 183, 20 L. ed. 615; *Boulus v. Phenix Ins. Co.* 133 Ind. 106, 20 L. R. A. 400; *First Cong. Church v. Fitchburg Mut. F. Ins. Co.* 158 Mass. 475; *Kyle v. Commercial Union Assur. Co.* 144 Mass. 43; *Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co.* 145 Mass. 265; *Porter v. United States L. Ins. Co.* 160 Mass. 183; *Parker v. Rochester German Ins. Co.* 162 Mass. 479; *Smith v. Niagara F. Ins. Co.* 60 Vt. 632, 1 L. R. A. 216; *Tarbell v. Vermont Mut. F. Ins. Co.* 68 Vt. 53.

The violation of this clause prohibiting the keeping or use of benzine or other inflammable materials avoids the policy, notwithstanding the fact that the fire which occasioned the loss may not have been caused by the presence of such materials. The contract of insurance became *ipso facto* void upon the breach of this condition, and from that time forward the company was no longer an insurer of the premises or property.

Morse v. Buffalo F. & M. Ins. Co. 80 Wis. 534, 11 Am. Rep. 587; *Carey v. German American Ins. Co.* 84 Wis. 80, 20 L. R. A. 267; *Faulker v. Central F. Ins. Co.* 1 Kerr (N. B.) 279; 1 Wood, Fire Ins. § 58, pp. 148-159; *Plumer v. Phenix Ins. Co.* 45 Wis. 622; *Kircher v. Mil-*

Waukees Mechanics' Mut. Ins. Co. 74 Wis. 470, 5 L. R. A. 779; *O'Brien v. Home Ins. Co.* 79 Wis. 899.

There was no waiver of any of the provisions or conditions of the policy.

Carey v. German American Ins. Co. supra; *Baumgartel v. Providence Washington Ins. Co.* 136 N. Y. 547; *Moore v. Hanover F. Ins. Co.* 141 N. Y. 219; *Parker v. Rochester German Ins. Co. and Knudson v. Hekla F. Ins. Co. supra*.

The provision relating to proofs of loss is material and must be complied with.

Atina Ins. Co. v. People's Bank, 62 Fed. Rep. 222; *Sagers v. Hawkeye Ins. Co. (Iowa)* 68 N. W. 194; *Quinlan v. Providence Washington Ins. Co.* 133 N. Y. 856; *Carey v. Phenix Ins. Co.* 84 Wis. 208; *Burr v. German Ins. Co.* Id. 78.

Marshall, J., delivered the opinion of the court:

The main question presented on this appeal is whether the presence of a small amount of benzine on the premises for use in the repair shop rendered the contract of insurance void. Keeping in mind the undisputed evidence that the prohibited article was not kept as an article of merchandise for sale, but as an article usually and necessarily kept in operating the business of the repair department of the furniture store, which the policy expressly covered, we find abundant authority to support the general rule, which we adopt, that where a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions of the contract. To that effect are *Mears v. Humboldt Ins. Co.* 92 Pa. 17, 87 Am. Rep. 647; *Viele v. Germania Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 88; *Collins v. Farmville Ins. & Bkg. Co.* 79 N. C. 279, 28 Am. Rep. 322,—cited by appellant's counsel, to which many may be added: *Carrigan v. Lycoming F. Ins. Co.* 53 Vt. 418, 38 Am. Rep. 687; *Stout v. Commercial Union Assur. Co.* 11 Biss. 813, 12 Fed. Rep. 554; *Franklin F. Ins. Co. v. Updegraff*, 48 Pa. 350, 353; *Plinsky v. Germania F. & M. Ins. Co.* 82 Fed. Rep. 47; *Bryant v. Poughkeepsie Mut. Ins. Co.* 17 N. Y. 200; *Phenix Ins. Co. v. Taylor*, 5 Minn. 492 (Gil. 893); *Whitmarsh v. Conway F. Ins. Co.* 16 Gray, 859, 77 Am. Dec. 414; *Franklin F. Ins. Co. v. Chicago Ice Co.* 36 Md. 102, 11 Am. Rep. 469; *Carlin v. Western Assur. Co.* 57 Md. 515, 40 Am. Rep. 440; *Harper v. Albany Mut. Ins. Co.* 17 N. Y. 197; *Hall v. Insurance Co. of N. A.* 58 N. Y. 293, 17 Am. Rep. 255, and many others. In the early case of *Harper v. Albany Mut. Ins. Co. supra*, it was held that the underwriters must be presumed to have been acquainted with the business and with the materials necessarily used in prosecuting it, and to have included such materials in the risk, the same as if each article had been particularly mentioned in the written portion of the policy; that the written portion in that regard will control the printed portion prohibiting the keeping of such articles. This case has been fre-

quently cited and approved, and may be said to be strictly in line with the great weight of authority on the subject. In *Hall v. Insurance Co. of N. A. supra*, the court referred to *Harper v. Albany Mut. Ins. Co. supra*, and several others of like character, stating, in effect, that they were all cases where the use of the prohibited article was necessary in the business; while in the case then under consideration, it was only said to be usually used. It was sought by the insurance company to avoid the policy, notwithstanding, by distinguishing between necessary and customary use, but the court held that, under a policy covering a business, permission to use all articles ordinarily, as well as articles necessarily used, must be held to be given and covered by the contract of insurance. In *Carlin v. Western Assur. Co. supra*, the policy covered a factory and machinery, and prohibited the keeping or use of petroleum. The court held, in effect, that if the engine room and machinery were included in the description of the insured premises, the keeping of petroleum, although among the prohibited articles, would not avoid the policy if the evidence showed that it was an appropriate and customary article used in the assured's trade for lubricating machinery, and that he kept it solely for that purpose; that the insurance company, when it issued the policy, knew that the factory could not be run without machinery, and it must be supposed to have contracted with reference to such use as an ordinary incident of the business; that, if petroleum oil was usual and necessary, then such use must have been contemplated, though prohibited in the printed portion of the policy. The court concluded that the rule in respect to the question under consideration as stated is well settled. It must be recognized that there is some conflict in the authorities on this subject, but the great weight of authority fully sustains the rule as above stated.

In the light of the foregoing, obviously the contract of insurance which covered the building to be used as a repair shop in connection with the furniture store permitted all things necessary to the enjoyment of the property for such use. The clause in the written portion of the policy, "Four hundred dollars on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," must be construed to cover merchandise kept in the trade in the furniture store, and the words "not more hazardous" to refer to such merchandise only, and have no reference to the necessary articles kept for use in the repair shop. The words "any usage or custom of trade or manufacture to the contrary notwithstanding," contained in the printed portion of the policy, so far as they would otherwise prohibit the necessary use of benzine in the repair shop, must be held to be controlled by the written portion of the policy, which expressly insures the building in part as a repair shop; this upon the presumption, that must exist, that the parties intended that the repair shop as it was, and as it must necessarily continue to be if it continued at all, must be carried on with all usual and neces-

sary incidents, and that as such it was protected by the contract of insurance; also by force of the well-established rule, that the written special description of the particular subject-matter, wherever inconsistent with the printed clauses of the policy, must control. *Citizens' Ins. Co. v. McLaughlin*, 58 Pa. 485; *Cushman v. Northwestern Ins. Co.* 34 Me. 487; *Archer v. Merchants' & Mfrs. Ins. Co.* 48 Mo. 484. The construction we thus give the policy renders the contract just and reasonable, and carries out the obvious intention of the parties to it. Any other construction would lead to the absurd result that the prohibitory clause of the policy would absolutely prevent the carrying on of the business expressly permitted in the written portion. No such absurdity can be held to have been contemplated by the parties, unless the terms of the contract are such as not to permit of any other reasonable construction. As said in *Carlin v. Western Assur. Co. supra*: "Where the contrary is not expressly made to appear it is not to be presumed that when an insurance is effected with reference to an established and current business, whose protection is really the object of the insurance, such a narrow and stringent construction of the provisions of the policy was intended as will necessarily cause its serious embarrassment or suspension."

The only other question which requires consideration is whether there has been a failure to comply with the condition requiring proofs of loss, so as to defeat a recovery on the policy. The circumstances of the defendant's adjuster's visit to plaintiff soon after the fire; his receiving and taking away a list of the property destroyed, furnished by plaintiff, and the retention of the same by the company or its agent; and the denial of liability for the loss on account of the presence

of benzine on the premises,—are sufficient to constitute a waiver of the provisions of the policy requiring proofs of loss. *Vankirk v. Citizens' Ins. Co.* 79 Wis. 627; *Zielke v. London Assur. Corp.* 64 Wis. 442; *McBride v. Republic F. Ins. Co.* 30 Wis. 562; *Parker v. Amazon Ins. Co.* 84 Wis. 363; *King v. Hekie F. Ins. Co.* 58 Wis. 508; *Harriman v. Queen Ins. Co.* 49 Wis. 71; *Phenix Ins. Co. v. Bachelder*, 32 N. H. 490; *Carson v. German Ins. Co.* 62 Iowa, 433; *Boyd v. Cedar Rapids Ins. Co.* 70 Iowa, 325; *O'Brien v. Ohio Ins. Co.* 52 Mich. 131.

In *McBride v. Republic F. Ins. Co. supra*, the court held that when the agent of the insurance company, after examining upon the spot the circumstances attending the loss, told plaintiff he could not recommend the company to pay the loss for certain reasons, it was a denial of all liability on the part of the company, and a waiver of its right to demand the usual proofs of loss. That substantially fits this case. The adjuster visited the premises, and when he discovered the presence of benzine, according to his testimony, he did very little further, and told the assured the policy was to all intents and purposes void; that he could do nothing for him; and that he, the assured, would have to present his claim to the company as provided by the policy. That, coupled with the refusal of the company to hold any communication thereafter with the assured, constituted a denial of liability by the company on the ground of a violation of the clause prohibiting the use of benzine on the premises, and effectually waived proofs of loss. It follows from the foregoing that the judgment of the circuit court must be reversed, and a new trial granted.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

CALIFORNIA SUPREME COURT.

E. R. MERRIMAN, *Respnt.*,

v.

J. A. WALTON *et al.*, *Appls.*

(105 Cal. 408.)

1. Relief will not be denied to one seeking to enjoin the execution of a judgment

NOTE.—Injunctions against judgments obtained by fraud, accident, mistake, surprise, and duress.

I. Equity jurisdiction.

II. Fraud in obtaining judgments.

a. By agreement.

1. Generally.
2. To dismit.
3. To give notice.
4. To abide by other matters.
5. To allow a defense.
6. To continue or delay.
7. To compromise.
8. Where complainant participated in fraud.

b. By concealment.

- c. In matters of record.
- d. In matters of party.
- e. In acts committed at the trial.
- f. By collusion.
- g. Other matters.

ment because he might have sought it under a different form of action, in a state where the various kinds of relief are administered by the same tribunal, and there is but one form of civil action for the enforcement or protection of civil rights.

2. The entering of a default judgment pending negotiations for a transfer of the

III. On account of accident.

a. Sickness.

1. Of party.
2. Of family.
3. Of witness.
4. Of attorney.

b. Death of attorney.

c. Other causes.

IV. On account of mistake.

a. Of law.

b. Of fact.

V. On account of surprise.

a. Generally.

- b. In matters of witnesses.
- c. In regard to perjury.

VI. On account of duress.

In *MERRIMAN v. WALTON*, an injunction was allowed against a judgment on account of fraud practiced by the attorney of the successful party with the co-operation of the justice, and which

cause to another jurisdiction, which is concealed until the time for appeal has expired, followed by the justice's refusal to vacate the same, will entitle the defendant to have the execution of the judgment enjoined.

3. A defendant against whom a default

fraud was not discovered until after time for appeal had expired, although relief had been denied in the justice's court, holding that where the relief was denied in matters of fraud, and there was no appeal, equity will relieve, and the complainant is not compelled to resort to the remedy of certiorari. This is in accord with the general doctrine.

I. Equity jurisdiction.

The rule is, that an injunction will not be granted unless the judgment was against conscience because the injured party had a just defense of which he could not avail himself at law, or had a legal defense of which he was ignorant, or was prevented from making by fraud, accident, mistake, or surprise, and that the failure to defend was unmixed with negligence of himself or his agent.

This rule seems universal and has been reiterated substantially in the above form, or conversely in an affirmative form. The following cases state the rule in a negative form: *Abraham v. Camp*, 4 Ill. 290; *Buckmaster v. Grundy*, 8 Ill. 626; *Stetson v. Goldsmith*, 81 Ala. 649; *Weems v. Weems*, 78 Ala. 462; *Crim v. Handley*, 94 U. S. 662, 24 L. ed. 216; *Hendrickson v. Hinkley*, 58 U. S. 17 How. 443, 15 L. ed. 123; *Stein v. Benedict*, 83 Wis. 603; *Ableman v. Roth*, 12 Wis. 81; *Wright v. Eaton*, 7 Wis. 595; *Alleman v. Knight*, 19 W. Va. 201; *Braden v. Reitzenberger*, 18 W. Va. 296; *Knapp v. Snyder*, 15 W. Va. 434; *Rice v. Railroad Bank*, 7 Humph. 39; *Freeman v. Miller*, 53 Tex. 372; *Johnson v. Templeton*, 60 Tex. 238; *Nevins v. McKee*, 61 Tex. 412; *Burnley v. Rice*, 21 Tex. 171; *Plummer v. Power*, 29 Tex. 6; *Ratto v. Levy Bros.*, 63 Tex. 278; *Clegg v. Darragh*, Id. 367; *Greenfield v. Frierson*, 9 Helsk. 638; *Morehead v. DeFord*, 6 W. Va. 316; *Richmond Enquirer Co. v. Robinson*, 24 Gratt. 548; *Goolsby v. St. John*, 25 Gratt. 146; *Oregon R. & Nav. Co. v. Gates*, 10 Or. 514; *Thurmond v. Durham*, 8 Yerg. 99; *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 36 N. J. Eq. 486; *Wells v. Wall*, 1 Or. 295; *Quackenbush v. Van Riper*, 1 N. J. Eq. 478; *Cotton v. Hiller*, 52 Miss. 7; *Lebanon Mut. Ins. Co. v. Erb*, 16 W. N. C. 113; *Knox County v. Harshman*, 128 U. S. 152, 33 L. ed. 586; *Collier v. Easton*, 2 Mo. 145; *Brick v. Burr*, 47 N. J. Eq. 189; *Dunn v. Hansard*, 37 Mo. 202; *Tompkins v. Drennen*, 56 Fed. Rep. 604, 18 U. S. App. 308; *Davis v. Staples*, 45 Mo. 567; *Wood v. Lenox*, 5 Tex. Civ. App. 318; *Carolus v. Koch*, 72 Mo. 645; *George v. Tutt*, 36 Mo. 141; *Lieby v. Ludwig*, 4 Ohio, 496; *Miller v. Morse*, 23 Mich. 366; *Mack v. Doty*, Harr. Ch. (Mich.) 366; *Schrieker v. Field*, 9 Iowa, 366; *Morris v. Fristoe*, 8 La. Ann. 646; *Harding v. Hawkins*, 141 Ill. 572; *Kriebsbaum v. Bridges*, 1 Iowa, 14; *Briesch v. McCauley*, 7 Gill, 189; *Shelmire v. Thompson*, 2 Blackf. 270; *Webster v. Hardisty*, 28 Md. 562; *Cairo & St. L. R. Co. v. Holbrook*, 92 Ill. 297; *Walker v. Shreve*, 87 Ill. 474; *Tillman v. Becker*, 65 Ill. 183; *Smith v. Allen*, 63 Ill. 474; *Parker v. Morton*, 5 Blackf. 1; *Hickerson v. Raiguel*, 2 Helsk. 829; *Levan v. Patton*, Id. 106; *Kearney v. Smith*, 8 Yerg. 127, 24 Am. Dec. 550; *Gwinn v. Newton*, 8 Humph. 710; *Prater v. Robinson*, 11 Helsk. 391; *Garrett v. Lynch*, 45 Ala. 204; *Stinnett v. Branch Bank*, 9 Ala. 120; *Collier v. Falk*, 66 Ala. 223; *Duran v. Cureton*, 1 Ark. 31; *Andrews v. Fenter*, Id. 186; *Cummins v. Bentley*, 5 Ark. 9; *Bently v. Dillard*, 6 Ark. 79; *Garvin v. Squires*, 9 Ark. 533, 50 Am. Dec. 224; *Conway v. Ellison*, 14 Ark. 300; *Mastick v. Thorp*, 29 Cal. 444; *Day v. Wells*, 31 Conn. 344; *Carnall v. Looper*, 25 Ark. 107; *Robbins v. Mount*, 3 Ga. 74; *Pearce v. Chastain*, Id. 223, 46 Am. Dec. 423; *Booth v. Stamper* 30 L. R. A.

judgment has been fraudulently entered is not compelled to resort to certiorari for relief, rather than to apply for an injunction against its execution, where he would not thereby obtain as effective relief as he could by injunction.

6 Ga. 172; *Stroup v. Sullivan*, 2 Ga. 275, 46 Am. Dec. 390; *Hoey v. Jackson*, 31 Fla. 541; *Williams v. Carr*, 4 Colo. App. 386; *Bellamy v. Woodson*, 4 Ga. 175, 48 Am. Dec. 221; *Kinney v. Orden*, 3 N. J. Eq. 169; *Scotfield v. State Nat. Bank*, 9 Neb. 316, 31 Am. Rep. 412; *Boley v. Griswold*, 2 Mont. 447; *Buntain v. Blackburn*, 27 Ill. 406; *Walker v. Kretzinger*, 43 Ill. 502; *Augusta Mut. L. Asso. v. McAndrew*, 68 Ga. 490. See *Simmons v. Martin*, *infra*.

This principle is the law in Tennessee but has been modified by the statute of 1844 in regard to judgments containing usury. *Brandon v. Green*, 7 Humph. 180.

And the following cases state the rule substantially in an affirmative form: *Moore v. Gamble*, 9 N. J. Eq. 246; *Goldsmith v. Stetson*, 39 Ala. 153; *Stetson v. Goldsmith*, 81 Ala. 649; *Leigh v. Armor*, 35 Ark. 123; *Fisher v. Greene*, 5 Colo. 541; *Pearce v. Olney*, 20 Conn. 644; *Stanton v. Embry*, 46 Conn. 65, and 595; *Carrington v. Holabird*, 17 Conn. 530; *Kersey v. Bash*, 3 Del. Ch. 321; *Dibble v. Truluck*, 13 Fla. 185; *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732; *Dugan v. McGlann*, 60 Ga. 363; *Hibbard v. Eastman*, 47 N. H. 507, 32 Am. Dec. 467; *Robinson v. Wheeler*, 51 N. H. 384; *Bassett v. Henry*, 34 Mo. App. 548; *Wingate v. Haywood*, 40 N. H. 437; *Hutchins v. Van Winkle*, 27 Ill. 334; *Winchester v. Grosvenor*, 43 Ill. 517; *Ames v. Snider*, 55 Ill. 496; *Burke v. Gibson*, 6 Kulp, 310; *Jacobs v. Morange*, 1 Daly, 523; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *North Chicago Rolling Mill Co. v. St. Louis Ore & S. Co.*, 152 U. S. 596, 38 L. ed. 565; *Truly v. Wanzer*, 46 U. S. 5 How. 14, 12 L. ed. 88; *Hiles v. Mosher*, 44 Wis. 601; *Barber v. Rukeyser*, 39 Wis. 590; *Taylor v. Fore*, 42 Tex. 256; *Wallace v. Richmond*, 26 Gratt. 67; *Ayres v. Morehead*, 77 Va. 586; *Green v. Masie*, 21 Gratt. 356; *Byars v. Justin*, 3 Tex. App. Civ. Cas. (Willson) 686; *Harrison v. Crumb*, 1 Tex. App. Civ. Cas. (White & W.) 991; *Emerson v. Udall*, 13 Vt. 477, 37 Am. Dec. 604; *Turley v. Taylor*, 6 Baxt. 876; *Jones v. Commercial Bank*, 5 How. (Miss.) 43; *Webster v. Skipwith*, 26 Miss. 341; *Powers v. Butler*, 4 N. J. Eq. 465; *Hiller v. Cotton*, 48 Miss. 598; *Cairo & F. R. Co. v. Titus*, 27 N. J. Eq. 102; *Beveridge v. Hewitt*, 8 Ill. App. 467; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Barnes v. Dodge*, 7 Gill, 100; *Bateman v. Wilcox*, 1 Soh. & Lef. 201; *Little v. Price*, 1 Md. Ch. 182; *Blackburn v. Bell*, 91 Ill. 424; *McGehee v. Gold*, 68 Ill. 215; *Ridgeway v. Bank of Tennessee*, 11 Humph. 523.

Georgia Rev. Code, § 3074, provides that equity will interfere to set aside a judgment of a court having jurisdiction, only where the party had a good defense of which he was entirely ignorant, or where he was prevented from making it by fraud or accident, or the act of the adverse party, unmixed with fraud or negligence on his part; and complainant must allege in addition to the above how the mistake or accident occurred. *Simmons v. Martin*, 68 Ga. 620.

The following cases state the rule both affirmatively and negatively: *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346; *Dey v. Martin*, 78 Va. 1; *Holland v. Trotter*, 22 Gratt. 133.

II. Fraud in obtaining judgments.

a. By agreement.

1. Generally.

If a defense is prevented by an agreement that is violated, and there is a valid defense to the action, and complainant is without fraud or negligence on his part, and there is no remedy at law, an

4. One of two codefendants against whom a default judgment is fraudulently entered may maintain a suit to enjoin the execution of the judgment against him, without joining his co-defendant in the action.

(January 8, 1896.)

injunction will generally be granted against the judgment.

So, a judgment against good conscience to execute, where a party had a good defense, and was induced to refrain from defending by acts and promises of his adversary, and which was rendered without any real adversary or trial, by reason of such representations or acts, if the complainant has been guilty of no negligence, will be enjoined. *Lazarus v. McGuirk*, 42 La. Ann. 194; *Pelham v. Moreland*, 11 Ark. 442; *Goodsell v. Olmstead*, 42 Conn. 354; *O'Neill v. Browne*, 9 Ir. Eq. Rep. 131; *Pearce v. Olney*, 20 Conn. 544; *Hibbard v. Eastman*, 47 N. H. 509, 32 Am. Dec. 467; *Buchanan v. Griggs*, 20 Neb. 165; *Dudley v. Cole*, 1 Dev. & B. Eq. 429.

So, an injunction will be granted where the plaintiff at law prevented a defense by representing to the complainant that he did not intend to take a judgment against him or molest him, where complainant was not negligent. *Rowland v. Jones*, 2 Heisk. 321; *Union Bank v. Geary*, 30 U. S. 5 Pet. 99, 8 L. ed. 60; *Purviance v. Edwards*, 17 Fla. 140; *Brake v. Payne*, 137 Ind. 479; *Roberts v. Miles*, 12 Mich. 297; *Poindexter v. Waddy*, 6 Munf. 418, 8 Am. Dec. 749; *Holland v. Trotter*, 22 Gratt. 188.

Although Iowa Code, § 2322, provides that judgment shall not be enjoined in equity, except for a defense which has been discovered since judgment was rendered. *Baker v. Redd*, 44 Iowa, 179.

And in *Hayden v. Moore*, 4 Bush, 107, it was said that if the prevailing party or his attorney had prevented a defense by deceiving the adverse party, an injunction against the judgment would be granted.

In Texas the justice of the peace must dispose of the matters pleaded, and where the judgment does not dispose of the issue in reconvention the judgment is not final and proceedings thereon will be enjoined when the defendant was prevented from being present by reason of the plaintiff violating an agreement. *Gulf, C. & S. F. R. Co. v. Stephenson* (Tex.) 28 S. W. 236.

Where a defense was prevented by deceit in representing that no judgment would be taken, and after it was obtained a motion to set the same aside was prevented by a promise to release and discharge the same, and the complainant was thereby prevented from proceeding at law to set the same aside, he may obtain an injunction against enforcing the judgment where there was a good defense to the action. *Johnson v. Unversaw*, 30 Ind. 485.

And in *Gillett v. Booth*, 6 Ill. App. 423, it was said that where the party in violation of an agreement induces his adversary to withdraw his attention, and then takes a decree, the same will be enjoined.

And in a suit to enjoin a judgment for purchase money on the ground that the defendant was prevented from making a defense by reason of an agreement of plaintiff which he did not keep, the injunction was denied in the lower court, but the court required the plaintiff to give a good bond of indemnity before he could enforce his judgment, and the plaintiff appealed, and the supreme court held that the injunction should have been granted, and refused to reverse the same. *Jackson v. Elliott*, 100 Ala. 669.

But an injunction against proceedings on a judgment and sale will not be granted on the ground of a contemporaneous agreement made at the time of the judgment, modifying its effect, where all the 30 L. R. A.

APPEAL by defendants from a judgment of the Superior Court for Napa County in favor of plaintiff in an action brought to enjoin the enforcement of a justice's judgment. *Affirmed.*

The facts are stated in the opinion.

parties were not parties to the agreement, and it was questionable whether the guardian *ad litem*, a party to the agreement, had the power to bind the wards, and there is no insolvency charged. *West v. Cobb*, 63 Ga. 841.

An injunction against an execution and judgment should not be allowed where it was claimed to have been in violation of an agreement made between the attorneys to take judgment for a less sum, where it was not alleged that such attorneys had authority to bind their client. *Anderson v. Oldham*, 33 Tex. 223.

And a defense prevented by statements of a third party will not authorize an injunction against a judgment. *Walker v. Shreve*, 37 Ill. 474.

And an injunction will not be granted against judgments obtained in violation of agreements where there is adequate remedy at law. *Kidwell v. Masterson*, 3 Cranch, C. C. 52; *Bicknell v. Field*, 3 Paige, 440.

See also *Frauenthal's Appeal*, and *Knapp v. Snyder*, 49 Pa. 11, g.

2. To Dismiss.

A judgment will be enjoined where a defense was prevented by the representations of the plaintiff or the court that the defendant need not appear and that the suit would be dismissed, and there is a valid defense to the action. *Engle v. Soheuerman*, 40 Ga. 206, 2 Am. Rep. 573; *Butler v. Peyron*, 4 Hayw. (Tenn.) 68; *Chambers v. Robbins*, 28 Conn. 582; *Wierich v. De Zoya*, 7 Ill. 385; *Wagner v. Shank*, 39 Md. 313; *Jarman v. Saunders*, 64 N. C. 387.

Although such statement was made on Sunday. *Blakesley v. Johnson*, 13 Wis. 531.

And will be enjoined for such a cause, where a justice of the peace cannot review a judgment, and has no equity jurisdiction to set the same aside. *Greenwald v. May*, 127 Ind. 511.

And will be enjoined although plaintiff at law was an infant but possessed discretion and had transacted business in his own name; and the remedy at law to vacate a judgment does not apply to a judgment rendered by a justice of the peace. *Cadwallader v. McClay*, 37 Neb. 359.

Where sureties were sued and the justice of the peace would not allow the principal to defend for them, and afterwards prevented an appeal by stating that the case had been settled, an injunction against the collection of the judgment on the ground that defense was prevented by the officer was allowed. *Austin v. Carpenter*, 2 G. Greene, 181.

Where a magistrate before trial informed the defendant's counsel and gave them a writing saying that the suits were dismissed, and afterwards entered judgment, which was not discovered until too late to appeal, an injunction was granted against proceedings thereon. *Wagner v. Shank*, 39 Md. 313.

But an injunction will not be granted on the ground that there was an understanding that the case was to be dismissed, where the complainant does not show with whom the contract for dismissal was made. *Gamble v. Campbell*, 6 Fla. 247.

Or where no defense is shown to the action, or that the result will be changed. *Way v. Lamb*, 15 Iowa, 79.

And where an agent took a note and mortgage in his own name, and was sued, and the plaintiff's attorney agreed to dismiss the action as to him, and that no judgment would be taken against him, but

News. Gesford & Thompson, for appellants:

If a judgment be void for want of jurisdiction, the remedy against any attempt to enforce it is by motion in the court rendering it, to quash the execution and to stay the judgment.

Judgment was taken against him, which fact he did not ascertain until the lapse of three years, it was held that his negligence in making a defense of the action and preventing a judgment will prevent an injunction against the execution. *Noble v. Butler*, 25 Kan. 645.

And where there is a conflict of evidence as to whether there was a verbal stipulation that a case was to be discontinued, but on the call of the cause the attorney of the defendant was notified by the officer and failed to attend, and notice of the entry of judgment was also served on him, his negligence will prevent an injunction against the judgment. *Barber v. Rukeyser*, 39 Wis. 500.

And an injunction will not be granted four years after judgment on the ground that after the suit was commenced the plaintiff agreed to dismiss it, but, contrary to such agreement, took judgment without defendant's knowledge, where such judgment was not taken until three years after the agreement to dismiss, during which time defendant was represented by counsel. *Watrous v. Rodgers*, 16 Tex. 410.

And that a defense was prevented by reason of an agreement to dismiss the suit at law will not entitle an injunction against proceeding on a judgment where the averments as to the agreement are indefinite and vague. *Gamble v. Campbell*, *supra*.

Or where the same are not proved. *Ivey v. McConnell* (Tex.) 21 S. W. 408.

An injunction will not be granted against a *ca. ar.* where complainant understood that the action was dismissed and judgment was thereafter taken, as the remedy of appeal or habeas corpus will prevent an injunction. *Turner v. Norton*, 81 Ill. App. 423.

As to whether or not complainant should not have moved to set aside a judgment obtained by fraudulent statements of the plaintiff's attorney that the case would be dismissed is not decided. *Way v. Lamb*, *supra*.

2. To give notice.

An injunction will be granted where a judgment was taken in fraud and in violation of an agreement not to try the case without giving complainant notice, and there is a valid defense to the action. *Watkins v. Gray*, 5 Mo. App. 562; *How v. Mortell*, 28 Ill. 478; *Dobson v. Pearce*, 1 Duer, 142.

Though relief might be had by motion to set aside. *Footo v. Despain*, 87 Ill. 23.

And an injunction will be granted against a judgment of a justice on the second trial, taken in violation of an agreement that the case should not be called for trial at that time, where a new trial could not be had, as Tex. Rev. Stat. art. 1623 prohibits granting more than one new trial and there is no appeal, but there is a valid defense to the action. *Gulf, C. & S. F. R. Co. v. Klor*, 80 Tex. 681.

An injunction was granted against a judgment in replevin obtained before the time set for trial, in absence of complainant's counsel, where the same was exorbitant, and the complainant sued for an accounting. The relief and retrial in equity were granted on the ground of fraud, as Iowa Code, § 2499, provides for relief for fraud practiced by the successful party in obtaining judgment. *Reno v. Teagarden*, 24 Iowa, 144.

And an injunction in an attachment suit was enjoined where there was a defense to that action, but such defense was prevented by the action of

Comstock v. Clemens, 19 Cal. 77; *Murdock v. DeVries*, 37 Cal. 527; *Gates v. Lane*, 49 Cal. 286; *Luco v. Brown*, 73 Cal. 6.

The refusal of the court to arrest the execution was a special order made after final judgment, and as the Code provides that an appeal

the attorney for plaintiff, who promised to furnish information as to the suit, but did not until it was too late to defend. *Farmers' & Exch. Bank v. Ruse*, 27 Ga. 391.

But that the attorney on the other side, in violation of an agreement, brought on a trial and obtained a judgment without notice, is not ground for an injunction where such facts are not established. *Lawson v. Bettison*, 12 Ark. 410.

And that a defense was prevented by an agreement on the part of the prevailing party or court to give notice of the trial, will not authorize an injunction against the judgment where the attorney of complainant was notified, although his client had no notice. *Devlinney v. Mann*, 24 Kan. 682.

And the statement of one of the plaintiffs that they would not press the case against complainant, and the fact that the title of the case was not correctly printed on the file list, will not be ground for enjoining a judgment where the party was negligent. *Hetzell v. Bentz*, 8 Phila. 261.

And the forgetfulness of the judge to notify counsel when a case would be tried is not fraud sufficient to entitle to an injunction. *Morris v. Morris*, 76 Ga. 733.

4. To abide by other matters.

An injunction will be granted against a judgment where there is a valid defense which was prevented by an agreement that the judgment should not be taken, but that the parties should await, and abide by the decisions in another case. *Pelham v. Moreland*, 11 Ark. 443.

Or should await the result of arbitration. *Hale v. Bozeman*, 60 Miss. 965; *Branshean v. Price*, 57 Mo. 422; *Sneed v. Town*, 9 Ark. 535.

And a judgment taken in violation of an agreement not to take the same until the amount realized from collateral could be ascertained, and afterwards agreeing that the judgment should be stricken off, and that it should not be enforced, will be enjoined, as the same is a fraud on the defendant. *Kent v. Ricards*, 3 Md. Ch. 322.

But a decree of a probate court entered without notice, preventing parties from obtaining a bill of exceptions, will not be enjoined where such decree was withheld on an agreement to await the decision of the supreme court in another case, where it was not shown that complainant was ignorant that such decision was made, and no showing was made that complainant was not negligent. *Stein v. Burden*, 30 Ala. 270.

5. To allow a defense.

An injunction will be granted where the judgment was taken in violation of an agreement by the plaintiff to allow the defense, thereby preventing the defendant from asserting such defense against the judgment. *Markham v. Angier*, 57 Ga. 43; *Kelley v. Kriess*, 68 Cal. 210; *Dunnahoo v. Holland*, 51 Ga. 147; *Hentig v. Sweet*, 27 Kan. 172; *Allen v. Medill*, 14 Ohio, 445; *Newnan v. Stuart*, 5 Hayw. (Tenn.) 78; *Dickenson v. McDermott*, 13 Tex. 242.

As, where a judgment was taken under an agreement that certain claims were to be paid by plaintiff, which he afterwards refused to pay, an injunction against so much of the judgment was allowed. *Clow v. Merritt*, 15 Tex. 184.

Or where a verdict was entered by mistake, and the party benefited agreed to make deductions, which was not done, an injunction was granted

may be taken "from any special order made after final judgment," plaintiff's remedy was by an appeal from said order.

Code Civ. Proc. § 963, subsec. 2; *Gilman v. Contra Costa County*, 8 Cal. 52, 68 Am. Dec.

against proceedings on the judgment. *Chase v. Manhardt*, 1 Bland, Ch. 383.

Where the owner of a house refused to comply with an agreement to secure a party making advances for building, the latter on securing the title may have a sale under a mechanic's lien enjoined, where he had agreed with the contractor for the latter to file the lien for the total cost of the building for his benefit, but the contractor settled the same and the judgment was taken in violation of such agreement, and the injunction will not be denied on the ground that he is *in part delicto*. *Hamilton v. Wood*, 55 Minn. 482.

But an agreement to allow a defense will not authorize an injunction where complainant was negligent in asserting legal remedies.

So, negligence in not prosecuting a writ of error will prevent equitable interference with a judgment taken on the understanding that all rights of complainant were reserved. *Rogers v. Kingsbury*, 22 Ga. 60.

And sharp practice of opposing counsel in violating a verbal assurance that he would agree to a statement will not authorize an injunction against the judgment, where there is negligence in applying for a new trial. *Phelps v. Peabody*, 7 Cal. 50.

That the attorney for plaintiff gave the attorney for defendant to understand that when judgment should be rendered it should be for the just amount due, deducting credits, will not authorize an injunction against a judgment where the allegations as to credits, amounts, and dates are not specific. *Shrieker v. Field*, 9 Iowa, 306.

Or where the error is not established. *Boone v. Poindexter*, 12 Smedes & M. 640.

And an injunction will not be granted against a judgment on a note on the ground that it was agreed that it should not be collected or used, but should be kept subject to future settlement, where the complainant has sufficient indemnity in a debt of greater amount which he owes to the same party, and the equity of the bill was not proved. *Graham v. Gray*, 87 Ala. 446.

And an injunction will not be granted on the ground that a judgment was taken in violation of a promise not to take a judgment, where the bill of complaint shows that there was an appearance of complainant in the action, and such appearance is not repudiated. *Knapp v. Snyder*, 15 W. Va. 484.

And a judgment will not be enjoined on the ground that plaintiff's attorney failed to enter a credit on the execution as he had promised. *Brown v. Wilson*, 56 Ga. 534.

Fraud or misrepresentation of the judge, that he would render a judgment that would not bar a party's rights, where the counsel was not present at the judgment, will not authorize relief where no merit is presented, as the losing party made the judge his agent, and will be charged with negligence, and the conversation "must have been with a judge of the court, not the court." *Green v. Dodge*, 6 Ohio, 80, 25 Am. Dec. 738.

6. To continue or delay.

An injunction will be granted against a judgment taken in violation of an agreement to continue the case, where there is a good defense to the action. *Beams v. Denham*, 8 Ill. 58; *Moore v. Lipscombe*, 82 Va. 546; *Sanderson v. Voelcker*, 51 Mo. App. 328.

Where the court rendering the judgment had not power to grant a new trial, and the judgment was taken in violation of an agreement to transfer the

290; *Comstock v. Clemens*, 19 Cal. 76; *Bond v. Pacheco*, 30 Cal. 580.

No excuse is stated for not pursuing that remedy, and nothing to show that it would not have been speedy and adequate. Under such

case to another court, and the judgment was not known until too late to appeal, and the consideration was a gambling debt,—an injunction was granted. *Booth v. Stamper*, 6 Ga. 172.

But where it was claimed that a judgment was taken in violation of an agreement to continue the case on account of sickness of complainant's counsel, an injunction should not be granted where the complainant was negligent in not providing another counsel. *Landrum v. Farmer*, 7 Bush, 46.

A judgment taken contrary to an agreement to continue will not be enjoined where no showing is made of a valid defense to that action. *Poor v. Tuston*, 53 Kan. 86; *Ableman v. Roth*, 12 Wis. 81.

But the failure to make a defense because the plaintiff's attorney informed the complainant that no judgment would be taken at that term will not authorize an injunction against the judgment, as Alabama Code 1876, § 794, requires that such agreements made by attorneys must be in writing. *Norman v. Burns*, 67 Ala. 248; *Collier v. Falk*, 66 Ala. 228.

An injunction will not be granted against a judgment obtained in violation of an agreement to delay a trial on account of sickness of defendant, where adequate remedy could have been had by a motion for a new trial. *Bryorly v. Clark*, 48 Tex. 845.

And the fraud of opponent's attorney in trying a case after an agreement to continue is not shown where complainant's attorney appeared and defended at the trial. *Lawson v. Bettison*, 12 Ark. 401.

The ground for injunction of "an alleged agreement for delay upon certain conditions which have been complied with," not having been made as defense to the action, will not authorize an injunction. *Bartlett v. Peck*, 5 La. Ann. 670.

Taking a decree in violation of a stipulation to stay the same will not entitle an injunction against the sale where there is a remedy in the same action to control the writ, and complainant had not complied with the stipulation. *Buell v. San Francisco Sav. Union*, 65 Cal. 292.

7. To compromise.

An injunction will not be granted against a judgment taken in violation of an agreement to compromise, where the same is established and complainant is not negligent, and there is no other adequate remedy.

So, a judgment obtained in violation of an agreement of compromise by which defense to the action was prevented, is such a fraud as entitles the party against whom judgment was taken to have it enjoined. *Nealls v. Dicks*, 72 Ind. 374; *Thompson v. Laughlin*, 91 Cal. 318; *Phillips v. Kuhn*, 85 Neb. 18; *Chambers v. Robbins*, 28 Conn. 552; *Porter v. Moffett*, *Morris* (Iowa) 106; *Turney v. Young*, 2 Overt. 206.

A judgment obtained in violation of a settlement of a case, whereby complainant was prevented from defending, will be enjoined. *Gates v. Steele*, 58 Conn. 318; *Cadwallader v. McClay*, 37 Neb. 352; *Dew v. Hamilton*, 23 Ga. 414.

But that a defendant compromised a suit by note payable in notes of the republic will not be ground for injunction where there was a continuance for years thereafter before judgment was taken, and his attorney made no defense, and the judgment in effect is only for the amount due plaintiff. *Watrous v. Rodgers*, 16 Tex. 410.

An injunction will not be granted on the ground

circumstances the plaintiff is not entitled to maintain a separate and distinct action.

Ketchum v. Crippen, 87 Cal. 228; *Ede v. Hazen*, 61 Cal. 380; *Luco v. Brown*, 73 Cal. 6; *Moulton v. Knapp*, 85 Cal. 885.

The plaintiff has an adequate remedy at

law, for he can apply to the superior court for a writ of certiorari.

Code Civ. Proc. § 1068; *Comstock v. Clemens*, 19 Cal. 78; *Jones v. Los Angeles Justice's Ct.* 97 Cal. 528.

When one of the defendants in a joint judg-

of fraud or surprise, where the attorney for the complainant consented to a trial and joined in the submission of the case after having been apprised of an understanding that it was to be settled out of the court,—especially where such agreement to settle the case was not sustained by the proof. *Lawson v. Bettison*, 12 Ark. 401.

That a judgment was obtained in fraud of a pending compromise whereby the defendant was prevented from making a defense, is not ground for an injunction against the judgment, where he cannot establish such defense in equity. *Deaver v. Erwin*, 7 Ired. Eq. 250.

A judgment and execution will not be enjoined on the ground that a defense was prevented by a settlement before judgment, and that the judgment was in violation of such settlement, where the complainant failed to keep his part of the agreement and has not paid the amount due from him. *Lowry v. Sloan*, 51 Ga. 688.

So, an appeal prevented by agreement for settlement will not authorize an injunction against the judgment, attempted to be enforced in violation of the agreement, where there is an adequate remedy in the supreme court to obtain relief at law, by motion to set aside the affirmance. *Koebling Sons Co. v. Stevens Electric Co.* 96 Ala. 39.

A defense prevented because plaintiff's attorney represented that a transfer of a security would settle the case and no further plea need be made in the action at law, will not authorize an injunction against proceedings on the judgment and the execution issued thereon, where the plaintiffs in the judgment are solvent and able to respond in damages. *Harris v. Western & A. R. Co.* 59 Ga. 830.

8. Where complainant participated in fraud.

A complainant guilty of fraud in participating in an agreement is not entitled to an injunction against a judgment, although the plaintiff at law violates the agreement.

So, a party guilty of a fraudulent arrangement to cover up his property and allow it to be foreclosed and purchased, in order that the title may be concealed, cannot obtain an injunction against the enforcement of the decree of foreclosure. *Randall v. Howard*, 67 U. S. 2 Black, 585, 17 L. ed. 209.

And a party conspiring to allow a fraudulent judgment against himself to defeat the rights of his wife in certain trust property cannot thereafter have such judgment enjoined on the ground that the plaintiff therein promised never to enforce it. *Wells v. Smith*, 18 Gray, 207, 74 Am. Dec. 681.

b. By concealment.

Fraud in concealing from the complainant a good and valid defense to the action will entitle an injunction against a judgment that is contrary to conscience, where complainant has not been guilty of negligence.

So, fraud in concealing from one party the payment on a claim in suit will entitle to an injunction against the judgment. *Spencer v. Vigneaux*, 20 Cal. 442.

Or on a discovery that the plaintiff had obtained a decree for a greater sum than he was entitled to, and of which he had knowledge and the complainant was ignorant, an injunction will be granted. *Bayse v. Board*, 12 B. Mon. 581.

Active fraud on the part of the plaintiff at law is not essential to the relief sought. It is enough 30 L. R. A.

that the judgment was the result of a mistake of fact on the part of the complainant and that he was prevented of his right of review by the failure seasonably to discover the real character of the judgment, which, though known to the other party, was purposely concealed from him, and without fraud or negligence on his part he was dispossessed of property without an opportunity to maintain his title. *Currier v. Esty*, 110 Mass. 539.

Fraudulent conduct of plaintiff, preventing defendant from contesting the claim, by representing that it was another one which was unpaid, will entitle to an injunction against the judgment. *Hinckley v. Miles*, 15 Hun, 170.

Where a judgment is procured on a fictitious cause of action against a sheriff for making a levy, and knowledge of his defense is prevented by the parties thereon, he may procure an injunction against proceedings on the judgment. *Iglehart v. Lee*, 4 Md. Ch. 514.

In *Tomkins v. Tomkins*, 11 N. J. Eq. 512, it was said that concealing from a court evidence that the claim in suit was fictitious will entitle to an injunction against the judgment.

But in order to obtain an injunction for relief against a judgment on the ground of fraudulent concealment of facts on the part of the plaintiff therein, and that the judgment was against conscience, it must be shown that the party seeking relief had used diligence. *Glover v. Hedges*, 1 N. J. Eq. 113.

The erasure of the name of one of the makers of a note is a legal defense, and the ignorance of one of the makers of such erasure is no ground for enjoining the judgment, where they were negligent in making their defense. *Shelmire v. Thompson*, 2 Blackf. 270.

c. In matters of record.

An injunction will be granted when the judgment is the result of fraudulent attention or use of records. *Byars v. Justin*, 2 Tex. App. Civ. Cas. (Willson) 685; *Smith v. Chandler*, 13 Ind. 513; *Gillett v. Booth*, 6 Ill. App. 423.

So, the use of a judgment will be enjoined where the court commissioner drafted a decree and falsely inserted therein that the summons had been served, and became the purchaser under the decree. *Martin v. Parsons*, 49 Cal. 94.

And a third party may have the levy and sale of his personal and real property enjoined on a judgment which has been altered by the clerk, and enlarged so as to render it void. *Hardy v. Broadus*, 35 Tex. 668.

And proceedings on a judgment will be enjoined on the ground of fraud, where the execution after levy was returned by order of the plaintiff, and the record was fraudulently changed, and the amount of the judgment increased without consent of the debtor, and a second execution issued, even though the court could have corrected the judgment. *Babcock v. McCamant*, 58 Ill. 214.

Fraud in procuring a judgment, by abstracting bonds in a case in which judgment had been rendered, and obtaining another judgment on the same, will entitle the defendant to an injunction against proceedings on the judgment, where complainant was ignorant of such use, and was not negligent. *Taylor v. Nashville & C. R. Co.* 86 Tenn. 228.

But the wrongful retention by the adverse at-

ment sues to have the judgment perpetually enjoined, his codefendants should be made parties to the action, or sufficient reasons for their omission should be stated.

Gates v. Lane, 44 Cal. 896; *O'Connor v. Ir-*

vine, 74 Cal. 448; *Harrison v. McCormick*, 69 Cal. 621.

The judgment is a joint judgment, and the reason why Mulville is not made a party to this action is a matter of substance.

torney of the case made, in order to prevent complainant from prosecuting proceedings in error, will not be ground for injunction where complainant has himself been guilty of negligence, and has a remedy by petition in error. *Muse v. Wafer*, 29 Kan. 279.

And the fraudulent retention of papers by the opposing attorney, preventing a bill of exceptions, will not authorize an injunction against proceedings on the judgment, as the remedy of rule to file them in court is adequate. *Smith v. Brownson*, 19 La. 313.

An injunction will not be granted to restrain a judgment for want of service of process where there is no allegation of fraud, accident, or mistake, and the record shows proper service. *Gillan v. Arnold*, 36 S. C. 612.

d. In matters of party.

Where there is a fraudulent suit by a party, who is not the real party in interest, in order to prevent a defense, and it is not discovered until after judgment, an injunction will be granted. *Hickerson v. Raiguel*, 2 Heisk. 329; *Stovall v. Northern Bank*, 5 Smedes & M. 17; *Davis v. Tlleston*, 47 U. S. 6 How. 114, 12 L. ed. 366; *Greenleaf v. Maher*, 2 Wash. C. C. 893; *Goad v. Hart*, 8 Smedes & M. 787; *Dady v. Brown*, 76 Iowa, 528; *Marchman v. Sewell*, 98 Ga. 668.

But a bill of complaint charging fraud of the plaintiff at law in procuring the cause of action to be assigned to him must state the particulars of the fraud. *Elston v. Blanchard*, 3 Ill. 420.

Where it was claimed that a judgment for trespass was not prosecuted by the true party, and was fraudulently obtained and sought to be enjoined, relief in equity was denied on the assignment of the judgment to the other party claimed to have an interest therein. *Yellow Pine Lumber Co. v. Carroll (Tex.)*, 21 S. W. 1002.

e. In acts committed at the trial.

A judgment in ejectment will be enjoined, where it was obtained by the fraudulent use of a forged deed, where the complainant has not been guilty of negligence and is unable to get relief at law. *Dunn v. Miller*, 96 Mo. 324.

And relief will be granted in the Federal court against a judgment obtained by the use of fraudulent and forged documents in the state court, where such fraud was not discovered in a court at law until after it was too late to appeal for relief in such court, and no negligence is shown, and the party obtaining such judgment will be prevented from using the advantage obtained therein. *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870.

In *Dundas v. Chrisman*, 25 Neb. 495, where a claim was allowed for \$583, on the misrepresentation that the estate was solvent, by an attorney of claimant, to the county judge, when it had previously been allowed for only \$385, and the administrator had no notice of the change until after time to appeal had elapsed, it was enjoined on the ground of misapprehension and mistake and fraud.

In *Stanton v. Embry*, 46 Conn. 65, it was held that fraud in taking judgments in a greater amount by *quantum meruit* where there was a contract for a less amount for the claim will authorize an injunction in another state against proceedings on such judgment. (But see next case.)

But this was reversed in *Embry v. Palmer*, 107 U. S. 8, 27 L. ed. 946, on the ground that no fraud was shown and complainant was negligent.

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But obtaining more relief than one is entitled to will not be held to be fraud so as to authorize another court to enjoin proceedings on a judgment or execution, there being a remedy by appeal. *Murdock v. De Vries*, 37 Cal. 527.

Where it was charged that the attorney for the plaintiff in a suit at law fraudulently presented but a part of the record upon which the judgment was recovered, while the attorney of the plaintiff was engaged in another court, and the charge of fraud was indefinite, and the record was not shown to have been prejudicial, an injunction was refused against proceedings on the judgment. *Dinet v. Eigenmann*, 96 Ill. 80.

And relief will not be granted in equity, against a sale under attachment rendered without notice, on the ground that the plaintiff had imposed a fictitious claim on the auditors, where this was not established, and a hearing had been had on the merits, and the case was properly submitted to them *at parte*. *Tomkins v. Tomkins*, 11 N. J. Eq. 512.

In *Humphries v. Blevins*, 1 Overt. 36, an injunction was granted against a judgment where the prevailing party had been guilty of improper conduct in influencing the jury amounting to embezzlement, but an issue was directed at law to ascertain how much the plaintiff was entitled to recover.

f. By collusion.

Collusion with complainant's attorney, or an unauthorized appearance, will entitle to an injunction against the judgment, but complainant must state the facts specifically and show a good defense to the action, and an injunction will not be granted where there is an adequate remedy at law.

So, collusion, fraud, or release of one of the members of the firm in order to obtain a judgment against the remaining members might authorize an injunction. *Wills Point Bank v. Bates*, 76 Tex. 329.

That a plea was filed in court by an unknown and an unauthorized attorney will not prevent an injunction against the judgment that is obtained by fraud of the prevailing party, as the plea by an unauthorized attorney is not an appearance. *Sneed v. Town*, 9 Ark. 585.

And fraud in obtaining a judgment by collusion and an unauthorized appearance, will entitle the defendant to an injunction against proceedings on the same. *Truett v. Wainwright*, 9 Ill. 418; *Cheek v. Taylor*, 22 Ga. 127; *Nelson v. Rockwell*, 14 Ill. 375.

Where the complainants had purchased mining property against which were pending suits for mechanics' liens, and their attorneys, defending the same in the name of their grantor, through fraud and collusion were discharged by the grantor on the day of trial, and the grantor employed others and confessed judgment, an injunction was granted against proceedings on the judgment. *Oro Fino Co. v. Cullen*, 1 Idaho, 113.

Where it was claimed that the party obtaining judgment was complainant's attorney although he was also a defendant sued as an indorser, and complainant failed to file a plea owing to a misunderstanding with his codefendant, the same was temporarily enjoined to submit the question to a jury. *Hill v. Sledge*, 51 Ga. 589.

But in an action to enjoin a judgment on the ground that it was obtained through unfaithfulness of complainant's attorney, the facts constituting the alleged defense must be alleged. *Hartford F. Ins. Co. v. Meyer*, 30 Neb. 135.

And in order to maintain a bill in equity to en-

The facts constituting plaintiff's cause of action must be alleged in the complaint.

Los Angeles v. Signoret, 50 Cal. 298; *Curry v. Lackey*, 85 Mo. 392; *Baker v. Berry*, 87 Mo.

806; *Bowling v. McFarland*, 88 Mo. 465; *Burkett v. Griffith*, 90 Cal. 532, 13 L. R. A. 707.

No loss could have been sustained by the sale under an execution issued upon a void

join a judgment at law on the ground of fraud and collusion with complainant's attorney, the facts showing such fraud must be clearly set out or else the injunction will be denied. *Conway v. Ellison*, 14 Ark. 360.

And an injunction will not be granted against a judgment taken on a stipulation of complainant's counsel in violation of his client's desire or orders, where a remedy at law by a motion to vacate the judgment would have afforded relief. *Cowley v. Northern P. R. Co.* 48 Fed. Rep. 825.

And a party stipulating that there was no collusion cannot thereafter obtain an injunction for such cause where he was negligent. *Andes v. Millard*, 70 Fed. Rep. 515.

And in *Lyon v. Bollwin*, 7 Ill. 629, the remedy at law by motion prevented an injunction against the judgment, obtained on an unauthorized appearance, as the remedy in chancery was said to be too dilatory and expensive. But in *Truett v. Wainwright*, 9 Ill. 418, this case was distinguished as not holding that there was no concurrent remedy in equity and an injunction was granted against a judgment on a warrant of attorney procured by fraud.

The cases in regard to a fraudulent collusion where the injunction is sought by third party will be hereafter annotated in a note, *Who may obtain an injunction against the judgment.*

As to fraud in obtaining jurisdiction, see note to *Texas Mexican R. Co. v. Wright*, 81 L. R. A. —, *Injunctions against judgments for want of jurisdiction, or which are void.*

For fraud in trying case after statement by court that it would not be tried, see note to *Gum-Elastic Roofing Co. v. Mexico Pub. Co.* ante, 700, *Injunctions for errors and irregularities.*

g. Other matters.

A judgment will be enjoined that is obtained by fraud where complainant has not been guilty of negligence, and there is a valid defense to the action, and there is no adequate remedy at law. *Payne v. O'Shea*, 84 Mo. 129; *Gainty v. Russell*, 40 Conn. 450; *Burpee v. Smith, Walk. Ch. (Mich.)* 827; *Davis v. Tilleston*, 47 U. S. 6 How. 114, 12 L. ed. 366.

In *Cromelin v. McCauley*, 67 Ala. 542, it was said that in order to enjoin a judgment or decree on the ground of fraud, it must have been procured by fraud either in its original rendition, or by a subsequent fraudulent alteration, and this must be shown to be actual and positive.

And in *Norman v. Burns*, 67 Ala. 248, it was said that if the defense was prevented by fraud, accident, or surprise, or the act of the adversary, and the judgment is unjust, it would be enjoined.

And where the plaintiff obtained a judgment by fraud, and is a nonresident, he cannot plead the statute of limitations as a bar to the injunction. *Hentig v. Sweet*, 97 Kan. 172.

And the fraudulent withdrawal of a deposit on which a judgment for specific performance was obtained will authorize an injunction against such judgment. *Hutchins v. Lockett*, 99 Tex. 165.

And Ohio Rev. Stat. § 5354, providing for vacating judgments, does not exclude the right to obtain an injunction against a judgment obtained by fraud. *Darst v. Phillips*, 41 Ohio St. 514.

In *Whitaker v. Wickersham*, 5 Del. Ch. 187, it was said that equity will restrain the collection of a judgment on satisfactory proof of fraud, mistake, or accident, where it is clearly shown.

An injunction will be granted against a judgment where the defense was prevented by falsehood and 80 L. R. A.

fraud of the plaintiff at law, representing that judgment had already been taken. *Burpee v. Smith, Walk. Ch. (Mich.)* 827.

And fraud in obtaining jurisdiction in the Federal court over the original action at law will authorize an injunction to stay execution. *Sawyer v. Gill*, 8 Woodb. & M. 97.

But an injunction against a judgment obtained by fraud will not be granted where there is an adequate remedy at law.

As by a motion for a new trial, where a default was entered upon consent through fraud practiced upon the defendant, or entered by mistake without fraud on the part of the defendant. *Chalmers v. Hack*, 19 Me. 124.

Or where relief could have been obtained in the trial court. *Furnald v. Glenn*, 56 Fed. Rep. 373.

By a motion to set aside. *Kidwell v. Masterson*, 8 Cranch, C. C. 52; *Bicknell v. Field*, 8 Paige, 440.

Or a remedy of appeal then pending in another state where the judgment was rendered. *Evans v. Taylor*, 28 W. Va. 184.

Or where the defense should have been made in the original action. *Metcalf v. Gilmore*, 50 N. H. 417, 47 Am. Dec. 217.

And an injunction will not be granted against making a deed on execution sale, on the charge of fraud in obtaining the judgment, where there is no showing of meritorious defense to the action, and the fraud is not proved. *White v. Crow*, 110 U. S. 183, 28 L. ed. 113.

Whether complainant's remedy was not against the attorney for fraud, and whether he should not have moved to set aside the judgment, are not decided, as an injunction will not be granted where complainant fails to show any defense to the debt. *Way v. Lamb*, 15 Iowa, 79.

The failure to establish fraud in obtaining judgment at law will bar relief in equity. *Devlin v. Boyd*, 40 N. Y. S. R. 906; *Hemphill v. Buckersville Bank*, 3 Ga. 436; *Bradley v. Richardson*, 23 Vt. 720; *Moer v. Polhamus*, 4 Abb. Pr. N. S. 442.

Or where the evidence is conflicting. *Driskill v. Cobb*, 66 Ga. 649.

In order to obtain an injunction on the ground of fraud in procuring a judgment, the same must be specified, and a general charge of fraud is insufficient. *Gulf, C. & S. F. R. Co. v. Henderson*, 83 Tex. 70; *Burnley v. Rice*, 21 Tex. 171; *Devlin v. Boyd*, *supra*; *McCook v. Bernd Bros.* 79 Ga. 391; *Taylor v. Mallory*, 76 Ind. 1; *Ramsour v. Bronnell (Ark.)* 12 S. W. 200; *Patton v. Taylor*, 48 U. S. 7 How. 132, 13 L. ed. 637.

And in order to enjoin a decree on the ground of fraud, it is necessary for the complainant to show that he was ignorant of the fraud, and that he had used reasonable diligence to inform himself of all the facts; and laches or negligence will prevent equitable relief. *Osborn v. Gehr*, 29 Neb. 661; *Foster v. Mansfield, C. & L. M. R. Co.* 146 U. S. 88, 38 L. ed. 899; *Williams v. Lumpkin*, 86 Tex. 641; *Hill v. Harris*, 51 Ga. 623.

Where relief asked against a judgment is based upon the nonperformance of a condition inducing the rendition of the judgment, and fraud is not specifically charged, an injunction will not be granted. *Raburn v. Shortridge*, 2 Blackf. 480.

And a judgment will not be enjoined on the ground that it was "obtained through fraud and other illegal practices," as this allegation is too general. *Rooks v. Williams*, 13 La. Ann. 874.

A decree restraining proceedings under a fraudulent judgment will be recognized as valid and *res judicata*, between the parties or privies in a suit on

judgment, as the title to the property sold would not thereby have been divested; and the property was repleviable by an action direct against the constable.

Richards v. Kirkpatrick, 53 Cal. 488; *Gray*

v. Hawes, 8 Cal. 568; *Wells v. Stout*, 9 Cal. 480; *Smith v. Reed*, 53 Cal. 345.

Messrs. Coghlan & Hutchinson, for respondent:

These facts show exactly and precisely a

the original judgment in another state. *Dobson v. Pearce*, 12 N. Y. 156, 63 Am. Dec. 152.

So, a decision that a judgment and execution were not contrary or in fraud of an agreement is *res judicata*. *Frauenthal's Appeal*, 100 Pa. 280; *Clopton v. Carlross*, 42 Ark. 560.

Although an injunction will be granted against a judgment where the defendant was prevented from making any defense by promise of the plaintiff that he would not take judgment, and that he need not appear, if the record shows an appearance for him which is not repudiated, an injunction will not be granted. *Knapp v. Snyder*, 15 W. Va. 484.

An injunction will not be granted against proceedings on a judgment, claimed to have been procured fraudulently, where such judgment has been satisfied long before such bill was filed. *Mexican Ore Co. v. Mexican Guadalupe Min. Co.* 47 Fed. Rep. 361.

So, a decree will not be enjoined on the ground of fraud where the complainant has condoned the fraud by a compromise agreement after the decree. *Bass v. Nelms*, 55 Miss. 502.

See further, note to *John V. Farwell Co. v. Hilbert (Wis.)* 80 L. R. A. 235, *Injunctions against judgments on confession*.

As to fraud in service of process, see note to *Texas Mexican R. Co. v. Wright*, 81 L. R. A. —, *Injunctions against judgments for want of jurisdiction, or which are void*.

III. On account of accident.

a. Sickness.

1. A party.

Where there is no negligence or remedy at law, and a valid defense to the action, an injunction will be granted where complainant was prevented from defending on account of his sickness, but will not be granted on account of sickness in his family. An injunction has generally been denied where defense was not made on account of the attorney's sickness or death, but has been granted where there was no negligence. In other cases accidents have usually been held insufficient to obtain an injunction, although some cases have granted them where there was fraud on the part of the prevailing party, or no remedy at law.

So, sudden illness on the part of the defendant on his way to the trial, thereby preventing an affidavit that his original deeds were lost in order to allow the use of copies, will authorize an injunction against the judgment on the ground of accident. *Hord v. Dishman*, 5 Cal. (Va.) 279.

And an injunction was granted against a judgment on a covenant in a deed, where the complainant was sick at the time of service of the writ in the action at law, and was unable to attend court, and his personal presence was necessary in order to inspect the original deed to enable him to plead *non est factum* on the ground of quasi trust and fraud, where complainant was not guilty of negligence. *Cummins v. Kennedy*, 4 J. J. Marsh. 642.

And an injunction against a judgment was allowed where the defendant had a good defense and was so ill at the time of service of summons that he was not able to know until afterwards that the suit was pending. *Rice v. Railroad Bank*, 7 Humph. 32.

So, the failure to make a defense at law, occasioned by unavoidable necessity through no fault on the part of the complainant, as dangerous sickness, where his presence was required at the trial to verify a plea that the debt was on a forged note, 30 L. R. A.

will authorize relief by injunction. *Watson v. Palmer*, 5 Ark. 501.

And sickness of complainant at the time of service of process, preventing any attention to the case, where he had a good defense and was not negligent, will authorize an injunction against the judgment. *Horn v. Queen*, 4 Neb. 106.

Where a party was prevented by sickness from making his defense of fraud and failure of consideration in the action at law, and his counsel in his absence was refused leave for time to present an affidavit of defense, an injunction was granted against the judgment and a sale under foreclosure of a mortgage, where there was no remedy by appeal. *Clifton v. Livor*, 24 Ga. 91.

But an unavoidable accident, as sickness of complainant, preventing the use of a set-off available at law, will not be sufficient to enjoin the judgment where insolvency is not shown, as there is a remedy at law. *Hudson v. Kline*, 9 Gratt. 379.

And the sickness of defendant and the failure of his witnesses to attend court will not be ground for enjoining a judgment where there is a remedy of certiorari. *Gatlin v. Kilpatrick*, 1 N. C. Law Repos. 531, 6 Am. Dec. 557.

And sickness of a party, preventing him from attending trial, is not ground for enjoining the execution where his attorney should have obtained a continuance, and there was negligence on the part of complainant. *Pharr v. Reynolds*, 3 Ala. 521.

And sickness at the time of the service of process, so as to be unable to attend court or employ counsel, is not sufficient for relief against a judgment at law and a levy, where the failure to defend was the result of complainant's negligence, and it is not shown that such judgment is inequitable, or that the plaintiff was guilty of fraud. *Kelleher v. Boden*, 55 Mich. 295.

And absence of complainant from the trial, through sickness, will not authorize an injunction against an execution sale, where there is no meritorious defense or equitable ground, and his attorneys were negligent. *Odell v. Mundy*, 69 Ga. 641.

And sickness of complainant, preventing attendance at the trial, will not authorize an injunction against proceedings on a judgment where he has been negligent. *Woodward v. Dromgoole*, 71 Ga. 523.

Sickness of a party will not excuse failure to make a defense at law, where diligence is not shown in employing an attorney before he was sick or having his witnesses subpoenaed, and where a valid defense is not disclosed. *Cole v. Hundley*, 8 Smedes & M. 473.

So, sickness at the day of trial, preventing a party from making an affidavit for continuance on account of absent witnesses, will not be ground for enjoining the judgment where the party was not diligent in suing out process for his witnesses and there was ample time before he was sick. *Robb v. Halsey*, 11 Smedes & M. 140.

"That complainant was too sick and wholly unable to ride to said court" will not entitle to an injunction when the same is not proved. *Lester v. Hopkins*, 26 Ark. 63.

The sickness of a married woman during a term of court at which judgment was rendered against her by the consent of an attorney employed for her, by her husband acting as her agent, will not entitle her to an injunction where no fraud is shown, for, if injustice has been done, her remedy is against her husband, and the failure to defend was due to negligence of her husband. *Newman v. Morris*, 53 Miss. 402.

case in which courts of equity will interfere to stop the execution of a judgment so obtained by fraud.

United States v. Throckmorton, 98 U. S. 65, 25 L. ed. 95; *Sanford v. Head*, 5 Cal. 297; *Bibb v. Kreutz*, 20 Cal. 110; *Martin v. Par-*

sons, 49 Cal. 94; *Baker v. O'Riordan*, 65 Cal. 368; *Zellerbach v. Allenberg*, 67 Cal. 296; *California Beet Sugar Co. v. Porter*, 68 Cal. 869; *Thompson v. Laughlin*, 91 Cal. 818; *Dunlap v. Steere*, 92 Cal. 344; *High, Inj. § 199*.

Certiorari was not the proper remedy for the

The failure to make a defense on account of sickness preventing attendance will not authorize an injunction against the judgment and execution, in the absence of any showing that the party's presence was necessary or an excuse had been given for not applying for a new trial. *Jamison v. May*, 13 Ark. 600.

And a judgment will not be enjoined on the ground of accident through sickness of defendant and his witness, where the facts are not shown which could be proved, and no excuse is given for not obtaining a remedy at law, by a motion for new trial, and he was negligent. *French v. Garner*, 7 Port. (Ala.) 549.

So, sickness, bad roads, and bad weather, preventing attendance at court, will not excuse failure to defend in the absence of any attempt thereafter to apply for a new trial, where complainant was negligent in not employing counsel. *Waldrom v. Waldrom*, 76 Ala. 235.

And sickness and inability to attend court will not authorize an injunction unless complainant shows that he has no remedy by appeal, certiorari, or application to the court rendering judgment. *Wingfield v. McLure*, 48 Ark. 510.

And an injunction will not be granted against a judgment on the ground of accident caused by illness and mental inability preventing a defense, where there is no proof as to mental inability, and an affidavit for continuance could have been made. *Alford v. Moore*, 15 W. Va. 597.

Where the complainant was prevented from attending trial by sickness, and alleged that the claim was enlarged and excessive judgment obtained by the use of perjured witnesses, and that he could defeat the same by newly discovered evidence, an injunction against proceedings on the judgment was refused because he did not specify that the perjury was procured by the plaintiff in that judgment, and complainant and his attorney were negligent. *Kersey v. Rash*, 3 Del. Ch. 321.

2. Of family.

That a defendant at law was detained from court by sickness in his family and one attorney was also absent, preventing him from pleading a set-off, will not be ground for enjoining the judgment, where one counsel was present and no effort was made for a continuance. *Griffith v. Thompson*, 4 Gratt. 147.

And sickness in the family is not a sufficient excuse for not making a defense at law, where it is not shown that complainant's personal presence was necessary. *Jamison v. May*, 13 Ark. 600.

So, the illness of complainant's wife, preventing an attendance at court, will not authorize an injunction on a judgment on the ground that his nonattendance prevented a right of appeal intended to be reserved. *Boetwick v. Perkins*, 1 Ga. 136.

But in *Brooks v. Whitson*, 7 Smedes & M. 513, where complainant attended court at its first term for the purpose of defending, and the term was not held, and at the subsequent term he was detained from attending by the death of his wife and by high water, which rendered the roads impassable, and an attorney, a friend of the complainant, was prevented from entering a plea by misrepresentations of the other party that there was an agreement that no defense was to be made, an injunction was granted where there was a valid defense.

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3. Of witness.

Sickness of a witness, impairing his memory and testimony, will not entitle to an injunction against the judgment, where a continuance was not asked and there was a remedy at law. *Gott v. Carr*, 6 Gill & J. 809; *Crim. v. Handley*, 24 U. S. 652, 24 L. ed. 216.

4. Of attorney.

Absence of witnesses, and sickness of leading counsel for defendant in the trial at law, will not be ground for enjoining the judgment, where the same is not sustained by proof. *Kearney v. Smith*, 3 Yerg. 127, 24 Am. Dec. 550.

The sickness of counsel when the time to plead had extended over a month, which is known to the client, so that he might have employed another attorney, furnishes no ground for injunction against the judgment taken by default for want of plea. *Clark v. Ewing*, 93 Ill. 572.

The failure to make a defense at law, on the ground of sickness of the attorney, will prevent enjoining a judgment, as negligence, inattention, or mistake of an attorney without the fraud or interference of the adverse party will prevent equitable relief. *Broda v. Greenwald*, 66 Ala. 538.

And that a message was received from counsel by defendant in a civil suit that he was sick and that all his cases would be continued, is not ground for enjoining the execution on such judgment, where the petition for injunction does not allege that any part of such message was true. *Sasser v. Oliff*, 91 Ga. 84.

An injunction claimed on account of sickness of attorney for defendant was refused against a judgment where no motion for a new trial had been disposed of in the trial court. *Gibson v. Cohen*, 85 Ga. 860.

And sickness of counsel is not sufficient to authorize an injunction against a judgment where other counsel were present, and a continuance or new trial was not demanded in that case. *McBroom v. Sommerville*, 2 Stew. (Ala.) 515.

So, an injunction will not be granted where other counsel could have been employed, when complainant's attorney was sick. *Landrum v. Farmer*, 7 Bush, 46.

And sickness of attorney, preventing defense, is not ground for relief against a judgment where the bill does not show that such attorney had the set-off to be pleaded, or that witnesses had been summoned. *Mock v. Cundiff*, 6 Port. (Ala.) 24.

But the sickness of counsel employed by a non-resident defendant, which prevented his making a defense, will authorize an injunction on the ground of accident, and no laches will be imputed to the complainant where the lawyer was present at several terms and the case was not tried until three years after suit in his absence, when he was known to be sick. *Hillier v. Cotton*, 48 Miss. 563.

And where plaintiff and his attorney lived at a distance from the court, and the attorney was stricken down with sudden illness, which prevented him from communicating with complainant or any attorney, it is such accident as will authorize a new trial and an injunction against the judgment. *Triplett v. Scott*, 5 Bush, 81.

In *DeGraffenreid v. Donald*, 2 Hen. & M. 10, an injunction was granted against a judgment where defense was not made owing to the sickness of defendant's attorney and defendant's absence from the state; but the question was not discussed, and

reason that there was an appeal from the judgment of the lower court, and a writ of certiorari will not lie where there is an appeal.

Code Civ. Proc. § 1068; *Miliken v. Huber*, 21 Cal. 166; *People v. Shepard*, 28 Cal. 115; *Dennett v. Wallace*, 43 Cal. 25; *Faut v. Mason*, 47 Cal. 7; *Hoke v. Perdue*, 63 Cal. 545; *Golden Gate Consol. H. Min. Co. v. Yuba County*

Super. Ct. 65 Cal. 187; *Slavonic Illyric Mut. Ben. Asso. v. Santa Clara County Super. Ct.* 65 Cal. 500; *Stuttmeister v. San Francisco City & County Super. Ct.* 71 Cal. 323; *McCue v. Marin County Super. Ct.* 71 Cal. 545; *Re McConnell's Estate*, 74 Cal. 217; *Gibson v. San Francisco City & County Super. Ct.* 85 Cal. 216.

the supreme court only passes on the question of costs.

b. Death of attorney.

Death of counsel, and unfamiliarity of his successor with the matters, are not sufficient reason to enjoin a judgment at law, where no application for further time was made. *Howell v. Stewart*, 17 Ala. 719.

So, the death of counsel, who made no defense, will not authorize an injunction against a judgment, where complainant has used no diligence and neglected the case for three years. *Callaway v. Alexander*, 8 Leigh, 114, 81 Am. Dec. 640.

But an injunction was granted in a bill to impeach a decree of settlement on the ground of fraud and surprise, where a suit was brought solely to construe a will, and complainant's counsel was killed in the war at an interval between two terms, and he was not represented at the decree, and the condition of the country excused the executor from ascertaining the condition of the suit, and an account and settlement were rendered, which were oppressive. *Kincaid v. Conly*, Phill. Eq. 270.

c. Other causes.

Injunctions have been generally denied for other causes,—as the loss or miscarriage of letters or papers, or the prevention of a defense by storm or other causes, or that the court was not held through accident; and they have been denied on the ground of failure to show diligence or a good defense, or that there was no remedy at law. But there are exceptional cases granting injunctions where the party injured was not guilty of negligence, and there was no other remedy, and the judgment was unjust.

That a letter miscarried, preventing a defense at law, will not authorize an injunction against the judgment, where the judgment is not shown to be unjust. *Essex v. Berry*, 2 Vt. 161.

Or where complainant was negligent. *Stanard v. Rogers*, 4 Hen. & M. 438.

But in *Huebschman v. Baker*, 7 Wis. 542, where a letter from the superintendent of Indians to the district attorney, asking him to attend to an action relating to a tort committed by the Indians, failed to reach the attorney in time, an injunction was granted on the ground of accident and that it was the duty of the United States district attorney to attend to such cases.

Where the original papers have been lost by fire, and appeal has been prevented, the execution of the judgment may be enjoined, but not where complainant has been negligent and could have perfected his appeal long prior to the fire, and material error in the judgment is not shown. *Bailey v. Stevens* (Utah) 80 Pac. 823.

The restoration of a lost record without notice will not entitle to an injunction in the absence of proof that it is not correct. *Fuller v. Little*, 69 Ill. 229.

The loss of the record or papers for appeal will not authorize an injunction against proceedings on the judgment, where complainant was negligent. *Palmer v. Gardiner*, 77 Ill. 143; *State v. Judge of Dist. Ct.* 18 La. 542.

That a record needed in a case was lost will not entitle to an injunction, where such record would not have changed the result. *Beadle v. Graham*, 66 Ala. 102.

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Or where there is a remedy at law. *Crim v. Handley*, 94 U. S. 632, 24 L. ed. 216.

An injunction will not be granted against a judgment on the ground that the answer filed was lost, and that there was no remedy by appeal, where a good and valid defense is not disclosed. *Chinn v. First Municipality*, 1 Rob. (La.) 522.

And the loss of a decree of sale by accident will not entitle the purchaser to an injunction against a judgment for purchase money, as the title may be perfected in chancery. *Garrett v. Lynch*, 45 Ala. 204.

But in *Vathir v. Zane*, 6 Gratt. 246, where a writing was lost at the time of the judgment preventing a defense at law, an injunction was granted against a judgment where there was a good defense to the action.

And in *Cyrus v. Hicks*, 20 Tex. 488, an injunction was granted where the record of the judgment was lost, but the defendant in equity was allowed the right to have the record renewed.

The accident arising from the resignation of a justice preventing an appeal within the time allowed by law will not entitle to an injunction, unless the defense is just and complainant was not negligent. *Galbraith v. Barnard*, 21 Or. 67; *Smith v. D'Lashmunt*, 4 Mo. 103.

Where a motion for new trial was prevented by accident in that the term of court was not held, or through sudden adjournment, an injunction might be obtained; but where the judgment is not shown to be unjust, an injunction will not be granted. *Ratto v. Levy Bros.* 63 Tex. 278; *Harkey v. Tillman*, 40 Ark. 551; *Whitehill v. Butler*, 51 Ark. 343; *Johnson v. Branch*, 48 Ark. 535.

But where the judgment is unjust an injunction will be granted. *Foushee v. Lea*, 4 Cal. (Va.) 273; *Kulfont v. Hendricks*, 2 Gratt. 212, 44 Am. Dec. 386; *Leigh v. Armor*, 35 Ark. 123.

The abandonment of a case by the attorney before the trial, requiring the employment of another attorney who was not prepared, will not constitute accident sufficient to authorize an injunction against proceedings on the judgment. *Winchester v. Grosvenor*, 48 Ill. 517.

An injunction against the enforcement of a judgment will be denied to a defendant who had his day in court, and an opportunity to avail himself of his equities, where no ground of interference is shown, although one attorney did not arrive at the trial until after verdict, but the defendant was ably represented. *Waldo v. Denton*, 135 Pa. 181.

An unsuccessful application to set aside a judgment at law on account of inability to reach court on account of the trains, where such courts had full power to give adequate relief, will prevent an injunction against an execution sale. *Holmes v. Steele*, 28 N. J. Eq. 173.

And inability to attend court on account of an epidemic will not entitle a party to an injunction against the judgment where he was negligent in employing counsel to defend. *Stinnett v. Branch Bank*, 9 Ala. 120.

And casualty of flood, preventing attendance at court, is not ground for relief in equity against a judgment, where it is not shown that the flood continued until after adjournment of court. *English v. Savage*, 14 Ala. 342.

Presence at a trial before a justice being prevented by a terrible storm will not authorize an injunc-

Harrison, J., delivered the opinion of the court:

The defendant Walton commenced an action against the plaintiff and another in a justice's court, and, after the defendants therein had answered the complaint, the justice set the case for trial on the 28th of February; but on the morning of that day it

was agreed between the attorneys for the respective parties that the trial should be postponed and that the cause should be transferred to another township. On the next day the attorneys for the plaintiff herein received a letter from the justice, purporting to have been written the previous day, in which he stated that the case was to be transferred to

tion against an execution sale, as there is a remedy by appeal. *Hunter v. Hoole*, 17 Cal. 418.

But in *Brooks v. Whitson*, 7 Smedes & M. 513, it was held that where a valid defense was prevented by a violent storm and flood obstructing intercourse with the court-house from defendant's residence until after court adjourned, an injunction should be granted against the judgment where the plaintiff fraudulently prevailed upon an attorney not to interpose or enter a plea.

The refusal of a witness to attend court, or his failure to testify to the truth, is not accident or mistake which will entitle to an injunction against the judgment. *Tallman v. Becker*, 65 Ill. 183.

IV. On account of mistake.

a. Of law.

The general rule is that an injunction will not be granted against a judgment on the ground of mistake of law, but there are exceptional cases where injunctions have been granted,—especially where the practice under a doubtful statute has been general.

Where the circuit judge made a mistake in remanding the case to the common pleas instead of allowing it to remain in the circuit court, and the chief justice on a rule to open the case remanded the case to the common pleas, when it ought to have been remanded to the circuit court, and the defendant did not know of this until the time to take out a writ of error had expired, an injunction will not be granted where no merit is shown. *Stout v. Slocum*, 52 N. J. Eq. 83.

Mistake of a judge of probate court in assigning claims to improper classes, whereby an unfair superiority is given, is not ground for an injunction, as there is a remedy in the court to correct the same. *Jillett v. Union Nat. Bank*, 56 Mo. 303.

That a judgment was rendered by a mistake of law will not entitle an injunction where there is a remedy by appeal. *Moeschler v. Lochte*, 12 N. Y. S. R. 855.

And overruling an application for a continuance through a mistake of law will not entitle to an injunction. *Risher v. Roush*, 2 Mo. 95, 22 Am. Dec. 442.

And a mistake of law in the decision of rulings of a court will not be ground for enjoining a judgment. *Barr v. Carpenter*, 16 R. I. 724 (1890).

For injunctions against judgments for errors of law, see *ante* to *Gum-Elastic Roofing Co. v. Mexico Pub. Co.* *ante*, 700.

Under Iowa Code, § 2522, providing that judgments at law cannot be annulled in equity except for causes arising or discovered subsequent to their rendition, a judgment for defendant will not be enjoined where he pleaded in that case a judgment in bar rendered in his favor by mistake where it should have been a judgment of dismissal, as the subject-matter and parties were within the jurisdiction of the court rendering the judgment sought to be enjoined. *Lowery v. Greene County*, 75 Iowa, 538.

So, an injunction was refused where at the time of confessing judgment it was the intention to enter appeal, and one of the defendants was sent to enter an appeal within four days, but the clerk supposed that it was an injunction bond which was desired to be executed, and not being familiar with the form, requested the defendant to return home and send it afterwards, stating that that would be

all sufficient, and the defendant, being ignorant of the necessity of entering an appeal at that time, failed to do so, which was unknown to the other complainants until the time for entering an appeal had elapsed. *Robbins v. Mount*, 3 Ga. 74.

A mistake of law made by a garnishee in not moving for a stay of proceedings in one suit until another suit for the same debt was terminated will prevent him from enjoining a judgment, and is not ground for relief. *Danaher v. Prentiss*, 22 Wis. 311.

So, the mistake of law by a judge in overdrawing his salary and giving his note to a judge *pro tem.* for the amount due such judge, will not be ground for enjoining the judgment on such note, although the appointment of a *pro tem.* judge was void. *Hubbard v. Martin*, 8 Yerg. 496.

And the mistake of law as to the rights of the wife in community property will not authorize an injunction restraining the husband from disposing of such property, under a decree of divorce which was not resisted through such mistake, where no fraud was practiced. *Champion v. Woods*, 79 Cal. 17.

In *Kearney v. Sasser*, 37 Md. 224, it was held that relief will not be granted for negligence or mistake of law, unless the alleged mistake is conclusive as to the existence of a legal right.

And an injunction will not be granted on account of a mistake of law by a surety in confessing a judgment for debt barred by limitation. *Harner v. Price*, 17 W. Va. 523.

Or where he was released by an extension granted to the principal, and was ignorant of the legal effect. *Meek v. Howard*, 10 Smedes & M. 502.

And an injunction will not be granted against a judgment at law on the ground of mistake of law, where the bill is to correct an error in an instrument, which error was occasioned by ignorance of law. *Cockerell v. Cholmeley*, 1 Russ. & M. 418.

And will not be granted for a mistake of law as to the effect of a summons. *Meem v. Rucker*, 10 Gratt. 506.

And a mistake of law that the court could not enter judgment at the first term after the commencement of the action will not entitle to relief by injunction. *Shricker v. Field*, 9 Iowa, 366.

Mistake in believing that a defense was not necessary, where there was an unauthorized appearance, and the defendant was in court, and protested against the judgment, but no effort was made to obtain a new trial, will prevent an injunction against the judgment. *Dunn v. Hansard*, 37 Mo. 190.

A judgment will not be enjoined on the ground of mistake at law as to the fact that a defense of usury could not be made at law. *Jones v. Watkins*, 1 Stew. (Ala.) 81.

The mistake of law as to the right to use a set-off at law will not authorize an injunction against the judgment. *Pearce v. Winter Iron-Works*, 32 Ala. 68.

And a mistake of law in paying money before judgment, where such judgment was afterwards reversed, will not authorize an injunction against an execution sale in another case to maintain a set-off. *Beard v. Beard*, 25 W. Va. 426, 52 Am. Rep. 219.

And a mistake of law as to the duty of an officer on a defective execution will not be ground for injunction against a judgment obtained against him on account of his neglect of duty. *Pettes v. Bank of Whitehall*, 17 Vt. 425.

another township, and thereupon the attorneys for Walton agreed to take such steps as would be necessary to effect the transfer. Instead of so doing, however, they had on the previous day, without any knowledge on the part of the plaintiff herein or of his at-

torneys, appeared before the justice, and caused judgment by default to be entered by the justice against the defendants therein for the full amount asked for in the complaint. At the time that the justice wrote the above letter, and at the time of the agreement on

And a judgment in trespass for procuring a levy of attachment will not be enjoined on the ground of mistake of law, in that the decision of the supreme court of the state holding the attachment void for want of authority on the part of the officer to issue it had not been decided and was contrary to general practice. *Stetson v. Goldsmith*, 81 Ala. 649; *Goldsmith v. Stetson*, 80 Ala. 183.

But see *Tomkies v. Downman*, 44/74.

And that a judgment was recovered against complainant on account of mistake in pleading by his counsel, or through erroneous advice as to the defense, will not entitle to an injunction against the same.

Mistake of counsel upon a point of law is not ground for an injunction against a judgment, and the case of *Ambler v. Wyld*, 2 Wash. (Va.) 87, which granted an injunction for errors at trial is not recognized as authority. *Fentress v. Robins*, N. C. Term Rep. 177, 7 Am. Dec. 104.

So, ignorance or mismanagement of the case by the attorney will not authorize relief by injunction against the judgment at law. *Burton v. Hynson*, 14 Ark. 82.

The mistake of counsel in advising complainant not to present a set-off will not be ground for equitable relief by injunction against the judgment. *Duckworth v. Duckworth*, 35 Ala. 70.

That complainant's attorney gave her advice, which was erroneous, will not be ground for enjoining the judgment. *Winchester v. Grosvenor*, 48 Ill. 517.

The mistake of counsel in advising a bail that after surrender of his principal he need not defend against a sci. fa. will not authorize an injunction against the judgment. *Allen v. Hamilton*, 9 Gratt. 255.

Misapprehension and mistake on the part of defendant's counsel, by which judgment was rendered on default, will not authorize an injunction against the same, especially where the motion has been made in a court at law for a new trial, and has been denied, and there is no special ground for equitable interference shown. *Railroad Co. v. Neal*, 1 Woods, C. C. 353.

The mistake of an attorney in pleading will not authorize an injunction against the judgment. *Green v. Robinson*, 5 How. (Miss.) 80; *Hambrick v. Crawford*, 55 Ga. 335; *Stephenson v. Wilson*, 2 Vern. 825.

Where the attorney could have obtained permission to amend. *Graham v. Stagg*, 2 Paige, 321.

The mistake of an attorney in advising a particular defense is not such a mistake as will entitle to an injunction, or the fact that the attorney abandoned the defense and the complainant was compelled to employ other counsel to try the case. *Winchester v. Grosvenor*, *supra*.

And a mistake of law by attorneys on both sides will not be ground for relief by enjoining a judgment. *Richmond & P. R. Co. v. Shippen*, 2 Patton & H. (Va.) 327.

So, a mistake of law as to the effect of a stipulation referring a case to the circuit judge for decision, whereby a review of the same was prevented, will not authorize an injunction against the judgment on the ground of surprise, where it is not shown that complainant had not a fair trial. *Farmers' Loan & T. Co. v. Walworth County Bank*, 23 Wis. 249.

In *Owens v. Ranstead*, 22 Ill. 161; *Lawson v. Bet-*
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tison, 12 Ark. 401; *Blackhall v. Combs*, 2 P. Wms. 75; and *Ware v. Horwood*, 14 Ves. Jr. 31,—it was said that equity will not relieve against judgments on the ground of mistake in pleading.

But in *Drew v. Clarke, Cooke* (Tenn.) 374, 5 Am. Dec. 698, it was held that a mistake of law produced by the representations of the adverse party, as to the title of land under an Indian treaty, would entitle one to relief against a judgment on a purchase-money bond, where the consideration had failed, as under act of Congress of 1806, providing that no purchase, lease, or conveyance contrary to the Indian treaty shall be made, this conveyance was void, and it is doubtful if a defense could have been made at law.

Where an appeal was taken, according to the practice at that time, from the marine court to the court of common pleas, and the case reversed, and judgment was not entered because the appellee paid the costs, and it was afterwards decided by the court of appeals that in such case the appeal should be to the general term of the marine court, and therefore the common pleas court had no jurisdiction, acquiescence for nine years will not prevent enjoining the enforcement of the judgment below, and the same will be enjoined where it is erroneous and the complainant was without fault or negligence. *Jacobs v. Morange*, 1 Daily. 523.

Mistake of law as to the remedy by certiorari will authorize an injunction against the judgment where, after its rendition, the supreme court has decided that the act in regard to certiorari is unconstitutional. *Cobbs v. Coleman*, 14 Tex. 504.

Where the defendant had a remedy at law and attempted to pursue it, but, on account of the misapprehension of the law by the court, he had been deprived of the same, an injunction against a judgment that was void for want of jurisdiction will be granted in an action for assault and battery. *Connell v. Stelson*, 33 Iowa, 147.

In *Oliver v. Pray*, 4 Ohio, 177, 19 Am. Dec. 600, where the clerk of a court made a mistake of law as to the amount of an appeal bond, thereby preventing an appeal, and there was a good defense, and it would be inequitable to enforce the judgment, it was enjoined.

A mistake of a clerk in drawing an appeal bond from a justice's judgment, producing a dismissal of the appeal, will authorize an injunction against the judgment; and in such a case the chancellor should retain the case for trial, as the circuit court had no jurisdiction on the dismissal and the justice could not try it. *Saunders v. Jennings*, 2 J. J. Marsh. 518.

In *Tomkies v. Downman*, 6 Munf. 537, an injunction was allowed against excessive fines, for a sheriff not returning an execution, where defense was not made at law owing to mistake of law, and a general delusion among the citizens as to the construction of a statute.

In *Bierne v. Mann*, 5 Leigh, 364, the case of *Tomkies v. Downman* was distinguished, as the delusion extended to the legislature, and every judgment after the first was against the law. But see *Stetson v. Goldsmith*, 81 Ala. 649.

Relief may sometimes be granted for a mistake of law, and an error of counsel in directing a note to be made by an assignor in a greater amount than he was liable for may authorize a relief against a judgment on the note which was given on a mistake as to what he was to pay. *Fitzgerald v. Peck* 4 Litt. (Ky.) 123.

the part of Walton's attorneys to effect the transfer to another township, it was known to them that such judgment had been entered. Other interviews were subsequently had between the attorneys for the respective parties regarding the transfer of the cause, in

which Walton's attorneys, for the purpose of misleading and deceiving the attorneys of the plaintiff herein, represented that they were seeking to effect the transfer of the cause, and in which they concealed the fact that the judgment had been entered; and by reason of

In *Pollock v. Gilbert*, 16 Ga. 398, 60 Am. Dec. 732, it was held that in a suit to compel the execution of a deed needed as a defense in a suit in ejectment, an injunction against the judgment in ejectment may be granted, where complainant was ignorant that his defense could not be made available at law, believing that the destruction of an unrecorded deed would reveal title, and he did not know that he could maintain a bill for relief until after the judgment; holding that *Paterson v. Bangs*, 9 Paige, 627, requiring a discovery before judgment, was overruled, and that the opinion in that case was qualified by the fact that the complainant must know that his defense was not available at law in order to require him to proceed before judgment.

In *Cochran v. Street*, 1 Wythe, 69, 1 Wash. (Va.) 79, it was held that the mistake of four jurors that they were bound by a majority to render a verdict contrary to their own judgment was held sufficient to enjoin a judgment at law, where it was discovered too late to apply for a new trial; but this case was overruled in *Howard v. McCall*, 21 Gratt. 206, as to allowing a juror to impeach his verdict.

In *Bull v. Com.* 14 Gratt. 613, which was a criminal case, it was said, referring to *Cochran v. Street*, 1 Wash. (Va.) 79, that if the question was new it is at least doubtful, but it must rest entirely on the ground of an innocent mistake clearly proved, showing that the verdict was never assented to by all the jurors, and was not in truth their verdict.

For *Injunctions against judgments for errors and irregularities*, see note to *Gum-Elastic Roofing Co. v. Mexico Pub. Co.* ante, 700.

b. Of fact.

Injunctions have been granted against judgments on the ground of mistake as to facts, where complainant was not negligent and the judgment was unjust; but where the mistake is not established, or complainant was negligent, or there was a remedy at law, and no fraud on the part of the prevailing party, injunctions have been refused.

So, where a wrong entry was made on the docket, thereby preventing a good defense, an injunction was granted against the judgment. *Seymour v. Miller*, 32 Conn. 402; *Brewer v. Jones*, 44 Ga. 71.

Or where the counsel was misled by a statement of the court and prevented from making a good defense, and there is no remedy at law. *Metcalf v. Williams*, 104 U. S. 39, 26 L. ed. 665.

And where the complainant was under a mistake in regard to the employment of his attorney, where the practice in relation to employment was that the *procure facias* was to be treated as a new case, requiring a new employment and for that reason a defense was not made, an injunction was granted. *Day v. Welles*, 31 Conn. 344.

So, an injunction was granted against a judgment of condemnation against a garnishee, rendered by a justice in attachment on a judgment more than three years prior to the issuing of the attachment, where the judgment was rendered by mistake, it having been agreed that no judgment should be entered until the decision of another case. *Welkel v. Cate*, 58 Md. 106.

And where a garnishee gave a certificate to the sheriff showing that he was indebted to the defendant, when in fact he was not, and the mistake was not discovered until after judgment, he was entitled to an injunction against the same, although he had applied to the court at law for relief, which 30 L. R. A.

had been refused presumably because too late. *Oregon R. & Nav. Co. v. Gates*, 10 Or. 514.

Or where he made full disclosure, and judgment was taken by mistake. *Freeman v. Miller*, 53 Tex. 372.

A decree of distribution in a probate court, obtained by using the names of distributees without their knowledge, will be enjoined as a fraud on the jurisdiction of the court, where the executor through mistake inventoried slaves which had already been given by the testator to the distributees as an advancement. *Fairly v. Thompson*, 34 Miss. 101.

The defendant in ejectment may have the judgment enjoined where, by a mistake in the description in a grant, a part of the tract was incorrectly described. *Dunlap v. Stetson*, 4 Mason, 349.

Mutual mistake of facts as to boundary line, incorporated in a decree in ejectment, but not discovered until too late to obtain review, will authorize an injunction against the judgment. *Currier v. Esty*, 110 Mass. 536.

So, a mistake in the clerk's certificate of record of a deed will authorize an injunction against the judgment in ejectment on the ground of quieting title. *Haitt v. Calloway*, 7 B. Mon. 178.

And proceedings in ejectment after verdict will be stayed where complainant's deed by mistake did not describe the land sold under the judgment, and the defendant with knowledge permitted him to take possession and make valuable improvements. *De Kiemer v. De Cantillon*, 4 Johns. Ch. 85.

And a mistake in inserting the penalty in a deed will authorize an injunction against the judgment on a covenant in the deed for the penalty. *Yelton v. Hawkins*, 2 J. J. Marsh. 2.

An injunction was granted against prosecuting an action in England on a judgment obtained in Ireland, on the ground of reformation of a mistake in an instrument upon which such judgment was obtained, although an injunction had been previously denied in the Irish courts, as such action on an interlocutory order is not binding. *Ball v. Storie*, 1 Sim. & Stu. 211, 1 L. J. Ch. 214.

And an injunction will be granted against a judgment obtained by mutual mistake in regard to a house overlapping a lot. *Anglesey v. Colran*, 44 N. J. Eq. 203.

Where a verdict was had on an executor's letter confessing a mortgage to the testator, a judgment was enjoined where it was obtained through a mistake and the mortgage was worth nothing. *Robinson v. Bell*, 2 Vern. 146.

And mistake and miscalculation on the part of the jury, which if discovered in time would have furnished a good ground for a new trial, will entitle to an injunction against the judgment. *Rust v. Ware*, 6 Gratt. 50, 52 Am. Dec. 100.

Mistake of fact in supposing a suit was upon a note against which there was no defense, when it was upon a forged note, will entitle the defendant to relief by injunction against the judgment. *Young v. Morgan*, 9 Neb. 169.

And mistake in dating a bill of exceptions preventing a review will be relieved against in equity where there is merit, and to prevent injustice. *Kohn v. Lovett*, 43 Ga. 179.

A judgment obtained upon an erroneous transcript under seal, where the clerk had inserted parts of two cases incorrectly, will be enjoined on the ground of fraud, as a defense could not be made at law. *Collier v. Easton*, 2 Mo. 145.

their statements and deceptions the plaintiff herein did not learn that the judgment had been entered until more than thirty days after its entry, and when the time for an appeal therefrom had expired. Upon learning this fact, the plaintiff herein moved the justice

to set aside the judgment, and recall an execution that had been issued thereon; and on the 18th of April this motion was granted, but on the next day the justice, without any notice to the plaintiff herein or his attorneys, vacated this order. Thereupon the plaintiff

But a mistake in a bill of exceptions will not be ground for enjoining prosecution of a writ of error where there is no charge of fraud. *Ford v. Weir*, 24 Miss. 563.

Or where complainant had been negligent and could have corrected the same. *Smith v. Fouché*, 55 Ga. 120.

And that the amount of a judgment at law is too large on account of mistake which is not indicated, will not authorize an injunction against the enforcement of such judgment, where the mistake occurred through negligence on the part of complainant, and the remedy exists at law to appeal to the court rendering the judgment for relief. *Muscatine v. Mississippi & M. R. Co.* 1 Dill. 536.

And where an executrix in good faith confesses a judgment against the estate, the subsequent discovery of a receipt for the debt, of which she had no knowledge at the time of confession, entitles her to an injunction against the same. *Gardiner v. Hardey*, 12 Gill & J. 365.

Giving a draft of a judgment adjudging all costs against a party to the clerk, where only part of the costs should have been assessed against such party will not entitle to an injunction against the judgment where there is no showing that the party was injured or the court was deceived or misled, or that such judgment could not have been rendered, and there is neglect to move to set aside the same. *Gulf, C. & S. F. R. Co. v. Henderson*, 38 Tex. 70.

A mistake caused by a miscalculation of executors as to the sufficiency of assets, and not merely by a misconception of the effect of their entering a plea of fully administered and confessing an unconditional judgment, will not authorize an injunction against an action on the judgment confessed, where the confession was founded on a consideration of gaining time. *Freelands v. Royall*, 2 Hen. & M. 575.

In *Brenner v. Alexander*, 16 Or. 349, it was said that an administrator confessing judgment admits there are assets, and he cannot thereafter have such judgment enjoined on ascertaining subsequently that there is a deficiency; but if he had not confessed judgment it was said that he would not have been estopped.

A judgment in the justice's court in California will not be enjoined on the ground of mistake, inadvertence, and excusable neglect, where defendant made a mistake as to the return day of the summons, being unable to read, but applied, as provided under Cal. Code Civ. Proc. § 869, to the justice for relief against such judgment, which was denied; and a court will not review the judgments of other courts by a suit in equity. *Reagan v. Fitzgerald*, 75 Cal. 220.

A statement by a clerk in the attorney's office as to the object of a suit contrary to the allegations of a complaint against the party on file will not authorize an injunction against the judgment, as the mistake is to be accounted the misfortune of the parties rather than the wrong of his adversary. *English v. Aldrich*, 132 Ind. 500.

And the claim that there is a mistake in the account on which judgment was rendered, which is not discovered until too late to obtain a new trial, is not ground for injunction where the mistake is apparent on the face of the account. *Falls v. Robinson*, 5 Md. 385.

And the dissolution of an injunction will not be set aside on account of mistake of attorney causing his absence, where the party was not present, and 30 L. R. A.

was negligent, and could have asked for a continuance or employed another attorney, where complainant was in the parish at that time. *Dwight v. Richard*, 4 La. Ann. 240.

The mistake of counsel in stating the facts in a plea will not authorize an injunction against the judgment, where the party was himself present at the trial. *Jamison v. May*, 13 Ark. 600.

So, a mistake in not defending, which mistake is due to negligence, will not authorize an injunction against the judgment. *Ross v. Holloway*, 60 Miss. 558.

Or where the clerk of the court made a loose declaration that no such suit was pending. *Hanna v. Morrow*, 43 Ark. 107.

The consent of complainant's attorney to a judgment at law under a misapprehension of facts will not authorize an injunction against the judgment in the absence of misrepresentations or fraud of prevailing party. *Gibson v. Armstrong*, 23 Ark. 438.

The enforcement of a judgment for partition will not be enjoined on the ground of mistake or accident, where it is claimed that under a prior judgment quieting title in plaintiff against the defendant by mistake and omission the description of the land was omitted from the decree, which was not discovered for eighteen years, but after discovery there has been such a delay and conduct as constitute a waiver of the right to appeal to equity to correct the judgment; besides, there was a remedy at law in the defense to the partition suit, when it was disclosed that the former decree was defective. *Ratliff v. Stretch*, 180 Ind. 222.

If in serving the summons the constable by mistake entered a less amount on the copy served than in the original summons, the judgment in excess is only voidable and the judgment in excess of the amount indorsed cannot be enjoined. (Reversing the former opinion in the same case.) *Bassett v. Mitchell*, 40 Kan. 549.

Where a judgment has been entered by mistake, thereby preventing a review, an injunction will not be granted against the same where a valid defense to the action is not shown. *Farmers' Bank v. Vanmeter*, 4 Rand. (Va.) 566.

And an injunction will not be granted against a judgment on the ground that the complainant was prevented from making a defense by mistake, where he does not state how the alleged mistake, oversight, unintentional, undiscovered, and accidental omission occurred, so that the court may see that there was no fault or want of diligence on his part. *Simmons v. Martin*, 53 Ga. 620.

For mistake as to matters arising after judgment generally, see note to *Little Rock & Ft. S. R. Co. v. Welles* (Ark.) ante, 590, *Injunction against judgments for matters arising subsequent to their rendition*.

V. On account of surprise.

a. Generally.

Surprise will not be ground for an injunction against a judgment unless a showing is made that the judgment was not obtained by reason of complainant's negligence or from circumstances beyond the control of the complainant. But surprise will be cause for injunction where complainant was not negligent, and the pleadings were amended at the trial in his absence, or the docket was not made as required by law, and injustice has been done.

So, surprise will not be ground for enjoining a

brought this action to perpetually enjoin Walton from enforcing the said judgment against him or his property. A demurrer to the complaint was overruled, and, the defendants declining to answer, judgment was rendered in favor of the plaintiff, from which this appeal has been taken.

The complaint shows that the judgment in the justice's court was obtained by a fraud practiced upon the plaintiff herein by the attorneys of Walton, with the assistance of the justice, in a manner which entitles the plaintiff to the equitable relief sought; and the appellant does not attempt to controvert the

judgment at law, unless the judgment was not occasioned by negligence of complainant. *Cunningham v. Caldwell, Hardin (Ky.) 123.*

And a judgment will not be enjoined on the ground of surprise although defendant's attorney left court on an erroneous announcement that there would be no more jury trials during that term, if no valid defense was shown to the action. *Phillips v. Samuel, 76 Mo. 657.*

A party served in attachment process cannot obtain an injunction against the judgment of condemnation on the ground of surprise. *Peters v. League, 18 Md. 68, 71 Am. Dec. 623.*

But an amendment to the pleadings, made without knowledge of counsel for defendant, which authorized a judgment without evidence for \$5,000 instead of about \$50, where the attorney for the plaintiff had just offered to dismiss, on payment of costs and fees, will authorize an injunction against the judgment. *Webster v. Skipwith, 26 Miss. 841.*

And where foreigners being residents abroad go to trial upon a declaration having a good defense, and new counts are filed covering another claim after the trial commences, and a delay of a short period only is allowed before the trial is again resumed, and the foreigners have no notice of such counts,—an injunction will be granted on the ground of surprise where there is a good defense to such action. *Bell v. Cunningham, 1 Sumn. 69.*

So, where the rules of court required a new calendar each month, and the call of the docket was at the time when a new calendar should have been made, and the attorney for defendant, learning that no new calendar was to be made, gave no further attention to the case for that month,—a judgment obtained in the absence of such attorney and his client should be enjoined where there was a good defense. *Beveridge v. Hewitt, 3 Ill. App. 467.*

b. In matters of witnesses.

An injunction will not be granted against a judgment obtained by the assignee of a bond on the ground that the obligee of the bond was absent from the country and the defendant was unable for that reason to obtain evidence for his defense. *Martlett v. Pettus, 3 Mo. 345.*

And that the plaintiff was absent from the trial, and the defendant was therefore unable to use him as a witness, will not be ground for an injunction against the judgment. *Wilder v. Lee, 64 N. C. 50.*

The mere fact of the absence of a material witness at the time of trial is not of itself a sufficient ground for an injunction, because the court of law who tried the cause was fully competent to give relief by a continuance or a new trial. *Chapman v. Scott, 1 Cranch. C. C. 302.*

Surprise as regards evidence will not entitle to an injunction against a judgment where there is a remedy at law. *Hendrickson v. Hinckley, 58 U. S. 17 How. 443, 15 L. ed. 123.*

So, where it is not shown that the evidence of the witness whose testimony is the ground for a new trial can be overthrown on a subsequent trial, an injunction will not be granted. *Harrison v. Harrison, 1 Litt. (Ky.) 187.*

And surprise is not sufficient ground for relief against the enforcement of a judgment where a witness did not testify, as expected, as to usury, there being no diligence shown in the attempt to ascertain what could be proved. *Williams v. Lockwood, Clarke, Ch. 172.*

In *Post v. Boardman, Clarke, Ch. 523*, which does not show that it was an injunction suit, it was held that surprise by a witness's unexpectedly refusing to testify as to usury on the ground of his being interested and that a defense could not be made at law, will authorize equitable relief against the judgment, as *N. Y. act May 15, 1867*, gives chancery courts jurisdiction in such cases if relief could not be had at law.

While neither a court of law nor a court of equity will grant a new trial to enable the party to get new witnesses, yet where the admission of a material fact necessary at law for a defense comes from the adverse party in equity, an injunction will be granted against the judgment at law. *Hankey v. Vernon, 3 Cox, Ch. Cas. 12.*

c. In regard to perjury.

An injunction will not be granted on the ground of surprise in that the judgment was obtained by perjury, where complainant was negligent, or there is not a showing that the judgment would be changed on another trial, or there is a remedy at law; but where the only material witness committed perjury, and it is clearly shown, an injunction will be granted.

Surprise at what is claimed to be false evidence will not be ground for enjoining a judgment where the complainant has not been diligent, and the evidence is not material and no fraud is shown. *Turley v. Taylor, 6 Baxt. 376.*

An injunction will not be granted against a judgment on the ground of perjury where it was not shown but what the judgment might be based upon other evidence. *Neelson v. First Nat. Bank, 70 Fed. Rep. 528.*

And an injunction will not be granted on the ground of the alleged perjury of a witness on a question as to the amount of damages, where an application for a new trial has already been denied at law, and complainant was negligent in not attending court. *Smith v. Lowry, 1 Johns. Ch. 819.*

As a general rule equity will not interfere with a judgment at law or the enforcement of the same, on the ground that a witness was mistaken as to the fact upon which the defense turned, or that he swore corruptly, and negligence in not searching the records to ascertain whether a judgment existed, which was allowed to be proved by parol to complainant's prejudice, will bar relief. *Vaughn v. Johnson, 9 N. J. Eq. 173.*

So, proceedings on a judgment will not be enjoined on the ground that it was procured by perjury, where a defense was not made to the action at law. *Cairo & St. L. R. Co. v. Holbrook, 22 Ill. 297.*

And an injunction against a judgment and the execution, on the ground of newly discovered evidence to prove perjury of the prevailing party in obtaining the judgment, or misconduct of jury, will not be allowed where the complainant has not used due diligence. *Gray v. Barton, 62 Mich. 186; Kersey v. Rash, 8 Del. Ch. 321.*

So, false evidence shown on a trial will not be sufficient in equity to enjoin a judgment at law. *Gaiona & S. W. R. Co. v. Ennor, 116 Ill. 55.*

An injunction will not be granted against a judgment on the ground of perjury of witness, where complainant fails to show that he has other witnesses than himself by whom he can prove the testimony is false, as it would not avail simply to grant a new trial. *Ames v. Snider, 55 Ill. 493.*

power of a court of equity to afford the relief sought by the plaintiff, but rests his defense upon the proposition that the plaintiff is not entitled to equitable relief if he could obtain the same relief at law. It is a familiar rule that a separate action to restrain the enforcement of a judgment will not be sustained when the same relief can be obtained through a motion or other proceeding in the action in which the judgment was obtained; and, in a jurisdiction in which legal and equitable relief is dispensed in different tribunals, a court of equity will not grant relief against a judgment when the same relief can be obtained by the aid of the court that rendered the judgment. But under the system of procedure which obtains in this state, where the various kinds of relief are administered by the same tribunal, and where there is but one form of civil action for the enforcement or protection of civil rights (Code Civ. Proc. § 307), a party who presents a complaint showing his right to the relief asked is not to be denied that relief because he might have sought it under a different form of action. See *Thompson v. Laughlin*, 91 Cal. 318.

When the plaintiff learned that the judgment had been entered against him, the time for an appeal had expired; and, even if the

justice had the power to grant his motion to open the judgment, his subsequent action vacating this order was equivalent to a denial of the motion, and from this order there was no appeal to the superior court. The rule under which a court of equity declines to interfere until after the application for relief has been made to the court in which the judgment was rendered has no application when relief has been sought and denied in that court. The denial of that court to grant relief gives to the court of equity the same authority to interfere as if the other court was powerless to render aid. Even if the plaintiff could have had the judgment annulled upon certiorari, he was not compelled to resort to that remedy; especially where he would not thereby obtain as effective relief as by the course herein pursued.

The objection that the codefendant of the plaintiff is not a party to this action is without merit. The judgment in the justice's court is restrained only so far as it affects the plaintiff herein and his property, leaving the judgment against his codefendant in full effect, to be enforced at any time.

The judgment is affirmed.

We concur: **Garoutte, J.**; **Van Fleet, J.**

And proceedings on an execution and judgment will not be enjoined on the ground that the same was obtained by perjury, where there is no showing made that on a new trial the result will be different. *Miller v. Morse*, 23 Mich. 355.

Where an injunction was obtained in a decree for alimony, proceedings on this decree will not be enjoined on the ground that it was obtained by perjury as it would be a renewal of the original litigation. *Jenkins v. Jenkins*, 86 Ga. 203.

So, an action on a judgment claimed by the defendant therein to have been obtained by perjury will not be enjoined, as it would be granting a new trial, for which there is a remedy at law. *Cotzhausen v. Kerting*, 29 Fed. Rep. 821.

In *Burgess v. Lovengood*, 2 Jones, Eq. 457, which was an action to enjoin a judgment on an award made by state commissioners, it was held that a judgment would not be enjoined for perjury where no particular falsehood is proved either by deed, writing, or conviction of perjury, and it is a question of doubt as to whether the commissioners' decision could be reviewed, as they are *functi officii*.

But new evidence of perjury of the only material witness will be ground for enjoining a judgment. *Peagram v. King*, 2 Hawks, 206.

So, a judgment obtained upon the testimony of one witness who was afterwards contradicted clearly in equity, was held sufficient to authorize relief by injunction where such witness was a partner of the plaintiff at law and proved the demand, and the debt was a gambling one. *Verdier v. Hume*, 4 Hen. & M. 479.

And where the defendant in an action for rent relied upon the plaintiff to prove a surrender, and he testified falsely, an injunction was granted against such judgment where complainant was able to establish the perjury and discovered a written authority executed by plaintiff at law authorizing such surrender, which could not have been found by the use of reasonable diligence. *Stowell v. Eldred*, 26 Wis. 504.

For injunctions for surprise in rendering judgments prematurely, see note to *Gum-Elastic Roofing Co. v. Mexico Pub. Co. (Ind.) ante*, 700. *Injunctions against judgments for errors and irregularities*, VI. *On account of duress*.

Duress in obtaining a judgment will not usually

be ground for an injunction,—especially where there was negligence on the part of complainant or a remedy at law; but an injunction was granted in an exceptional case.

So, an injunction will not be granted against a judgment where complainant was prevented from attending court by the danger incidental to reorganizing courts after the war, where he was negligent and had time to prepare for his defense. *Prater v. Robinson*, 11 Helsk. 391.

Fear of personal safety, preventing attendance at court on account of war, will not authorize an injunction against proceedings on a judgment where no effort was made to employ counsel. *George v. Tutt*, 36 Mo. 141.

And a failure to make a defense at law on account of fear of personal injury at the court from his adversary will not authorize an injunction against the judgment. *Holt v. Graham*, 2 Bibb, 192.

In order to enjoin a judgment the complainant must show that he had a good defense and used diligence, and fear of bodily harm in attendance on court will not excuse. *Duncan v. Gibson*, 45 Mo. 352.

And that a judgment was obtained by influence and threats of plaintiff over referee, will not be ground for enjoining a judgment or execution sale, as there is a remedy by appeal. *Nichols v. Snow*, 42 Tex. 72.

A judgment will not be enjoined in an action by the wife on the ground that the debt was her husband's and that the judgment was obtained by fraud and marital influence, where the debt was one for which she should be held liable. *Bell v. Francke*, 23 La. Ann. 599.

But in *Holcomb v. Canady*, 2 Helsk. 610, a judgment in ejectment was enjoined where complainant, who was old and infirm and lived in another county, had title bonds from the defendant for the land in controversy and his defense was prevented by the disorganized conditions of the court owing to circumstances of war, and an unconscientious advantage was taken in the absence of complainant and his counsel.

For injunction against judgment on the ground of ignorance, see *By concealment*, *supra*, II, b, and *Mistake of fact*, *supra*, IV, b.

L. T.

MONTANA SUPREME COURT.

William F. FITZGERALD *et al.*, *Respts.*,
v.

William A. CLARK *et al.*, *Appts.*

(.....Mont.....)

1. The construction of U. S. Rev. Stat. § 2322, defining the rights of a mining locator in a vein of which the apex is within his location, should be such as to give him a length on the strike equal to the length on the apex within the boundary lines of his location, regardless of the direction of the dip or the depth to which it is followed.
2. The owner of a mining claim located on the apex of a vein which enters on an end line and passes out of a side line is entitled, under U. S. Rev. Stat. § 2322, to so much of the strike of the vein on the dip extending beyond such side line as is comprehended between a vertical plane let fall into the earth through such end line extended and a parallel vertical plane let fall through the point of intersection of the apex and the side line.
3. The existence between two veins of such material or indications as a practical miner would follow with the expectation of finding ore does not establish such connection between them as entitles the owner of the older vein to the ore in the portion of the other vein lying within his location, but which in the absence of a connection between the two veins would belong to the owner of the other vein, by virtue of U. S. Rev. Stat. § 2322; but the connection to accomplish such result must be a continuous streak or body of ore or vein matter.
4. An instruction making the basis for estimating the value of ore extracted from a claim the market value of such ore on the dump after deducting the cost of mining and hoisting the same in effect allows a party liable the reasonable expense of treating the ore.
5. The existence of a fault in one vein cannot be proved by showing faults in other veins which are claimed to be a continuity of the vein in question, in the absence of a showing of a continuity in the fault.
6. The accidental absence of the attorney of a party when the verdict is received, not due to any order or action of the court or any conduct by the counsel or parties on the other side, is not cause for reversal.
7. A juror's affidavit impeaching his verdict in an equity case, which is merely advisory, is properly disregarded.

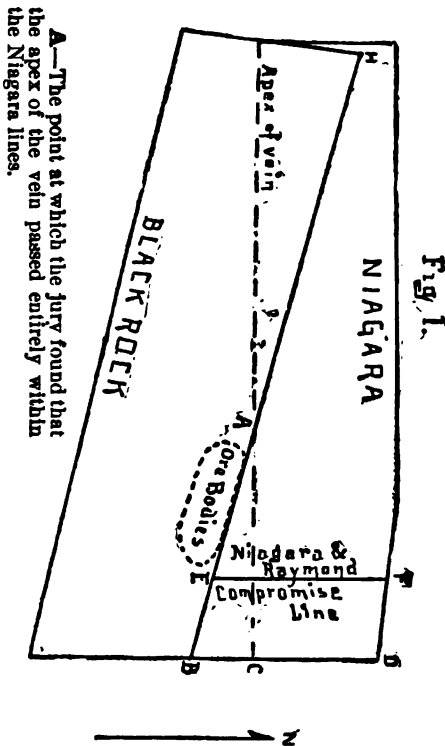
(November 11, 1895.)

APPEAL by defendants from a judgment of the District Court for Silver Bow County in favor of plaintiffs in an action brought to recover the value of certain mineral ore taken from a vein having its apex within the plaintiffs' mining location and the title to which was alleged to be in the plaintiffs. *Affirmed.*

NOTE.—The above case presents a point of great practical importance in mining law, as to which there is no decision of the Supreme Court of the United States that is exactly applicable. While the Montana court evidently disapproves of the doctrine
30 L. R. A.

Statement by De Witt, J.:

The respondents own an undivided two-thirds interest in the Niagara quartz lode mining claim. The defendant William A. Clark owns the other one third in said claim. The appellants own the Black Rock quartz lode mining claim. The surface relations of the two mining claims are indicated upon the annexed diagram, marked "Figure 1".



It will be more convenient in this statement and in the opinion to sometimes speak of the parties to this appeal as the "Black Rock" and the "Niagara," instead of using their names, or the terms "appellants" and "respondents."

The north side line of the Black Rock claim is the south side line of the Niagara claim. We do not purport to exactly indicate on the diagram the position of the apex of the vein as it traverses the two claims. The dotted line simply indicates the general course of the vein, and, as far as the purposes of this decision are concerned, is correct. The apex moves across the Black Rock claim from west to east, and crosses the boundary line between the two claims at a point marked A on the diagram, which is, as the jury found, 513 feet westerly

of the former court in the Amy Case, it is believed that the correctness of the present decision does not necessarily involve any disapproval of the doctrine of the Amy Case.

from the northeast corner of the Black Rock, which corner is marked B on the diagram. The east end line of the Niagara was originally at the place marked B D. In some controversy between the Niagara and the Raymond claim to the east a compromise was made by which the boundary between those two claims was placed at a point about 224 feet westerly from the original Niagara east end line. This was called the "compromise line," and would be at about the place as marked on the diagram E F. This, however, is not important in the present suit. The parallelism of the end lines of the Niagara was not disturbed by the Raymond compromise. The apex and strike of the vein, having crossed into the Niagara ground at the point marked A, continue easterly, and pass wholly out of the Niagara ground through the easterly end line thereof. It is immaterial whether that end line is the line B D or E F. The strike and apex pass through each of them. The vein dips to the south. The portion of the apex which is represented by the line A G is wholly within the Niagara surface lines. The portion of the vein below this part of the apex, in its downward course into the earth,—that is to say, on its dip to the south,—passes under the line H B, which is the north side line of the Black Rock, and the south side line of the Niagara. We call this line a side line at present simply for convenience, and not as a prestatement of our views as to whether it must be considered a side line or an end line. On this portion of the vein on the dip lying under the apex A G the ore was found (marked on the diagram "Ore Bodies") which was the subject of this action. The defendant the Black Rock owner entered upon this portion of the vein, and extracted the ore from the place as marked on the diagram. There was a contention in the case that these ore bodies were upon a vein other than that which apexed (if we may invent this verb) at A G; that is to say, upon another vein, the apex of which was on the Black Rock ground. But the findings were adverse to the Black Rock in this matter. We will not review that contention. For the purposes of this decision the ore bodies in question were upon the vein the apex of which is indicated by the line A G, which lies wholly within the Niagara surface lines. The plaintiffs, being the owners of an undivided two-thirds interest in the Niagara, brought this action against the defendants to recover the two-thirds value of the ores so taken from the place above described. Plaintiffs obtained judgment for \$27,242.54. The jury also found that the apex of the vein in controversy passed entirely within the lines of the Niagara lode at the point marked A. Judgment was to this effect, and for the amount of money named above. A motion for a new trial was denied. The Black Rock people appeal from the judgment and from the order denying the new trial.

Messrs. George Haldorn, Robinson & Stapleton, and Smith & Word for appellants.

Mr. John F. Forbis, for respondents:

Plaintiffs have the extralateral rights claimed by them under the facts in this case.

Last Chance Min. Co. v. Tyler Min. Co., 157 30 L. R. A.

U. S. 695, 89 L. ed. 864; *Del Monte Min. & M. Co. v. New York & L. C. Min. Co.* 66 Fed. Rep. 212; *Last Chance Min. Co. v. Tyler Min. Co.* 61 Fed. Rep. 557; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. Rep. 540.

The action of the court in striking out that portion of the instruction in regard to the method of determining the connection between veins which was eliminated, was highly proper.

Iron Silver Min. Co. v. Chasman, 116 U. S. 529, 39 L. ed. 712.

Defendants were as much trespassers as if they had not owned any interest in the property in question, and must account as any other trespasser.

Hazard v. Albro, 17 R. I. 181; *Almy v. Daniels*, 15 R. I. 312; *Fulmer's Appeal*, 123 Pa. 24.

There are different rules laid down for ascertaining the damages for ores or coal mined by a trespasser. In some cases the trespasser is not allowed for the costs of extraction, but the true rule and the one most favorable to defendants was set forth in the instructions.

Baker v. Wheeler, 8 Wend. 505, 24 Am. Dec. 77, note, *et seq.*; *McLean County Coal Co. v. Long*, 81 Ill. 359, 10 Min. Rep. 193; *Robertson v. Jones*, 71 Ill. 405, 10 Min. Rep. 190; *Re United Merthyr Collieries Co.* L. R. 15 Eq. 46, 10 Min. Rep. 153; *Illinois & St. L. R. Co. v. Ogle*, 82 Ill. 637, 25 Am. Rep. 842, 10 Min. Rep. 198; *Ege v. Kille*, 84 Pa. 333, 10 Min. Rep. 212; *Clowser v. Joplin Min. Co.* 4 Dill. 469, note, 10 Min. Rep. 222; *Trotter v. Maclean*, L. R. 13 Ch. Div. 574, 10 Min. Rep. 263; *Austin v. Huntsville Coal & M. Co.* 73 Mo. 535, 37 Am. Rep. 446, 9 Min. Rep. 115.

The law makes it the duty of the counsel to be present, and that whether the court is actually in session or in recess awaiting the verdict of a jury.

Strouger v. Sample, 44 Kan. 298; *Reilly v. Bader*, 46 Minn. 212; *Seaton v. Smith*, 45 Kan. 48; *Torque v. Carrillo*, 1 Ariz. 386; *Walker v. Dailey*, 87 Iowa, 375; *People v. Goldenson*, 76 Cal. 341; Code Civ. Proc. § 269.

What a travesty on law it would be to say that after leaving the jury room, and after falling into the hands of the opposite party and their counsel, a juror could come into court and impeach his own verdict.

Thompson & Merriam, Juries, § 441; Thompson, Trials, § 2613.

De Witt, J., delivered the opinion of the court:

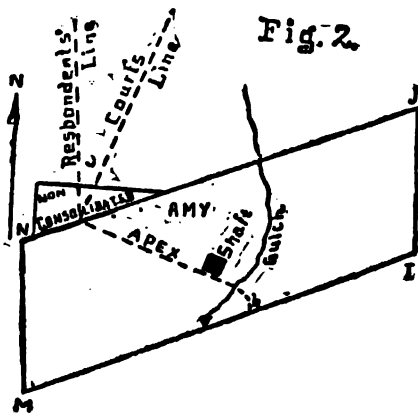
This case was tried in the district court after the decision of *King v. Amy & S. Consol. Min. Co.* 9 Mont. 543, and before the reversal of that decision on appeal to the United States Supreme Court (152 U. S. 322, 38 L. ed. 419). The case was tried upon the assumption that the law as attempted to be declared in 9 Mont. was correct. The district court instructed the jury upon this theory, and the judgment gave to the Niagara people the two-thirds value of the ore taken by the Black Rock east of the point where the apex of the vein passed entirely into the Niagara ground, namely, point A on the diagram. No exceptions to these instructions were preserved or specified so that they can now be reviewed. But since the trial of the case at

bar, and perfecting the appeal to this court, the United States Supreme Court has reversed our decision in the *Amy & Silversmith Case*. The Black Rock people argue that, although they are not now in a position to urge error in the instructions (that is to say, that which they now claim to be error by reason of the United States Supreme Court decision of the *Amy & Silversmith Case*), still they can raise the same point upon the ground that the pleadings do not support the judgment. Their argument to this effect is that the pleadings, alleging the facts as detailed in the statement above, do not warrant the judgment under the law as decided by the United States Supreme Court in the *Amy & Silversmith Case*. In other words, the Black Rock contends that under that decision, if the Niagara apex leaves the Niagara claim through a side line, as it does, the Niagara is limited, in following down the dip of the vein, to a perpendicular plane drawn downward through that side line,—the line H B on the diagram; whereas the district court did not so limit them, but held in its judgment that the Niagara could take the ore on the dip of the vein under the apex A G, and east of the point A, although such vein on its dip extended southward under the Black Rock north side line. That is to say, the district court gave judgment in accordance with the law of the *Amy & Silversmith Case*, in 9 Mont. which was declared not to be the law in the *Amy & Silversmith Case* in 152 U. S. We will concede to the Black Rock that this question is raised by the pleadings, and we shall proceed to determine whether the Niagara or the Black Rock owns the ore in dispute taken from the place marked "Ore Bodies" on the diagram.

We shall not renew the discussion of the cases upon this question decided by the United States Supreme Court prior to May 21, 1890, the date of our decision of the *Amy & Silversmith Case*. Our best construction of those decisions is found in our opinion in that case. We there met the problem which had for years engaged the earnest attention of lawyers who had to do with mining litigation,—i. e. the preservation of the intent of the mining statutes when they are applied to a location in which exploration has demonstrated that the apex and strike of the vein do not pass through both end lines of the location. We gave our best endeavor and research in that decision, and arrived at a result which we were willing to concede was not wholly in accord with the decisions of the United States Supreme Court upon that subject, but which we believed could, with a very little effort, be reconciled with those decisions, and which we were wholly satisfied was the only practicable working solution of the problem in all its phases, and which we were also wholly satisfied was fully within the intent of the United States mining laws. Even with the profound respect which we, in common with all courts, entertain for the decisions of the United States Supreme Court, we think that there is no impropriety in saying, and that it is due to ourselves to say, that, the longer we observe the daily operation of the mining laws in practical affairs, the more satisfied are we that our decision of the *Amy & Silversmith Case* was correct. We are strengthened in this opinion by the views of

other courts, to which we shall hereinafter refer. But the United States Supreme Court is the court of last resort upon this subject, and our opinions, as a rule of decision, must be abandoned if they are in conflict with the declarations of the superior tribunal. If that court had given no further utterance upon this subject since its decision of the *Amy & Silversmith Case*, we should feel that we must, however reluctantly, desert the principle which we sought to maintain in that case. But, as will be seen in the review of the cases below, that distinguished tribunal has given a hint that it is willing to reconsider the principle involved. Upon that hint we feel that we are justified in approaching the subject much as if it were *res integra*, and without subjecting ourselves to the criticism of judicial insubordination.

But to the subject in hand. As noted above, we shall not go to the decisions back of our *Amy & Silversmith* opinion. 9 Mont. 543. We are satisfied with that discussion of the subject, and the review of the authorities up to that date. We shall take up the subject as it has been developed since our decision in that case. The history of the discussion is found, chronologically, in the following cases: *King v. Amy & S. Consol. Min. Co.* (May 21, 1890) 9 Mont. 543; *Tyler Min. Co. v. Sweeney* (Jan. 16, 1898) 4 C. C. A. 329, 54 Fed. Rep. 284, 7 U. S. App. 463; *King v. Amy & S. Consol. Min. Co.* (March 5, 1894) 152 U. S. 223, 38 L. ed. 419; *Last Chance Min. Co. v. Tyler Min. Co.* (April 9, 1894) 9 C. C. A. 613, 61 Fed. Rep. 557; *Del Monte Min. & M. Co. v. New York & L. O. Min. Co.* (March 13, 1895) 66 Fed. Rep. 212; *Last Chances Min. Co. v. Tyler Min. Co.* (April 15, 1895) 157 U. S. 683, 39 L. ed. 859. The cases cited above in 4 C. C. A., 54 Fed. Rep., 7 U. S. App., 9 C. C. A., 61 Fed. Rep., and 157 U. S., are different appeals and discussions of the same case. In the *Amy & Silversmith Case* the apex of the vein crossed the claim as indicated in the diagram used in that opinion, and which is reproduced here, marked "Figure 2":



The vein dipped to the north. We held that the right of the Amy & Silversmith to follow the vein on the dip was bounded by a

perpendicular plane extending into the earth at the point where the apex crossed the Amy & Silversmith north sideline, the point marked e on the diagram, Fig. 2, and which plane was parallel to the end lines of the Amy & Silversmith claim, and extending north of the Amy & Silversmith north side line. We quoted section 2822, U. S. Rev. Stat., which is as follows: "The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all . . . veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." We then said: "As said by Mr. Justice Field (*Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 206, 80 L. ed. 101): 'This section appears sufficiently clear on its face. There is no patent or latent ambiguity in it. . . . The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein.' We may add to these words that further difficulties arise when we are obliged to apply the statute to facts not wholly within its contemplation. If a mining location be made regularly,—made so that the strike of the vein crosses the location from end line to end line, and at right angles to said end lines,—there is nothing in the statute to construe or interpret. *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 469, 25 L. ed. 259; *Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 205, 80 L. ed. 101; *Argentine Min. Co. v. Terrible Min. Co.* 123 U. S. 485, 80 L. ed. 1142. 'There is no patent or latent ambiguity.' But when veins or their strike cross the side lines, or a side line and end line, at all conceivable angles, difficulties confront the courts that can best be fully met by legislative aid. Until such aid is invoked, the courts must follow the statute and previous construction as closely as the varying facts permit. *Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 208, 80 L. ed. 102. The history of mining has proved that the law of May 10, 1872, and amendments thereto, do not afford clear, adequate, and simple solution for some of the practical conditions that arise in the developing of the mining industry. The case at bar is a notable instance. It is a first impression in this court, and all other appellate courts." After stating what we understood to be the meaning of the words "dip," "strike," etc., as used by miners and in the decisions, we further said: "The United States mineral law gives to the miner the whole of every vein the apex of which lies within his surface exterior boundaries, or which lies within perpendicular planes drawn downward indefinitely on the lines of those boundaries. The

miner may follow the dip . . . wherever it goes, provided he has the apex as a basis of operation, and that he does not cross the vertical planes of the end lines. The intent of the statute is to give the miner a section or block of the vein of a length on the strike which is equal to the length of the apex lying within the exterior vertical bounding planes of the location, and of a depth as far as he desires, or is able to work downward; and that at the most remote depth attained he shall have the same number of feet on the strike as he had at the apex. *Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 205, 80 L. ed. 101." We have always been of opinion that this is the keynote of the interpretation of section 2822, U. S. Rev. Stat., that is to say, if the miner has the apex in his location, he is to have the vein, and he has as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether that apex reaches the surface or is found beneath the same, within the planes of his exterior boundary lines extending downward perpendicularly. This, in our opinion, is what section 2822 says in plain language.

Continuing further in the *Amy & Silversmith Case*, we said: "It seems that such grant by the statute to the miner, in view of the geological facts and history of veins, and particularly their almost universal tendency to depart from a perpendicular in their course downward, was deemed to secure to him a more satisfactory title than he would obtain if he were compelled to locate a parallelogram on the surface of the earth, as under the Spanish mining law, and take all and only that portion of the solid contents of the earth included in a parallelepipedon formed by dropping vertical planes downward on the line of each side of such parallelogram; and the intent of the statutory grant of section 2822 is that the miner may follow his vein on the dip, but not on the strike, if it departs from the parallelepipedon indicated. Therefore, if the miner locates his claim regularly,—that is, as the statute contemplates that he will,—he has all that the statute intends to give him. See cases cited *supra*. If he 'will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences' (*Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 207, 80 L. ed. 102); that is, he takes less of the apex and strike than he would obtain by a regular location, and consequently less of the dip." We are still of opinion that the loss which a miner should suffer if he is obliged to make his location before he can trace the apex and strike of the vein for its whole distance, and thus makes his location irregularly, should be the loss of so much length of the vein on the strike as by his irregular location he has failed to observe the length on the apex. If this be the consequence which he is to suffer by reason of his irregular location, he loses simply that which he failed to locate, and he does not lose the vein of which he has located the apex. That he is to have the vein when he has the apex, we believe is the intent of the mining law. U. S. Rev. Stat. § 2822. We said further in the *Amy & Silversmith Case*: "But in order for the miner to make his location in ex-

act conformity with the intent of the law, he must know when he fixes his exterior boundaries, what the true strike of the vein is. If he knows this, he will locate so that the strike shall pass through the middle of each end line, leaving 300 feet of surface ground on each side of the vein. But the true strike is often ascertainable only after immense sums of money are expended in development. He has twenty days, under our statute, to determine this important matter, which may take years to fully demonstrate. If in this helpless condition the prospector commits an error of geological judgment, and upon such error he expends the toil of years, and that toil has wrought its reward, we are of the opinion that the statute should be so construed as will come the nearest to giving him that whole section or block of the vein which we have above indicated that it is the intent that he shall have, as is consistent with the amount of apex which he has happened to secure by his surface lines, and their planes extended downward." We then proceeded to review the contentions of counsel in the case, and to discuss, as we understood them, the three leading cases in the United States Supreme Court, namely: *Flagstaff Silver Min. Co. v. Tarbet (The Flagstaff Case)*, 98 U. S. 463, 25 L. ed. 253; *Iron Silver Min. Co. v. Elgin Min. & S. Co. (The Horseshoe Case)*, 118 U. S. 196, 30 L. ed. 98; *Argentine Min. Co. v. Terrible Min. Co.* 123 U. S. 478, 30 L. ed. 1140. We then offered the following solution of the problem, and decided the case upon the principle as found on page 575 of 9 Mont. as follows: "These three United States cases have compelled that court to endeavor to cast into the Procrustean bed of the statute individuals that strained the mould into which they were forced. But we believe that we may legitimately conclude from those cases that, in the facts now before us, the principle is that the north side line of the Amy terminates the strike of the vein, and that the dip must be controlled by the planes of the original end lines. The Amy people may follow their dip north of their north side line, but only as it lies between the planes of their end lines, as below considered. The object of parallelism in the end lines is that the locator may have his full section of the lode in its entire depth. But the determination of the strike of the Amy at a point on the side line deprives them of the dip northwest of that point, because the dip in that portion lies under the apex of the Non-Consolidated. The law intends that the plane of the end line shall operate as a boundary to the dip, and so operate at the point where the strike is ended. If the strike reached the original end line, as in a regular location, the bounding plane would there operate upon the dip. If the strike, by reason of its going out of a side line, falls short of reaching the original end-line plane, that plane must take effect where the strike in fact ends; that is, at a point on the side line (point e. Fig. 1), and, if it takes effect there, its parallelism must not be destroyed. We therefore have the bounding plane operating at the point where the apex leaves the north side line, and operating parallel to the east end line, and retaining its parallelism as originally marked on the ground. It is not a new line or plane, or one judicially

constructed. It is determined by the location lines on the surface. There is never any readjustment according to subsequent developments. The parallelism of the end-line planes is fixed by location, and never varies. The point of departure of the strike from the surface lines fixes the point where the end-line plane is to perform its functions, whether that departure be at an end line, as contemplated by the statute, or whether accident has fixed it at a point on a side line. Complications are soluble upon this theory. The intent of the statute seems to be secured." As noted in the *Amy & Silversmith Case*, the difficulties arise in applying the United States mining statutes to accidentally irregular locations; that is, locations where it is developed in time, and by explorations, that the apex and strike pass through the side lines, or a side line and an end line (as in the case at bar), or enter and pass out of the same side line. We essayed in that case a solution of this difficulty which could be applied to every irregularity, and which would secure absolute uniformity in all complications, and give to every mining location, as the statute intended and declared, the whole vein, in its whole depth, to the extent of the length of the apex which was located. We thought that we had accomplished that result. With due deference to those who have differed from us, we think so still.

The principle which we sought to maintain in the *Amy & Silversmith Case* found its first approval in an appellate court in *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 54 Fed. Rep. 284, 7 U. S. App. 463. In that case the United States circuit court of appeals, ninth circuit, discussed the extralateral rights of a location where the apex and strike passed through a side line and an end line. The situation differed from that of the *Amy & Silversmith Case*, as in that case the apex and strike passed through both side lines. But we understood that the circuit court of appeals approved the principle of our decision in the *Amy & Silversmith Case*, for the opinion by Judge Hawley, a veteran lawyer and judge in the mining regions, says: "Here the location of the Tyler was properly made in the form of a parallelogram along the course of the lode or vein. The lode extends from the northwesterly end line for a distance of nearly 1,100 feet within the side lines of the surface location, and then so changes its course as to cross the southerly side line into the Last Chance location. The learned justice who wrote the opinion in *The Horseshoe Case (Iron Silver Min. Co. v. Elgin Min. & S. Co. supra)*, when he said that the parallelism of the end lines 'is essential to the existence of any right in the locator or patentee to follow his vein outside of the vertical planes drawn through the side lines,' did not mean that it was essential to such right that the lode should extend in its length from one end line to the other of the location. If the lode in question, instead of extending into the Last Chance location, had abruptly broken off within the surface lines of the Tyler near the point where in fact it crossed the line, there could certainly be no question as to the right of the Tyler to follow the lode or vein in its downward course for its entire depth outside of the vertical planes drawn through the side

lines. The fact that it continued its course and crossed the side lines does not in any manner change this principle. In either case the locator is entitled to the same rights. In such cases the end lines are not necessarily those which are marked on the ground as such. An end line may be drawn at the point where the lode abruptly terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location. This, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute. Whenever, and in whatever manner, this point has been presented by any similar facts, the rulings of the courts have been substantially in accordance with the views we have expressed. *Golden Placer, G. & S. Min. Co. v. Cable Consol. G. & S. Min. Co.* 12 Nev. 818; *Doe v. Sanger*, 83 Cal. 208; *Kahn v. Old Teleg. Min. Co.* 2 Utah, 174; *King v. Amy & S. Consol. Min. Co.* 9 Mont. 548. In the case last cited the lode crossed the surface lines without reaching either end line as marked on the surface, and the court held that, where a lode or vein crosses the side line of a location, the strike is terminated by the plane of such side line, and the right to follow the vein on its dip is determined by a vertical plane, parallel to the end lines, drawn downward, and which takes effect at the point where the apex intersects the side line. The court, in its opinion, after reviewing the *Flagstaff Case*, 98 U. S. 463, 25 L. ed. 258; *The Argentine Case*, 123 U. S. 478, 30 L. ed. 1140, and the *Horseshoe Case*, 118 U. S. 208, 30 L. ed. 102,—and pointing out the differences existing between them and the *Amy Case*, and stating the various contentions of counsel, said: . . . The opinion of Judge Hawley then quotes the *Amy & Silversmith Case* (9 Mont.) as to the principle therein announced. That case went back for trial and appeared again in the circuit court of appeals as *Last Chance Min. Co. v. Tyler Min. Co.* (April 9, 1894) 9 C. C. A. 618, 61 Fed. Rep. 557, and in the opinion the court adhered to the principle of the *Amy & Silversmith Case*. In the meantime the *Amy & Silversmith Case* had been reversed by United States Supreme Court, March 4, 1894 (153 U. S. 225, 38 L. ed. 420). But that decision is not mentioned in the *Last Chance Case* (9 C. C. A. and 61 Fed. Rep.), and does not seem to have been considered by the circuit court of appeals. That court said: "The right of each party to follow the lode on its strike or true course lengthwise is terminated at the point where the lode crosses the side line of the Tyler and Last Chance locations: but each company would have the right to follow the lode, the top or apex of which is within its surface lines, on its dip, not upon its strike, upon a vertical plane drawn downward parallel to the end line, at the point where the strike of the lode ended; that is, at the point where the lode, in its lengthwise course, intersects the side lines of the claims. The Tyler would be entitled to all that portion of the lode that lies westerly of such vertical line drawn downward and the Last Chance would be entitled to all that portion of the lode easterly of said line."

As the United States *Amy & Silversmith* decision was not mentioned in 9 C. C. A. and 61 30 L. R. A.

Fed. Rep. although preceding it in time, we may treat the United States decision as being subsequent. In that case, after stating the facts and the contentions, the United States Supreme Court said: "Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location; and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines, extended downward vertically, therefore determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. The difficulty in the present case arises from the course of the vein or lode upon which the *Amy* location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact, but are end lines. Side lines, properly drawn, would run on each side of the course of the vein or lode distant not more than 300 feet from the middle of such vein. In the *Amy* claim the lines marked as side lines cross the course of the strike of the vein, and do not run parallel with it. They therefore constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But, as was said by this court in *Iron Silver Min. Co. v. Elgin Min. & S. Co.* 118 U. S. 196, 207, 30 L. ed. 98, 103. 'If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences.' The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights, as his imperfect location warrants, under the statute. It cannot relocate his claim, and make new side lines or end lines. Where it finds, as in this case, that what are called side lines are in fact end lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law. Acting upon this principle there is no lateral right to the holder of the *Amy* claim by which he can follow its vein into the Non-Consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. Even

then,' the court added, 'with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein, but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims.' Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines."

We understand that the United States Supreme Court not only reversed our judgment, but discarded as untenable the principle upon which we pronounced it. This decision was received with regret, not only by the bench and bar in the mining regions, but by both practical and scientific miners. The regret was greater in that the decision emanated from, as we said in the *Amy & Silvermith Case*, "Mr. Justice Field the judicial father of the mining law of the United States," a jurist who has illuminated this topic of the law by not only his profound learning, but by his practical experience in mining affairs. As an indication of the reluctance with which courts inferior to that of the United States Supreme Court have accepted the reversal of the principle of the *Amy & Silvermith Case*, we notice the case of *Del Monte Min. & M. Co. v. New York & L. C. Min. Co.* 66 Fed. Rep. 212. In that case the court had before it the conditions of an apex and strike passing through an end line and side line. Judge Hallett, District Judge, to whom courts and counsel in the mining regions are greatly indebted for his learning, which has been applied to this class of litigation, said: "If the strike of the lode in the New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be denied. As, however, it departs on its strike from the location on the east side, and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law deducible from several decisions of the supreme court that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end lines, whatever their position may be; and, if this proposition be accepted, the south end line and east side line, intersected by the outcrop of this lode, are not parallel to each other, as demanded by section 2320 of the Revised Statutes. This, however, has not been the interpretation of law in the supreme court, or in any court, so far as we are advised. It is true that in the

Flagstaff Case, 98 U. S. 463, 25 L. ed. 253, and recently in the *Amy & Silvermith Case*, 152 U. S. 223, 38 L. ed. 420, the supreme court declared that the side lines of a location shall be end lines whenever the lode, on its strike, crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location, and within its side lines a distance of 1,070 feet. It is conceded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstance that the location extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side line. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. *Iron Silver Min. Co. v. E'gin Min. & S. Co.* 118 U. S. 196, 30 L. ed. 98. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and, if there be magic in the word 'line,' it will be better not to use it. In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end lines by measuring the same distance from the south end line produced. In this proceeding there is no departure from the end lines of the New York location as fixed by the locator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end line of the location as required by the statute, and the circumstance that we are somewhat short of the north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location. Let it be assumed that upon a lode of the length of 1,000 feet (which is not an extraordinary occurrence) a location shall be made of the length of 1,500 feet, extending 250 feet in each direction beyond the ends of the lode. Would any one deny the right of the locator to follow the lode within his end lines, upon the ground that the lode did not come to either of such lines? I think not. The case is not different when the lode intersects one end line and not the other, but keeps within the location for a considerable distance. In that case, as in the accepted case of a lode traversing the location from end to end, the locator ought to be allowed to follow his lode into adjoining terri-

tory, so far as he may within his end lines, and so far as he holds the outcrop in his location. Upon this construction of the statute respondent is entitled to so much of the lode upon its dip as lies between the south compromise line and the point of divergence of the apex of the vein from the New York location." It is also true that in Judge Hallett's case the facts differed from the *Amy & Silversmith*, in that the apex crossed a side line and an end line, instead of two side lines, as in the *Amy & Silversmith Case*. But Judge Hallett applied the principle of the *Amy & Silversmith*, and he so applied it after, as we understand, the United States Supreme Court had repudiated it.

One month after Judge Hallett's decision—that is, on April 15, 1895—appeared the decision in the United States Supreme Court in *Last Chance Min. Co. v. Tyler Min. Co.*, the case which we have formerly encountered in 54 Fed. Rep., 4 C. C. A., 7 U. S. App., and 61 Fed. Rep., 9 C. C. A. See 157 U. S. 688, 89 L. ed. 859. The case was decided in the United States Supreme Court without it being necessary to treat the question of the apex and strike passing through an end line and a side line. But as to this matter the court said: "Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler claim the vein enters through an end and passes out through a side line, while by the amended location it passes in and out through end lines. Of course, if the latter is a valid location the owner of the claim would unquestionably have the right to follow the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this court in the cases heretofore cited that where the course of a vein is across instead of lengthwise of the location, the side lines become the end lines and the end the side lines; but there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip in whatever direction that may go, within the limits of some equitably created end lines? If the common-law rule as to real estate obtains in such a case, then, of course, on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical plane of any of its boundary lines; and even if the amended application was perfectly valid the question would arise whether the rights acquired under it related back to the date of the original location, or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the *Last Chance* had by years a prior location. However, in the view we have

taken of the other question, it is unnecessary to consider this." Mr. Justice Brewer wrote the opinion. There was no dissent. We assume that Mr. Justice Field concurred. The fact that the United States Supreme Court said in this case (with the justice concurring who wrote the *Amy & Silversmith* decision) that it had never given any decision as to what extraterritorial rights exist if a vein enters at an end line and passes out at a side line, we think is a sufficient warrant to us to reopen the discussion as to what principle of decision should apply in these regular locations.

We can see but two solutions of the difficulty presented in this case: One is to say that when the apex and strike cross a located side line, such side line becomes an end line, in accordance with what we understand to be the decision in the *Flagstaff Case* and in the *Amy & Silversmith Case* in the United States Supreme Court. The other is to apply the *Amy & Silversmith* doctrine as announced in 9 Mont. We will examine what seems to us to be the legitimate results of the first proposition. Turning again to the diagram, Fig. 1, the located east end line of the Niagara claim must still remain an end line. It was located as such, if that means anything; and the apex and strike pass through it, which fact, under any view, means everything. So this line is, and must remain, an end line. Then we have the south side line of the Niagara, also an end line, because the apex and strike pass through it. So we have two end lines not parallel to each other but at an angle to each other not far from a right angle. But the end lines must be parallel. The result is that the Niagara cannot follow its dip at all. But the statute says it may follow the dip. These difficulties do not come to us at all as a surprise. We clearly foresaw them, and pointed them out in the *Amy & Silversmith Case*, 9 Mont. 571. Thus we find that the Niagara claim, under these views, must be relegated to the common law. It owns downward inside of the perpendicular planes of its surface lines. But this result is not the intent of the law. U. S. Rev. Stat. § 2322. The intent is that the locator shall have the right to the vein throughout its entire depth if the apex lies within its surface liens, although the vein, on its dip downward, departs from the perpendicular so as to extend outside of the side lines. By calling this side line an end line the whole intent of the statute is destroyed, and we go back to the system of the Spanish law (9 Mont. 567), which was deserted in the adoption by Congress of the American mining laws. For example, again, in this case, reverse the direction of the dip, and assume that it goes north, then the Niagara people would take all of the vein between the downward planes of the end line and side line,—the lines E F and E H on the diagram. They would get a fan-shaped section of the vein, rapidly increasing in size with every foot downward. That is to say, such would be the result, unless we adhere to the common-law rule, and have no extralateral rights at all. The plain fact is that to call the side line an end line in this case leads us into consequences that totally upset the whole intent of the law. We cannot subscribe to any such doctrine." These conten-

plations are not at all new to us. We pointed out the difficulties and absurdities in the *Amy & Silversmith Case*, and we then hoped that they would not again threaten the disturbance of the rights intended to be given by the mining statutes. We feel now, as we did in the *Amy & Silversmith Case*, that we are not able to take the responsibility of any such destructive construction. And why, indeed, should a located side line be converted into an end line by a court? The locator never so intended it. He made the side line the long line, 1,500 feet in length, intending it to be generally parallel to the vein. The law never intended that such a side line should be an end line. If the side line is to become an end line and the end line a side line, then the court working this readjustment of the lines puts the side lines at a distance from the center of the lode much greater than 800 feet. What would be done with those lines and this extra surface taken in by them? Shall they be left so that they will include 1,000, or 1,500 feet in width when the law intended the locator should have 600 feet only, or will these judicially created side lines be drawn in, and thereby new side lines made by the court? But "the court cannot become a locator for a mining claimant." *Amy & Silversmith Case*, 152 U. S. 228, 38 L. ed. 421. The further we follow this doctrine into its details, the more untenable it appears. We shall abandon its pursuit, and leave its reconciliation to reason, law, and the intent of the statute, and practical application to others, who may be more skillful in making a reasonable construction.

As we leave this confusion, and turn to the other solution,—that of the *Amy & Silversmith Case* in 9 Mont.—difficulties disappear, and there is light upon the whole path. We can, then, do, as the United States Supreme Court said in its decision in the *Amy & Silversmith Case*, on page 228, 152 U. S. and p. 421, 38 L. ed.: "The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants, under the statute;" that is to say, we can give to the miner, or rather the law, as we construe it, gives to the miner, as much length of strike, no matter how deep he goes upon the dip, as he has length of apex; and he loses in strike and dip only what he has failed to get in apex. That is what the district court, in this case, following the *Amy & Silversmith Case*, 9 Mont. 543, accomplished. It gave to the Niagara the ore on the dip east of the point where the apex and strike crossed the south side line of the Niagara. This is what the circuit court of appeals did in *Tyler Min. Co. v. Sweeney*, 4 C. C. A. 329, 64 Fed. Rep. 284, 7 U. S. App. 463, and *Last Chance Min. Co. v. Tyler Min. Co.* 9 C. C. A. 618, 61 Fed. Rep. 557. This is what the circuit court of the district of Colorado did in *Del Monte Min. & M. Co. v. New York & L. C. Min. Co.* 66 Fed. Rep. 212. This is what we understand the United States Supreme Court suggested in *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, that it might do. The language of Judge Hawley and Judge Hallett in those decisions is very apt when they suggest that, if the apex and strike broke off abruptly at the side line

would any one contend that the dip could not be followed within the end lines? And why should it not also as well be followed if the strike, instead of physically ceasing to exist at all, simply ceased to further exist within the Niagara lines? We can think of no good reason which would allow the owner to follow the vein on the dip in the supposititious cases and deny him that right in the actual case. In the *Amy & Silversmith Case* we spoke of the end-line plane taking effect at the point where the strike in fact ended. By this use of the words "end line" perhaps we gave opportunity for the contention that we were moving an end line, and locating it in a place other than that fixed by the locator. We endeavored to make it clear that we were not moving an end line, but we were simply giving it effect at the only point where it could operate. But as Judge Hallett says, if there is any "magic" in the word "line," we will not use that word. Perhaps we can more effectively describe the principle for which we contend as follows: Put one side of a square on the located east end line of the Niagara (the line B D, Fig. 1), and let the other end of the square be long enough to reach the point where the strike and apex leave the Niagara ground (point A, diagram); then run this square up and down the east end line (line D B, diagram), and that line extended south, and run the square all over the perpendicular plane of this line; then the successive points which the long end of the square reaches will be the points beyond which, to the west, the Niagara people may not follow the vein on the dip, and beyond which, to the east, the Black Rock people may not come. Thus the Niagara is keeping upon the dip of the vein within its end lines, and it is not following the strike of the vein outside of any line. The principle might also be further illustrated by imagining a pair of draftsman's parallel rulers. One ruler is placed on the east end line of the Niagara (the line B D); its parallel is pushed out to the point where the apex crosses the side line (the point A), and set. The plane dropped perpendicularly from the westerly ruler would form the boundary between the Niagara and the Black Rock on the dip of the vein.

Of course we understand the difference between the doctrine of the United States Supreme Court, which commences with the *Flagstaff Case* and received its last treatment in the *Amy & Silversmith Case*, and our theory which we held in the *Amy & Silversmith Case*. The supreme court doctrine seems to be that the side lines which are marked as such on the ground, namely, the 1,500-foot lines as the side lines, and the 600-foot lines as the end lines, are not in fact the side lines and end lines; but what are the side lines and the end lines is to be determined by the subsequent demonstration of where the apex and strike cross the locator's lines. The trouble with the theory is that it leaves the determination of the boundaries to subsequent development, which may require years, and it calls that any end line which was never located as such, and it makes the side lines 600 feet long only when the statute says they may be 1,500 feet, and makes the end lines 1,500 feet long when the statute says they shall not be over 600, and it gives a surface

of more than 800 feet on each side of the center of the lode. We cannot be persuaded to think that this is the intent of the statute. As we noted in the *Amy & Silversmith Case*, the difficulties of this construction did not fully appear in the *Flagstaff* and *Argentine Cases*, where, as we understand, the strike and apex of the vein were practically at right angles to the length of the location. 9 Mont. 574. But the theory meets great difficulty when applied to veins which have a general course lengthwise of the location, and which happen to slip out of the location by a side line before the end line is reached.

Again, we fully understand that the situation in the case at bar and the *Tyler Case* and the *Del Monte Case* differs slightly from that of the *Amy & Silversmith Case*. In the *Amy & Silversmith* the vein passed through two side lines. In the case at bar and the other cases it passes through a side line and an end line. But we contend that the same reasoning applies to both situations; that is, that the miner shall have as much vein in length on the strike, at all depths to which he may go on the dip, as he has length of apex within his surface lines. We cannot too strongly emphasize our opinion, even at the expense of tiresome reiteration, that this is the intent of section 2822, 2 U. S. Rev. Stat. and the true interpretation of the decisions thereunder. We believe that this doctrine should be applied to both situations. On the other hand, if the other doctrine is to be applied to one situation, why not to both? For it does not seem to us consistent to say that the dip of the *Amy & Silversmith* must be cut off at their north side line, and that the Niagara may go beyond their south side line, simply because the Niagara vein, on its eastward course on the strike, goes out through an end line instead of a side line. But when we undertake to apply the United States *Flagstaff* and *Amy & Silversmith* doctrine to the case at bar, we find that the Niagara cannot follow its dip out of any of its lines, and it is cut down to the common-law rule of "*ad coelum et ad orcum*." What we contend for is a uniform construction of the law; a construction which will give the vein on the dip to every locator who has the apex in his location, and not give it to one who has the apex, and withhold it from another who as fully has the apex; that shall give it to the *Amy & Silversmith* and the Niagara as well. Let us do this, and make estates in mines uniform under the law. This seems to us more reasonable than to apply a construction which will give to one locator the estate which the law contemplates and deny it to another.

The United States Supreme Court in *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, observing the possibility or probability of being at some time obliged to apply its *Flagstaff* and *Amy & Silversmith* rule to the situation of a vein passing through a side line and an end line, seemed to shrink from the consequences of the doctrine (consequences which we pointed out in our opinion in the *Amy & Silversmith Case*, 9 Mont. at page 571), and stated that they had never decided what extraterritorial rights existed in such a situation. They also said: "May the court rely upon some equitable doctrine and give to

the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?" We propose now just such an equitable doctrine, the same one that we proposed in the *Amy & Silversmith Case*, and one wholly within the intent of section 2822, U. S. Rev. Stat. We have hereinbefore, and especially in the *Amy & Silversmith Case*, given the reasons for our belief that such a doctrine can, by a slight effort, be reconciled with the former decisions of the United States Supreme Court and that, as Judge Hawley said in the *Tyler Case*, 4 C. C. A. 329, 54 Fed. Rep. 292, 7 U. S. App. 463, "this, upon principle, justice, and authority, it seems to us, is the only reasonable construction that can be given to the statute." We now feel at liberty to follow our convictions and our belief that our view of the law is correct, by reason of the indication given by the United States Supreme Court (157 U. S. 685, 39 L. ed. 860) that they are willing to reconsider (or, as the court puts it, consider) this important principle in the construction of section 2822, U. S. Rev. Stat. We shall accordingly adhere to the principle of our *Amy & Silversmith* decision, and hold in this case that the judgment of the district court was within the law when it gave to the Niagara people the ore found on the dip of the Niagara vein south of their south side line, and east of the point where the apex and strike of the Niagara vein crossed the bounding side line between the Niagara and the Black Rock.

The appellants also rely upon some alleged errors in the instructions. It is contended by respondents that the errors in the instructions are not properly excepted to. Respondents cite cases from this court upon that subject. But we think the proper contention should have been as to whether the errors were specified on the motion for new trial. We are not satisfied that the specification was insufficient. We shall not, however, pass upon that question, as it has not been clearly or fully argued, and the question of practice is a delicate and troublesome one; but will proceed to an examination of the instructions. Our doing so cannot be a matter of complaint to the respondents, for our examination of the instructions has satisfied us that there is no error therein. We will briefly review them. Appellants complain that the court instructed the jury in reference to following a vein on its dip beneath the surface, but did not in this instruction inform the jury as to the matter of the parallel end lines. If the appellants mean that the court did not instruct as to the parallelism of the end lines as located, it is sufficient to reply that no contention was made upon this point. The parallelism of the located end lines is conceded, and the court, having adopted the *Amy & Silversmith* doctrine of this court, proceeded, of course, upon the theory that the original end lines continued to be the end lines.

The Black Rock people contended upon the trial that the "ore bodies" in question were upon a vein the apex of which was wholly within the Black Rock ground. This was called the "Stoner vein." The apex of the Stoner vein, it appears, was on the Black Rock ground. One of the great contentions of fact in the case was that the Stoner vein from its apex down to the ore bodies, was a continuous

vein. Upon this contention, as noted in the statement of the case, the Black Rock failed. It seems to have been established by the decision that the Stoner vein was not continuous to the "ore bodies." In instructing the jury upon this contention, the court gave them the following: "If you find from the evidence that what has been called in the evidence the 'Stoner vein' is a separate and distinct vein from what is called the 'Niagara Vein,' and that the apex of said Stoner vein is inside the boundaries of the Black Rock claim, and also find that said Stoner vein connects with said Niagara vein at some point below the surface of the ground, and that such connection is made by following a continuous streak or body of quartz or ore, or by passing through vein matter as defined in these instructions, *or by following such material or indications as a practical miner would follow with the expectations of finding ore*, then, in such case, defendants are entitled to and are the owners of all quartz, ore, mineral-bearing rock contained in such vein below the said point of intersection, and plaintiff cannot recover therefor; it being conceded that the Black Rock lode vein owned by defendants is older and was located and patented prior to the time when the Niagara claim was located or patented." This instruction as we have just quoted it was that submitted. The court, in giving it, struck out the portion which is in italics. Appellants complain of error in striking out that portion. We think in this the court was correct. The question was a geological one,—that is, whether the Stoner vein, in its downward course, connected with the Niagara,—and the court instructed how such connection would be made; that is, by following a continuous streak or body of quartz or ore, or by passing through vein matter, as defined in the instructions. This was a question of geology and of facts in nature. It would have left it to the jury entirely too indefinitely to have told them that they could find a continuous body of ore by following such indications as a practical miner would follow with the expectation of finding ore. We do not think that this is the method by which geological facts can be established. The application of such language as this which was stricken out of the instruction must not be confused with the use of similar language in reference to finding ore sufficient to support a location of a mine. When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work (*Shreve v. Copper Bell Min. Co.* 11 Mont. 309, and cases therein reviewed), it is a very different question from telling the jury that the geological fact of the continuity of a vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity.

Objection is made to instruction No. 15, in that, as it is contended by counsel, the court assumed that the respondents had established a right to recover. But the court did not make this assumption. The instruction opens with the following language: "Plaintiffs having the burden of proof, they must establish the

material allegations of their complaint by a preponderance of evidence."

Another instruction objected to by appellants is as follows: "In estimating the value of the ore extracted from the Niagara claim you will take as a basis therefor the market value of such ores on the dump of the claim after deducting the cost of mining and hoisting the same." The objection which appellant makes to this instruction, as he states it in his brief, is that he was not a trespasser, and was entitled to his actual expenses in extracting and treating the ore, provided the expenses are reasonable, and as low as the work could be done. He cites us to a number of cases involving questions of accounting between cotenants when one tenant has made necessary improvements on premises, or has extracted ore therefrom. We are of opinion that the instruction places the appellant upon precisely the ground which he himself claims. The court says that the basis of computation shall be the market value of the ore on the dump after deducting the cost of mining and hoisting the same. By the instruction the appellant is given credit for the cost of mining and hoisting, just as he claims should be. Furthermore, we think that the instruction, by its only reasonable construction, gives the appellant the expense of smelting and reducing the ore. The court says that the basis shall be the market value of the ore on the dump. What is market value? It is certainly that price for which the ore could reasonably be sold on the market. That market value would, in the mind of a buyer, be necessarily determined by deducting the cost of reducing the ore; that is to say, if a purchaser compute what he would give for the ore he would figure the value of the same on the dump, and then he would deduct from that value the cost of reducing the ore to bullion, and, having deducted that cost, he would make a bid for the ore, and this would constitute the market value. No one could possibly contend that the market value of crude ore was the value of fine silver in such ore. On the other hand, the market value would be the value of fine silver, less the expense of getting such silver out of the ore. We are satisfied that the instruction was in fact precisely what the appellants claim it should be.

Appellants object to the refusal of the court to give the following instruction: "The jury are instructed that if they believe from the evidence that the side lines of the Niagara location are practically perpendicular to the vein, then the side lines of said location become the end lines, and the plaintiffs cannot claim the dip beyond the side lines." But there was no evidence whatever in the case, and no contention to support any such instruction. The side lines of the Niagara not only are not practically perpendicular to the vein, but they are practically not far from parallel to the same. There were no facts in the case to warrant the giving of such an instruction.

Appellants also urge error in the exclusion of certain testimony of a witness—William E. Hall—offered to be introduced. Mr. Hall was a practical miner. He testified to what is known as the "Rainbow lode" in the Butte district. He said that it was his opinion that

the vein on the Black Rock was a part of or an extension of the Rainbow lode. He had examined the Black Rock mine. He saw a fault in that mine. Appellants then offered to prove by Mr. Hall that he had worked five claims on the Rainbow lode, and that the faults which he had found on the Black Rock are characteristic of the Rainbow vein. The testimony was objected to, the respondents stating that, if the appellants intended to prove that this fault in the Black Rock extends to the Alice mine, with which mine Mr. Hall was familiar, they would not object. Appellants stated that they did not intend to prove this. The court sustained the objection, remarking, "If it is for the purpose of attempting to show a condition of affairs here (that is, in the Black Rock) by comparison of what exists in the Alice, or in any other ground outside, unless it is shown that there is a continuity between the conditions which exist there and the conditions found in this ground," the evidence will not be admitted. The objection was sustained. We are of opinion that the learned judge of the district court stated the reasons for excluding the testimony as completely as we could set them forth. The subject under consideration in Mr. Hall's testimony was a fault in the Black Rock vein. One certainly could not prove the existence of a fault in one vein by showing that there were other and disconnected faults in another vein, which the witness claimed was a continuity of the vein under consideration, without showing any continuity in the fault.

Again, appellants contend that the judgment should be reversed because the appellants' counsel were not present when the verdict was rendered, and thus had no opportunity to poll the jury. Appellants' counsel had made arrangements with the bailiff that when the jury agreed upon a verdict, he, the bailiff, should call counsel. This was a matter wholly out of the court, and had no place in the proceedings in the court. It appears that the jury came in at a time when all the counsel were absent. The bailiff omitted to send for appellants' counsel. The counsel made the bailiff his agent for this purpose, and, if such agent omitted to do that which he had agreed to do, we are not prepared to reverse this case for that reason. When it is the fact that counsel had the privilege of being in the court, if he wished, when the verdict was received, and his accidental absence at that time was not owing to any order or any action of the court, or any conduct by the counsel or parties on the other side, we shall not reverse this judgment for any such reason.

Another ground set up for the granting of a new trial is the alleged misconduct by Juror Hess. Hess makes an affidavit that he was ill, and that he agreed to the verdict in order to get discharged from service. But this juror never made any complaint to the court of his illness. When the jury came in and rendered its verdict, he said nothing to the court, and there was no intimation that he was ill, or needed any medical attendance. His alleged illness, and thereby his alleged coercion into the verdict, never appeared until after his discharge and his making an affidavit for the benefit of the appellants. The case was an

equity one, the findings were advisory, and the district court very properly disregarded this juror's affidavit given to impeach his own verdict. *Gordon v. Trevarthan*, 18 Mont. 387. It is also attempted to be shown in Juror Hess's affidavit that the bailiff in charge of the jury was guilty of misconduct. The story that Juror Hess tells about the conduct of the bailiff bears upon its face nearly all the appearances of absurdity. Perhaps the district court would have been perfectly justified in disbelieving Hess's statements in regard to the bailiff without any contradiction, but the affidavit was contradicted in many respects. The district court was perfectly justified in paying no attention to the showing attempted to be made by the Hess affidavit.

Having reviewed all the questions raised in this case, it is ordered that the judgment and the order denying a new trial be affirmed.

Pemberton, Ch. J., and Hunt, J., concur.

Affirmed in 43 L. ed. 87.

James H. PROSSER, *Recept.*

MONTANA CENTRAL RAILWAY COMPANY, *Appl.*

(.....Mont.....)

1. The contributory negligence of a brakeman and switchman in mounting a flat car coming toward him by grasping a brake staff which was loose and bent, when he did not know of its defects, is a question for the jury.
2. A switchman and brakeman who grasps a brake staff on the front of a flat car as it approaches him, for the purpose of mounting the car as his duties required him to do and in the manner that he was expected to mount, although the staff was loose in its socket and was bent but appeared to him to be straight as the bend was directly away from him, is not as matter of law guilty of contributory negligence.
3. Allowing a brake staff to remain loose in its socket and to be bent at an angle of 80 degrees from the perpendicular, when it is used by brakemen and switchmen for the purpose of mounting a flat car used in front of a road engine for switching purposes, is negligence on the part of a railroad company.
4. Evidence of the usual and customary way of mounting flat cars in front of a road engine when used in switching, offered to disprove contributory negligence, is not inadmissible on the ground that it is an attempt to excuse negligence by usage or custom, where it does not appear that the act in question was positively negligent.
5. A requested instruction that the jury may render a general verdict or a special one is properly refused in the absence

NOTE.—As it appears in the above case that the brakeman was acting as the necessities of the case required and as he was expected to act, the case is in some respects analogous to those in which the employee acts in reliance upon orders of his superior, as to which see note to *Orman v. Mannix* (Colo.) 17 L. R. A. 602.

of a request to submit any special findings upon any branch of the case.

6. **Testimony that flat cars were placed before a locomotive for the purpose of allowing brakemen and switchmen to mount upon the brake beam of a car by grasping the brake staff is not incompetent as an opinion of the witness or as a statement of fact, when made by a witness who is cognizant and observant of the conduct of the business.**

7. **An improper or insufficient modification of an instruction is not ground for a reversal if on the facts and evidence in the case it was not misleading.**

8. **The burden of proof as to contributory negligence is on the defense.**

(December 21, 1895.)

A PPEAL by defendant from a judgment of the District Court for Cascade County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Arthur J. Shores, for appellant:

If, in the discharge of a dangerous duty, an employee voluntarily places himself in a dangerous position unnecessarily when there are other places that are safe or safer that he could have chosen, and is injured, he cannot recover.

Union P. R. Co. v. Estes, 87 Kan. 715; *Cunningham v. Chicago, M. & St. P. R. Co.* 17 Fed. Rep. 882; *Dowell v. Vicksburg & M. R. Co.* 61 Miss. 518; *Roul v. East Tennessee, V. & G. R. Co.* 85 Ga. 197.

The servant is bound to see for himself such risks and hazards as are patent to observation, and is bound to exercise his own skill and judgment in a measure, and cannot blindly rely upon the care and skill of his master.

3 Wood, Railway Law, p. 1456.

The act of the plaintiff could not be excused by showing that under similar conditions other brakemen are in the habit of taking the same chances of injury.

Metropolitan Street R. Co. v. Johnson, 91 Ga. 466 (1893); *Southern Kansas R. Co. v. Robbins*, 48 Kan. 145 (1890); *Mayfield v. Savannah, G. & N. A. R. Co.* 87 Ga. 374 (1891); *Larson v. Ring*, 48 Minn. 88 (1890).

An established usage or custom among men engaged in the same line of employment cannot justify or excuse the commission of an act negligent in itself.

Larson v. Ring, *supra*; *Ferguson v. Central Iowa R. Co.* 58 Iowa. 298.

The verdict is against law, for the reason that the jury disregarded the instructions of the court and declined to apply them to the evidence.

Emerson v. Santa Clara County, 40 Cal. 543; *Karr v. Parks*, 44 Cal. 47; *Sweeney v. Central P. R. Co.* 57 Cal. 15; *Aguirre v. Alexander*, 58 Cal. 30; *Crane v. Chicago & N. W. R. Co.* 74 Iowa, 830.

When one sues to recover damages for a negligent injury the gravamen of his complaint is that he has been damaged by the wrongful and negligent act of the defendant, without having contributed thereto by his own negligent conduct. The absence of contributory negligence is therefore a part of 30 L. R. A.

his case, and it is quite proper to say that he should show that he acted with due care.

Teipel v. Hilsendegen, 44 Mich. 461; *Beach, Contrib. Neg.* p. 432; *Missouri P. R. Co. v. Foreman*, 73 Tex. 811 (1892); *North Birmingham Street R. Co. v. Calderwood*, 89 Ala. 247.

Messrs. Largent & Huntben, for respondent:

In order to amount to contributory negligence the plaintiff's act must be the proximate cause of the injury, if not that defense will not lie.

Beach, Contrib. Neg. 2d ed. p. 28. §§ 24, 25.

It cannot be said that the act of the plaintiff was the proximate cause of the injury received.

Galveston, H. & S. A. R. Co. v. Templeton, (Tex.) 25 S. W. 187; *Eppendorf v. Brooklyn City & N. R. Co.* 69 N. Y. 195, 25 Am. Rep. 171; *Morrison v. Erie R. Co.* 58 N. Y. 802; *Wendell v. New York C. & H. R. R. Co.* 91 N. Y. 420; *Filer v. New York C. R. Co.* 49 N. Y. 49, 10 Am. Rep. 827; *Thurber v. Harlem Bridge M. & F. R. Co.* 60 N. Y. 331; *Northwestern P. R. Co. v. Egeland*, 56 Fed. Rep. 200; *New York P. & N. R. Co. v. Coulbourn*, 69 Md. 360, 1 L. R. A. 541; *Coates v. Boston & M. Railroad*, 153 Mass. 297, 10 L. R. A. 769; *Lowe v. Chicago, St. P. M. & O. R. Co.* 89 Iowa, 420.

Plaintiff had the right to assume that the staff was in proper condition and to act accordingly.

Goodrich v. New York C. & H. R. R. Co. 116 N. Y. 398, 5 L. R. A. 752; *Louisville, N. A. & C. R. Co. v. Buck*, 116 Ind. 566, 2 L. R. A. 520; *Beach, Contrib. Neg.* 2d ed. § 64, p. 90; *Thompson, Trials*, p. 1227; *Fernandes v. Sacramento City R. Co.* 52 Cal. 50; *Buswell, Personal Injuries*, § 93, p. 129, cases cited, and § 94, p. 131.

There were no special questions submitted to have the jury pass upon. And the court may give such special interrogatories or not as he sees fit.

American Co. v. Bradford, 27 Cal. 865; *Thompson v. Gregor*, 11 Colo. 534; *Swift v. Mulkey*, 14 Or. 65.

DeWitt, J., delivered the opinion of the court:

This action was brought by plaintiff to recover damages for injuries received by him when in the employ of defendant as a brakeman and switchman. The plaintiff was engaged in switching cars at or near the station of Nelhart, on the defendant's railway. The engine used on this occasion was a road engine. The distinction between a road engine and a switch engine is this: The road engine has a pilot in front. A yard or switch engine has a footboard, both front and rear, upon which the brakemen and switchmen step and stand while switching cars. The engine in this case had been used on the work ordinarily performed by a yard or switch engine. It had no footboards in front or rear, and therefore no convenient or safe place for the switchmen to mount and ride while engaged in their duties. Furthermore, in making up trains and switching cars, it was inconvenient to use a road engine, for the reason that the cars would have to be attached to the engine by a pilot bar,

which is too heavy for convenient use. To convert the road engine to the use of a switch engine, two flat cars were placed in front of the engine. The second flat car from the engine was so placed that the braking apparatus was at the end furthest from the engine. It was equipped with a double connected brake and brake staff. The purpose of placing these flat cars as they were was to enable brakemen or switchmen to mount the brake beam and hold by the staff, in moving about the yard while switching cars. The engine and these cars were moving down the track, and crossed a switch. Having crossed the switch, it was the duty of the plaintiff to throw the switch to let the train in on another track. As the last car passed over the switch, the engineer reversed his engine. The plaintiff threw the switch, and stepped into the middle of the track. The car approached him at the rate of 2 or 3 miles an hour. He stepped carefully upon the brake beam, and took hold of the brake staff carefully with both hands. The staff was loose in its socket, and was bent at an angle of about 30 degrees from the perpendicular. It bent away from the plaintiff, as he stood. He testified that for this reason it appeared straight to him, and he could not tell that it was bent, and that he did not see whether the brake wheel was tipped from a horizontal. Having carefully and firmly grasped the staff, it turned in his hands, swung around towards him, and caused him to lose his hold and fall under the trucks. The jury awarded him \$2,500, which is not claimed by defendant to be excessive, if there is any liability. It appears further that, although the engine had already started when plaintiff threw the switch, he signaled the engineer to come on. He said that, at the rate the train was approaching, he could have gotten off the track if he had seen the defective condition of the brake staff at a distance of 6 or 10 feet. He did not see the defective condition, for the reason above mentioned. He had a right to signal the engineer to stop, if there was occasion to stop in the performance of the business in which the train was engaged. There were no means provided for mounting the car on the side. It was also impossible or dangerous to mount from the side, owing to the roadbed being washed out and depressed. He was obliged to get upon the train and ride in order to be at a point about 340 feet distant, where there was another car to be coupled. He could not have walked to that point, while the train was moving to it, and be there in time to make the coupling. These facts appeared by the testimony of plaintiff and two other witnesses. These two flat cars were equipped with air brakes, and while plaintiff was employed at this place he did not see the hand brakes used for braking the cars. These facts being shown, the defendant moved for nonsuit, upon the ground that no negligence had been shown on the part of the defendant, and that plaintiff appeared to be guilty of contributory negligence.

As to proof of negligence or contributory negligence sufficient to go to the jury, the writer of this opinion said in *Wall v. Helena Street R. Co.* 12 Mont. 61, as follows: "I am fully aware that negligence of the defendant or contributory negligence of the plaintiff is a

matter for the jury, unless the evidence is such as to leave the matter clear and undisputed to persons of fair and sound minds. It is needless to cite authorities. Their name is legion. They are collected in the citations above made. I find their tenor to be that, if the question of negligence or contributory negligence is a fairly disputed question of fact, it must be resolved by the jury, but that if the evidence is perfectly clear the matter is for the court; and by 'perfectly clear,' the authorities say, is meant, not perfectly clear in the view of the particular court or persons composing the court which is reviewing the matter, but rather in the judgment of reasonable men of sound minds. That is, if different conclusions might be drawn by different men of fair, sound minds, then the matter must go to the jury; but if only one conclusion can be reached by men of fair, sound minds, the determination is for the court. This seems to be a settled doctrine, and with it I fully concur. But is it not, practically, somewhat illusive? For the court must determine what would be the judgment of men of fair, sound minds, and to arrive at that determination, the court must use its own sense and knowledge and judgment. And as long as courts are composed of finite men, with minds not all cast in the same mold, we cannot but expect some diversity of views in the application of the doctrine to particular facts. This may account for the confusion in the reported cases, and the fact that decisions may be produced, sustaining either side of a contention of this nature which is at all close." In the case before us we are perfectly satisfied that there was a sufficient showing of negligence on the part of the defendant to go to the jury. It was not perfectly clear that there was no negligence by defendant. The brake beam and brake staff being used for the purpose of mounting the car by the brakemen and switchmen, we do not hesitate to say that, to allow the apparatus to remain in the condition it was, was a showing of negligence sufficient to go to the jury.

The next question upon the decision of the court in denying the nonsuit is, Was it perfectly clear that plaintiff was guilty of contributory negligence, so that that question should have been taken from the jury, and the court grant a nonsuit? We do not think that this was, by any means, perfectly clear. The plaintiff mounted the car with the utmost care. He mounted it just as it was intended he should. The cars were so arranged for this purpose. This was the only means by which he could mount and ride on the car in order to arrive at the car to be coupled in time to make the coupling when the train reached there. The facts in this case differ from those in *Cunningham v. Chicago, M. & St. P. R. Co.* 17 Fed. Rep. 882, in which case Mr. Justice Miller used such strong language in granting a new trial, and in which case the learned justice said that this was not only a case of clear negligence on the part of the deceased, but a case of stupid negligence on his part. We are scarcely prepared to fully indorse the remarks in that case, even upon the facts which there existed. But the distinction between the facts in that case and this is that here, so far as the plaintiff could reasonably be expected to see, the apparatus of the car was

in a proper condition for him to make a safe mount. In the *Cunningham Case* the deceased undertook to mount the footboard of a switch engine from which the hand railing had been torn away the night before. The case is not fully stated in the report, but, as far as it appears, it seems that the deceased could, by looking at the rear of the tank, have very readily perceived that the hand rail was missing. In this case, plaintiff could not see that the brake staff was bent, because it was bent directly away from him, and, so far as he could see, it might readily appear to be straight. And, seeing an apparently straight brake staff, it does not appear that he should also have looked at the brake wheel, to observe that it was tipped, for the brake wheel might easily have been tipped from causes other than the bending of the staff. Taking the facts altogether, we are not at all satisfied that contributory negligence was so clearly shown that the court should have removed that subject from the consideration of the jury, and ordered a nonsuit. We are therefore of opinion that in this respect there was no error committed by the court.

The treatment thus far brings us logically to the next assignment of error made by the appellant. We have discussed the question of nonsuit upon the ground, partly, that it was in evidence that the arrangement of the locomotive and cars shown was for the purpose of allowing the brakemen and switchmen to mount upon the brake beam by grasping the brake staff. There was an objection, however, to the introduction of evidence showing that this arrangement of the cars was made for this purpose. The plaintiff and two other competent witnesses testified that the cars were so arranged in order that employees might mount when moving, in the manner attempted by the plaintiff. The objection to this testimony was that it was an opinion of the witnesses that this arrangement was made for such purposes. The court admitted the testimony over the objection. We think this was not error. The witnesses did not give this testimony as an opinion. They, being employed in the business, and being cognizant and observant of the conduct of the business, stated, from this knowledge and observation, that as a fact the cars were arranged as described for the purposes mentioned. We think that their testimony was the statement of a fact which came under their observation. If they were mistaken, or if their testimony was not true, it could have been taken for simply what it was worth, and rebutted by testimony on behalf of defendant. But this testimony was not denied by the defendant.

The next question raised by appellant is its exception to the allowance of certain testimony. It may be stated as he puts it in his own brief, as follows:

Q. Mr. Ennis, the testimony in this case shows that there were two flat cars, with double connected brakes, with brake staff and brake beam on the further end of the second car from the engine, and this was a road engine; that this engine and the cars had passed out of the side track where the switch had been thrown by the plaintiff, and the engine and cars were going on up to another track,

about 840 feet, to make a head end coupling with other flat cars, and that it was necessary for the plaintiff to be at the cars to make the coupling; that the engine and cars were approaching the plaintiff at the rate of about 8 miles an hour; that there were no hand holds, stirrups, or jaw straps, or other means of mounting the approaching cars from the sides; that these flat cars had double connected brakes on the end nearest the plaintiff; were attached to the engine for the purpose, among others, of allowing the brakeman to step upon the brake beam, and take hold of the brake staff and mount the car. It appears, also, from the evidence, that on the west side from the track upon which the plaintiff stood the embankment was low, and depressed from 2 to 3 feet below the track, the ties stuck out over the embankment, large rocks and bowlders were lying along the track, and that the east side of the track from where the plaintiff stood, the ground was low and depressed, and another track, known as the 'Main Track,' came into this side track where the plaintiff stood, and on which this train was running. The evidence further shows that the plaintiff had no right to stop the train for the sole purpose of mounting the car, and that the engineer should obey the plaintiff's signals. You may state, from your experience as a brakeman, what is the usual and customary way of mounting flat cars by brakemen experienced in the business, under those circumstances? (Defendant objects to the question upon the ground that the question assumes a state and condition of affairs not existing at the time the plaintiff received his injuries. Does not truly state the evidence, in matters material to be considered, if the question is to be answered at all. That it misdescribes the conditions of the car the plaintiff attempted to mount, and fails to state its condition in important particulars disclosed by the evidence. The question assumes that there was a necessity for mounting the car while in motion. The question is further objected to upon the ground that the evidence is not relevant or material; upon the further ground that it is incompetent as proof of the usage or custom among brakemen and men employed as the plaintiff was employed, and cannot excuse the plaintiff's conduct as disclosed by his own evidence, such conduct being negligent as a matter of law.)

We will examine the objections to the question as they were made. An examination of the record satisfies us that it is not the fact that the question did not truly state the evidence on matters material to be considered. The question gave a very fair statement of the facts. Furthermore, the objection in itself is open to criticism, in that it did not state wherein the question was defective, or wherein it did not state the facts in the case as a basis for the hypothetical question. Appellant's counsel elaborately argues the question that testimony as to how persons other than the plaintiff performed acts similar to that performed by the plaintiff is incompetent, and that proof that other persons did negligent acts under the same circumstances is not evidence to excuse the doing of a negligent act by the plaintiff. But the competency of evidence to

show acts of carelessness by other persons is not the question here involved. From what we have said as to denying the motion for a nonsuit, it is apparent that the conduct of the plaintiff was not *per se* negligence. He carefully mounted the car in the way provided for him to mount in order to perform his duties. The question was not as to what other persons did in a careless manner. The question hypothetically stated the facts, and then asked the witness to state, from his experience as a brakeman, what was the usual and customary way of mounting flat cars, under these circumstances, by brakemen experienced in the business. Therefore the question involved what an experienced person would do, not what other persons generally did, or what careless persons did. We think that the word "experienced" is used here much in the sense of "prudent;" and the question, in effect, was put to a person experienced in the business, as to what experienced or prudent persons did under the circumstances. The matter of the competency of the question comes to this: Is it competent to prove what experienced or prudent persons do under the existing circumstances? We will concede that it is not competent, in endeavoring to excuse a negligent act, to show that there is a usage or custom by others, to perform said negligent act. 27 Am. & Eng. Enc. Law, pp. 889 *et seq.* But, when it does not appear that the act is positively negligent, we are of opinion that it is competent to show the usage or custom of competent and prudent persons in performing the act. In the case at bar it did not appear that the act of plaintiff was negligence *per se*. He carefully performed his duties with the means supplied him for their performance, and we think it was competent to show, under those circumstances, that persons experienced in the performance of the same act, under the same circumstances, performed it as did the plaintiff.

It is said in *Miller v. Illinois C. R. Co.* 89 Iowa, 567: "The plaintiff introduced a witness who testified that it was usual and customary for brakemen, in going over the tender, to step on the lid of the manhole. We do not understand counsel to object to this line of evidence. It was surely proper for plaintiff to show that he was in the line of his duty when he received the injury, and that he pursued the course usually adopted by men in that employment under similar circumstances. *Jeffrey v. K. & D. M. R. Co.* 56 Iowa, 546; *Whitsett v. Chicago, R. I. & P. R. Co.* 67 Iowa, 150. The objection of the defendant is that the witness was allowed to state what he would do under the same circumstances, and what was considered a safe course to pursue. We need not set out the questions and answers to which objection is made. When the whole testimony of the witness is considered, the objections do not appear to be well taken. The questions and answers show that the witness did not give his own opinion of the proper course to pursue."

As in the Iowa case, so in the case at bar, the witness did not give an opinion as to what he would do, but as to what experienced persons do. In *Larson v. Ring*, 48 Minn. 88, there was a question as to negligence of con-

tractors in stretching a guy from the top of a derrick across the street. The supreme court said: "The court erred in permitting defendants to show at what height or distance above the public ways it was usual for contractors to stretch or suspend guys and ropes." The court, in speaking further of usages and customs, said: "It would depend largely, perhaps, on whether there had been adopted and used a way or means of fastening which time, usage, and long experience had demonstrated to be reasonably safe." It was upon this idea that the district court acted in admitting the testimony complained of. He did not admit testimony as to other persons doing careless acts, but, on the contrary, testimony as to what experience had demonstrated to be reasonably safe.

We find the following in *Lawson on Usages and Customs* (page 318): "Judge Story, in stating the degrees of negligence, and the measure of diligence in different relations, says: 'Indeed, what is common or ordinary diligence is more a matter of fact than of law. And in every community it must be judged of by the actual state of society, the habits of business, the general usages of life, and the dangers as well as the institutions peculiar to the age; so that, although it may not be possible to lay down any very exact rule applicable to all times and all circumstances, yet that may be said to be common or ordinary diligence, in the sense of the law, which men of common prudence generally exercise about their own affairs in the age and country in which they live.'" Further in the same volume, we find the following: "In *Vaughan v. Menlove*, 3 Bing. N. C. 468, Vaughan, J., said, speaking of the evidence of negligence: 'The conduct of a prudent man has always been the criterion for the jury in such cases; but it is by no means confined to them.'" See also, by the same author, section 171, p. 324. See also 27 Am. & Eng. Enc. Law, p. 902, with a large collection of cases.

We are satisfied that, under the circumstances of the case at bar, it was not error to admit this testimony.

The next error assigned by appellant is the modification of an instruction which it offered. The instruction offered was as follows: "An established usage or custom among men engaged in the same employment cannot justify or excuse an act negligent in itself." There does not seem to be an objection to this instruction as a matter of law, but, as noted in the treatment of the motion for a nonsuit, it did not appear clearly that the act of the plaintiff was negligent in itself. The court refused to give this instruction as it stood, and modified it by the following: "Unless known and acquiesced in by the defendant." This modification was not as full probably as it should be; but we are of opinion that error cannot be predicated upon it under the facts of this case, and in consideration of the fact that there was evidence in the case to the effect that, in the arrangement of the cars, the brake beam and brake staff were for the purpose of mounting as the plaintiff mounted.

The next question presented by appellant is that the verdict is against the law, for the reason that the jury disregarded the instructions

of the court, and declined to apply them to the evidence. This is a proposition of law with which we fully concur,—a proposition which is fully discussed in the case of *Murray v. Heinze* (decided this term) (Mont.) 42 Pac. 1057. But the question here is, Was the verdict against the instructions? The first instruction contrary to which the appellant claims the verdict was rendered is as follows: "If, in the discharge of a dangerous duty, an employee of a railroad company voluntarily places himself in a dangerous position unnecessarily, when there is another place that is safer that he could have chosen, and he has time to exercise his judgment, and an injury results to him by reason of his position, he cannot recover for such injury." But it is to be observed that this instruction lays before the jury the conditions of an employee voluntarily placing himself in a dangerous position unnecessarily, when there is another place safer that he could have chosen, etc. But, as appears in the treatment of this case heretofore in this opinion, the evidence is not conclusive that the plaintiff voluntarily and unnecessarily put himself in a dangerous position when he might have chosen a safer one. That was an open and disputed fact in the case, and there was evidence, as before shown, sufficient to go to the jury upon this question; and the jury, in finding a verdict for the plaintiff, did not, by necessity, find against this instruction. The same reason applies to the other instructions contrary to which the appellant claims the verdict was rendered.

Appellant complains of the refusal of the court to give the following instruction: "In this case the jury may, in its discretion, render a general verdict or a special one. A general verdict is one by which you pronounce generally upon all the issues in favor of the plaintiff or in favor of the defendant. A special verdict must present the conclusions of fact as established by the evidence and not the evidence to prove them, and those conclusions of fact shall be so presented as that nothing shall remain to the court but to draw from them conclusions of law." In connection with this, the appellant complains that the court submitted to the jury two forms of verdicts only,—one a general verdict for the plaintiff, assessing the amount of the damages, and leaving the amount blank to be inserted by the jury. It is said in *American Co. v. Bradford*, 37 Cal. 865, and *Swift v. Mulkey*, 14 Or. 65, that it is discretionary with the court whether or not it submit special findings to the jury. But in the case at bar no findings were requested by the appellant. He did not ask that the court submit special findings upon any branch of the case. Not having made this request, he cannot complain of the action of the court. It certainly would have thrown the jury into inextricable confusion to instruct them, as appellant requested, that they might find special findings or special verdict, when not the slightest intimation was given to them upon what questions of fact they should find.

Appellant complains that the court refused to instruct the jury that there was no evidence tending to show that the defendant had failed to use proper care to keep its track and roadbed in proper condition; nor that there was any evidence that would justify the jury in

finding that the defendant had failed to use reasonable care in keeping the ground on both sides of the track in proper condition for use by the employees. But if this instruction had been given it would have taken that question of fact wholly from the jury. We are of opinion that there was some evidence at least upon this question, and the treatment of this branch of the case seems to us to have been fully covered by other instructions which the court gave.

As to the exception to the refusal of the court to give instructions Nos. 7 and 12, requested by the appellant, without reciting them, we are satisfied to say that the questions there raised were covered by other instructions given by the court.

Appellant again complains of the refusal of the court to give the instruction requested by it, No. 15, as follows: "The undisputed evidence is that the plaintiff had the power to stop the engine and cars by a signal, and that it was the duty of the engineer to obey his signals." Following this was defendant's request 22, refused, as follows: "I charge you that the plaintiff had a right to stop these cars for the sole purpose of mounting them, if, in the proper discharge of his duties, it was reasonably necessary that he should mount the car on the brake beam, and if the act of mounting a flat car or the brake beam thereof, while moving at the rate of about 8 miles an hour, would ordinarily be attended by any considerable danger." It is true that the plaintiff had the power to stop the engine by signal for the purpose of mounting them, but his right to stop the train was only in the course of his business as brakeman, and it was all through the case a question whether his mounting the car while in motion was *per se* contributory negligence. We have determined that that was a question for the jury. If the court had given the instructions as charged, it would have taken that question away from the jury, and practically instructed the jury that it was contributory negligence *per se* to mount the cars as he did.

The appellant complains of the refusal of the court to instruct the jury as requested in Nos. 20 and 21, which are as follows: "It appears from the evidence that the plaintiff's injuries resulted from his own voluntary act in mounting the car as it was in motion. This being the case, it devolves upon the plaintiff to satisfy you by a fair preponderance of the evidence that he was not guilty of negligence contributing to his injury." "Under the circumstances of the case, the burden of proving that he was free from negligence contributing to his injury rests upon the plaintiff, and he must establish his freedom from such negligence by a preponderance of evidence." Counsel on both sides of this case have extensively argued the question of the burden of proof of contributory negligence. It is as unnecessary to review the law upon that topic in this opinion as it was to discuss it in the briefs, as it has long been settled in this state. *Higley v. Gilmer*, 8 Mont. 97, 35 Am. Rep. 450; *Kennon v. Gilmer*, 4 Mont. 433; *Wall v. Helena Street R. Co.* 12 Mont., at page 56; *Nelson v. Helena*, 16 Mont. —. Contributory negligence is a matter of defense, and plaintiff need not allege or prove its absence. The corollary to this rule

is that, whenever the plaintiff's own case raises a presumption of contributory negligence, the burden of proving its absence is immediately upon him, and it devolves upon the plaintiff to clear himself of suspicion of contributory negligence which he himself has created. See cases last cited. The instructions refused were based upon the ground that the plaintiff had shown himself guilty of contributory negligence. As heretofore demonstrated, this was not the fact. The instructions were therefore

inapplicable and properly refused. It did not appear by the testimony on the part of the plaintiff that there was a presumption of his contributory negligence.

Having reviewed the points raised upon this appeal, we are of opinion that *the judgment and the order denying a new trial should be affirmed*, which is accordingly done.

Pemberton, Ch. J., and Hunt, J., concur.

CALIFORNIA SUPREME COURT.

James WHOLEY, *Rept.*,

v.

Leona J. CALDWELL *et al.*, *Appls.*

(108 Cal. 96.)

1. A grant by a riparian proprietor of land bordering on the stream below

that retained by him, and of the "water accustomed to flow in the stream," will not entitle the grantees to go upon the grantor's land to return to the stream waters suddenly diverted by an extraordinary freshet.

2. A riparian proprietor has no right to go upon another's land and restore to the old channel the water which has been suddenly

NOTE.—*Rights in water of stream as affected by act of God or natural change of course.*

Very few cases have dealt with this question directly, and *WHOLEY v. CALDWELL* seems to be the first in which the question of the right of a riparian owner above whose land the water has left the channel to restore it to its natural bed has been considered. The doctrine of Lord Hale as stated in *WHOLEY v. CALDWELL*, that if a river running between the lands of A. and B. leaves its course and sensibly makes its channel wholly on the land of A., the whole river belongs to A., is but remotely analogous, and cannot be regarded as settling the question of the right to restore the water to its ancient course. He bases the statement upon the maxim *aqua cedat solo*. Hargrave, *Law Tracts*, 5; 6 Cow. 537.

But the fact that the title to the water follows that of the land while it is upon the land does not conclusively establish that there may not be a right to prevent the water from going upon the land.

Consequently *WHOLEY v. CALDWELL* must rest upon its own reasoning and be regarded as the pioneer case upon the subject.

In *Mississippi Cent. R. Co. v. Mason*, 51 Miss. 234, it is said that the right of a riparian owner to the continued flow of the water in its natural channel could only be extinguished by operation of law, the act of God, or the act of himself, but it is not stated what act of God is necessary to effect such result.

There are some cases in which the right to remove deposits which have gradually accumulated has been considered. And such cases are quite closely analogous to that of a sudden change of the course of the stream, for the same reason which would permit one man to enter upon the land of another to clean out the channel for the purpose of preserving the ancient flow of the water, would justify his going there to return the water to its ancient channel.

Prescott v. White, 21 Pick. 341, 32 Am. Dec. 206, was a case of the exercise of an easement by the upper riparian proprietor in cleaning out his roadway over the land of a lower proprietor.

The owner of a mill has an easement in the land below for the free passage of the water from his mill, accompanied by a right to enter upon the land for the purpose of cleaning out the stream and removing obstructions to the free flow of the wa-

ter. *Prescott v. Williams*, 5 Met. 429, 30 Am. Dec. 683.

But those cases probably depend more upon the Massachusetts mill acts for their determination than upon general principles of law. On the contrary, it was held in *Blood v. Johnson*, 28 Vt. 72, that the accumulation of a sand bar in a stream is ordinarily one of those natural results which neither party has a right to interfere with by direct removal.

In cases which have been decided under the doctrine of prior appropriation it has been held that an appropriator can go upon the land of an upper proprietor and remove obstructions such as sediment from the bed of the stream so as to permit the water to flow in its natural course to the head of the ditch. *Crisman v. Heiderer*, 5 Colo. 599; *Ware v. Walker*, 70 Cal. 591.

The fact that a freshet deposits debris in a stream so that it shuts off almost all of the water formerly flowing therein does not give a third person a right to enter upon the bed of the stream and construct a dam for the purpose of diverting the water of the stream to a different use of his own. *Paige v. Rocky Ford Canal & I. Co.* 53 Cal. 93.

There seems to be no question that the owner of the land at the point where the water left its channel may, if he acts promptly, return it to its bed.

The owner of the land where the break occurs may restore the water to its old channel. *Tuthill v. Scott*, 43 Vt. 535, 5 Am. Rep. 301.

The person on whose land the water leaves its banks may erect barriers to return it to its natural channel. *Pierce v. Kinney*, 59 Barb. 53.

So, one interested in the navigation of a stream may repair a break in its banks with the consent of the owner of the land, where the break occurs, although the effect is to cast the water against the banks of other riparian owners to their injury. *Slater v. Fox*, 5 Hun. 544.

But the upper proprietor may estop himself from returning the water to its natural channel by acts which will make it detrimental to the other proprietors if the water is returned. *Smith v. Musgrove*, 32 Mo. App. 241.

So, if the upper proprietor acquiesces for ten years in the changed course, he cannot restore the water to its ancient channel. *Woodbury v. Short*, 17 Vt. 337, 44 Am. Dec. 814.

H. P. F.

diverted by the act of God so as to flow elsewhere.

(July 12, 1896.)

APPEAL by defendants from a judgment of the Superior Court for Siskiyou County in favor of plaintiff in an action brought to compel defendants to permit the water of a certain watercourse to be returned to the channel from which it had been diverted by a freshet. *Reversed.*

The facts are stated in the opinion.

Mr. L. F. Coburn, for appellants:

The granting to plaintiff of the right of way across defendants' said land and the right to such control over said creek is an invasion of the rights of private property; the taking of private property for, not public, but private use without just compensation.

Black's Pom. Riparian Rights, § 109; Cal. Const. art. 1, § 14.

Plaintiff cannot enter on defendants' land under the facts stated in the complaint and make any changes thereon.

Gould, Waters, § 231, note 5; *Nevada Water Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685; *Luz v. Haggin*, 69 Cal. 255.

It is a right of the riparian owner at common law to have the stream flow in its natural channel without diversion, but this right extends no further than the boundary of his own estate.

Black's Pom. Riparian Rights, §§ 7, 8; Gould, Waters, § 204; Angell, Watercourses, § 95; 3 Kent, Com. p. 489; *Heath v. Williams*, 25 Me. 209, 43 Am. Dec. 269.

A watercourse running between the lands of A. and B., which leaves its course and suddenly and sensibly makes its channel wholly on the land of A., belongs wholly to A.

Angell, Watercourses, § 57, and authorities therein cited; 3 Kent, Com. p. 525; Gould, Waters, § 160, note 5.

The findings of the court with regard to "well-defined streams emanating from towards the 'North channel of Parks creek' and flowing into the 'Spring Branch channel' are not sufficient to give a right to any of such percolating waters if such they are, or a right to have Parks creek continue to flow in said 'North' or any other channel."

Pom. Riparian Rights, § 63; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; Civil Code, §§ 1, 410; Gould, Waters, §§ 229, 280-283; *Southern P. R. Co. v. DeFour*, 95 Cal. 615, 19 L. R. A. 92; 19 Am. & Eng. Enc. Law, p. 28, and note 80; *Fraser v. Brown*, 19 Ohio St. 294; *Wheatley v. Baugh*, 25 Pa. 523, 64 Am. Dec. 721; *Painter v. Pasadena Land & W. Co.* 91 Cal. 74.

Mr. James F. Farragher, for respondent:

The appropriator by his appropriation, and the riparianist by his acquisition of riparian lands, acquires the right to have the waters of a stream flow to his ditch or lands in its accustomed channels.

Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co. 60 Cal. 410; *Heilbron v. Kings River & F. Canal Co.* 76 Cal. 12; *Luz v. Haggin*, 69 Cal. 255; *Rigney v. Tacoma Land & W. Co.* 9 Wash. 576, 26 L. R. A. 425; *Kay v. Kirk*, 76 Md. 41; Black's Pom. Riparian Rights, §§ 8-10; Angell, Watercourses, 7th ed. § 96.

30 L. R. A.

This right is an easement.

Civil Code, § 801; Angell, Watercourses, 7th ed. § 142; *Ware v. Walker*, 70 Cal. 591.

It carries with it such secondary easements as are essential to its enjoyment.

Angell, Watercourses, §§ 158-160; *Ware v. Walker*, 70 Cal. 595.

Rights in water coming from a spring by percolation are acquirable by prior appropriation, and the appropriator cannot be divested of them by a subsequent owner of the soil.

Cross v. Kitts, 69 Cal. 222, 58 Am. Rep. 558; *Hale v. McLean*, 53 Cal. 578; *Ely v. Ferguson*, 91 Cal. 188; *Willis v. Perry* (Iowa) 26 L. R. A. 124; Civil Code, §§ 662, 1083; *Vocco v. Conroy*, 104 Cal. 468.

Mr. J. J. De Haven, with **Mr. James F. Farragher**, in support of petition for rehearing:

Ownership was based on a grant from appellants' testate predecessor of the waters of this Spring Branch channel, not as an appurtenant of the lands granted, or as a part of them, but as an independent right created by an independent covenant in the instrument of grant which conveyed said water specifically.

This grant vested the same title in respondent, to the waters of Spring Branch channel, as would a valid appropriation thereof, and created an easement in favor of respondent to have the flow continued through the usual channel to his ditch and lands.

Kinney, Irrigation, § 285, and cases cited; Black's Pom. Riparian Rights, § 61; Gould, Waters, § 209, and cases cited.

If the diversion is gradual, the rule stated by Sir Mathew Hale applies, but where it is sudden, as by avulsion, the diverted rights may be restored.

Angell, Watercourses, 7th ed. §§ 56-58; Gould, Waters, 2d ed. § 159; *Rood v. Johnson*, 26 Vt. 73; *Tutill v. Scott*, 43 Vt. 527, 5 Am. Rep. 301; *Woodbury v. Short*, 17 Vt. 337, 44 Am. Dec. 344; *Paige v. Rocky Ford Canal & I. Co.* 88 Cal. 93; *Scriven v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224.

Henshaw, J., delivered the opinion of the court:

Plaintiff is a lower, defendants are upper, riparian proprietors. Parks creek for many years had flowed over the land of defendants to a point on that land known as "Batterton Crossing," where it divided into two branches, called the "North channel" and the "South channel." About one third of the waters of the creek passed on to the plaintiff's land through the North channel, while the remaining two thirds flowed down the South channel. A third waterway, seemingly an ancient course of Parks creek, left the main stream about one half a mile above Batterton crossing, and entered upon and extended over the land of plaintiff in a direction parallel with that of the North channel. This last waterway was known as the "Spring Branch channel." There was no direct surface flow from Parks creek into it, the point of separation being dammed by gravel, bowlders, and debris, but its bed was lower than the bed of the North channel, and from North channel by percolation and by small but defined surface streams water rose in this Spring Branch channel and

flowed over plaintiff's lands. The amount of water so rising bore direct relation to the amount of water flowing through the North channel. Plaintiff relied upon the waters of the Spring Branch and North channels for all beneficial purposes. Such were the conditions until the winter of 1890-91, when an extraordinary freshet deposited a bar of bowlders, gravel, and *débris* at the head of the North channel, and thus prevented the waters from flowing into it as had been their wont. At the same time the waters cut a new bed for themselves. This "new channel" (so named) left the original stream from the south about a mile above Batterton crossing, extended in a general course parallel with it, and joined the South channel, still on the lands of defendants, above the point where South channel entered plaintiff's property, and thence flowed on by the accustomed South channel. During the first year after this change some of the water passed down the old way to Batterton crossing. The rains of the following year deposited a bar in the main stream at the point where the new channel had been cut, and thereafter all the waters of the creek flowed down this new channel into the South channel, and so on to defendants' lands, leaving dry the original watercourse down to Batterton crossing, and, consequently, also the North channel and the Spring Branch channel. Plaintiff then commenced this action, averring that these changes were occasioned wholly by natural causes, and asserting the right to enter upon defendant's land, and to take such necessary and proper steps as might be required to return the water to the channels wherein it flowed prior to the year 1889, and asking that defendants be enjoined from preventing him from entering upon their land and doing such proper and necessary acts. He also pleaded a grant to himself, from defendants' predecessor, of his land and of "the waters accustomed to flow in the Spring Branch channel." Defendants denied the asserted rights, and by cross-complaint pleaded the construction and maintenance for thirty years last past of a dam across the head of the North channel sufficient to divert all the water thereof, during ordinary low stages, from the North to the South channel, and also their prescriptive right to divert two thirds of the water of the creek by ditches. They pleaded defendants' interference with these rights, and asked damages accordingly. Plaintiff was denied an injunction, but as riparian proprietor and as grantee under the deed above mentioned, was decreed the right of "restoring and restraining the waters of Parks creek to the following channels: First, from the point where the new channel cut from and left the former channel (original bed of the stream) down said former channel in a single body to the Batterton crossing; second, from the Batterton crossing in two channels in the following proportions, to wit: One third through the said North channel, and the remainder through said South channel."

We cannot see that the rights of the parties in this action are in any way affected by the grant to plaintiff "of the waters accustomed to flow in the Spring Branch channel." *Aqua cedit solo*. This grant accompanied the grant of the land bordering upon that channel.

Whether the waters which flowed in it came from the North channel by percolation and seepage, or by well-defined subterranean or surface channels, can here make no difference. For, in either case, the utmost that could be claimed for the grant would be that it gave plaintiff full right to the waters against any asserted right of the defendants to them, and protected him from any use which defendants might make of the waters of the creek after the grant to the injury of their right in these waters. But the complaint of plaintiff does not declare upon any such invasion or infringement by defendants. It asserts the right to go upon the land of an upper riparian proprietor, and return a stream to its original channel which has been diverted therefrom suddenly and sensibly by natural causes. And plaintiff's warrant in doing this rests, not upon any contractual relations with defendants, but upon his prerogatives as a lower riparian proprietor. We do not attach importance to the contention of appellants that the right of the lower riparian proprietor is merely to have the water enter his land by its accustomed channels, without regard to the quantity which these channels are wont to carry. The lower proprietor, as against the unwarranted acts of the upper, is entitled, not only to have the water enter his land by its accustomed channels, but to have each channel carry its due amount of water. Any other rule would lead to untold hardship and oppression.

But we are here concerned only with the rights of the lower proprietor where the change in the channel has been caused, not by the act of man, but by the act of God. Does the right of the riparian proprietor to have the water enter his land by its accustomed channels stand superior to changes wrought in the flow of a stream by the act of Providence? Has such a proprietor a paramount right over the forces of nature, as well as over the acts of man, to insist that water which has once flowed upon his land shall always flow upon it? A somewhat extended examination leads to the conclusion that the assertion of such a right is new to jurisprudence. The right finds no recognition by the commentators of either the civil or common law, and no case has come under our observation in which the question is considered. Even Sir Matthew Hale, whose *De Jure Maris* is declared by Chancellor Kent to have exhausted the learning on the subject, makes no mention of so important a topic. This silence is itself significant; for it is not easily to be believed that if this important right exists it would not have been asserted and announced in numerous instances. While thus lacking in authority, it is certain that the contention cannot find better support from principle or reason. The foundation of the riparian proprietor's rights rests upon the universally accepted maxim, adopted by the common law from the civil law, *Aqua currit, et debet currere ut currere solebat ex jure nature*. These rights thus draw their support from the laws of nature, but they do not rise superior to those laws. When, by their operation, the flow is lost the right is lost with it. The new channel itself becomes the natural channel. Otherwise a riparian proprietor would hold all lands above him in extraordinary and perpetual servitude. If, by the forces of nature, the

stream should change its course at a point miles above him, he would still be empowered to subject any and all of the intermediate territory to operations requisite to enable him to turn the water back upon his own premises, and this power would be his to the very fountain head of the stream. Such a doctrine could not be tolerated. If it be needed, however, the reasoning of the foregoing finds abundant support in analogous principles of the law which are firmly established. Says Sir Matthew Hale (*De Jure Maris*, chap. 1): "A water-course running between the lands of A. and B., which leaves its course and suddenly and sensibly makes its channel wholly upon the land of A. belongs wholly to A." This rule has been reannounced by all the later text-writers, and has been adopted by the courts without suggestion of dissent. 3 Kent, Com. 428; 2

Bl. Com. 262; Angell, *Watercourses*, § 57; Gould, *Waters*, § 160, and cases thereunder. True, it has usually been invoked in cases of boundaries and of the accretion and reliction of land, but nevertheless, by necessary implication, it defines the riparian proprietor's right in the matter under consideration. Because, if the stream belongs wholly to A., thus depriving B. of all his riparian rights, this can only result because B. has no right to go upon another's land and restore to the old channel the water which has been diverted therefrom *ex jure natura*.

For the foregoing reasons the judgment is reversed, and the case remanded.

We concur: McFarland, J.; Temple, J.

Rehearing in banc denied.

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

SOUTHERN RAILWAY COMPANY,
Appt.,
v.

Joseph H. BOUKNIGHT, Intervener, Appellee.

(70 Fed. Rep. 442.)

1. A mortgagee of a railroad by accepting the mortgage subsequent to the passage of a statute giving judgments against the railroad company for personal injuries recovered in actions commenced within twelve months from the injury precedence over any mortgage or security for bonds assents to the priority.
2. A railroad mortgage is not entitled to priority over a judgment for personal injuries subsequently recovered, under S. C. Gen. Stat. 1882, § 1522, providing that such judgment shall take precedence over any mortgage, because of the further provision that they shall relate back to the date when the cause of action arose, and the fact that the injury was subsequent to the mortgage.
3. A judgment for personal injuries is not deprived of its priority over a railroad mortgage, under S. C. Gen. Stat. 1882, § 1522, by the fact that the mortgage was executed by a consolidated company formed from companies organized in South Carolina and other states, and the entire property was sold as a unit, as against a purchaser who agreed as part of the price to satisfy all claims adjudged prior in lien to the mortgage.
4. A purchaser on foreclosure of the property of a railroad company, who has covenanted to discharge all liens held prior to the mortgage, is not entitled to assert an equity for the revival of prior mortgages executed before the passage of S. C. Gen. Stat. 1882, § 1522, giving judgments for personal injuries priority over railroad mortgages, so as to destroy the precedence of such a judgment over the

mortgage upon which the sale was made, or to claim a proportionate reduction by reason thereof.

5. The record of a judgment against a railroad company for personal injuries is admissible as against a purchaser on foreclosure sale who agreed as part of the price to satisfy all claims held prior in lien, not simply to establish the fact of its rendition, but as proof of when the action was brought, for what, and the amount, for the purpose of showing that such judgment is prior to the mortgage under the South Carolina statute giving judgments for personal injuries precedence over railroad mortgages.
6. A railroad company which, under the lease of another road, is conducting it wholly in the interest of the lessor, occupies the position merely of operating agent, and the lessor is liable for injuries from the negligence of the lessee.
7. A personal injury in another state for which judgment is recovered in South Carolina is within S. C. Gen. Stat. 1882, § 1522, giving priority to a judgment recovered on a cause of action against a railroad company for personal injuries over any railroad mortgage.
8. A consolidated railroad company may be held responsible for the acts and neglects of its constituent members as done by it as a whole.
9. The priority of a judgment recovered against a consolidated railroad company over a mortgage made by such company, under S. C. Gen. Stat. 1882, § 1522, cannot be defeated on the theory that the mortgagor was in fact three corporations of different states, and that the injury was inflicted in the exercise of the franchises of a separate domestic corporation of another state.

(November 7, 1895.)

NOTE.—As to liability of consolidated railroad company for obligations of its predecessors, see *note* to *Chicago & I. C. R. Co. v. Hall* (Ind.) 23 L. R. A. 231.

30 L. R. A.

A PPEAL by the purchaser of the Charlotte, Columbia, & Augusta Railroad Company from a decree of the Circuit Court of the United States for the District of South Caro-

was directing it to pay to intervenor the amount of his claim against the company for damages for personal injuries, it being a claim prior to the mortgage under which appellant purchased the road. *Affirmed.*

Before Fuller, Circuit Justice, Goff, Circuit Judge, and Hughes, District Judge.

Statement by Fuller, Circuit Justice:

The Charlotte & South Carolina Railroad Company was incorporated by the states of North Carolina and South Carolina, and the Columbia & Augusta Railroad Company by the states of South Carolina and Georgia. These companies were consolidated under the name of the Charlotte, Columbia, & Augusta Railroad Company, in accordance with an act of the general assembly of South Carolina approved March 19, 1869, which provided: "That the Charlotte & South Carolina Railroad Company and the Columbia & Augusta Railroad Company shall, upon the consent of the stockholders of each company, be consolidated, and form one and the same body corporate, under the name of the Charlotte, Columbia, & Augusta Railroad Company, possessing all the rights, powers, privileges, immunities, and franchises conferred upon said companies, by the several acts heretofore passed and now of force, incorporating said companies, and amending the charters thereof," and that "the affairs of the said consolidated company shall be managed and directed by a general board, to consist of eighteen directors, to be elected by the stockholders from among their number: provided, that four of the directors shall be elected from amongst the stockholders residing in the state of North Carolina, and four amongst the stockholders residing in the state of Georgia." S. C. Laws 1868-69, p. 232. And an act of the legislature of Georgia, approved February 20, 1869 (Laws 1869, p. 154), and of the legislature of North Carolina, approved April 12, 1869 (N.C. Pub. Laws 1868-69, p. 598), to the same effect.

The consolidated company owned a road extending from Charlotte, N. C., to Augusta, Ga., which passed across the state of South Carolina, in which by far the largest part of the track was situated. On July 1, 1883, this company executed to the Central Trust Company of New York a mortgage upon the whole road, together with equipment, appurtenances, and franchises, to secure its coupon bonds, which were issued and negotiated to the amount of \$500,000. The mortgage recited that its execution was authorized at a meeting of the board of directors of the company, held at the city of Columbia, S. C., June 1, 1883, and ratified by the stockholders of that company at a meeting held in said city on July 26 of that year. In 1886 the company leased all its franchises and property, including the whole line of railroad from Augusta to Charlotte, to the Richmond & Danville Railroad Company; and thenceforward all the rolling stock of the road was owned, and all its operations were controlled and managed, by the latter company, whose agents, without interference on the part of the lessor, were in charge of all of the business of the road. The Richmond & Danville Railroad Company and all its property and leased lines went into the hands of a receiver in June,

1892. The interest falling due July 1, 1893, on the bonds secured by the consolidated company's mortgage, was not paid; whereupon the trustee in the mortgage, the Central Trust Company, filed its bill to foreclose July 31, 1893, and receivers were appointed under order dated July 28, 1893. April 7, 1894, a final decree of foreclosure was entered, ordering the sale of the road. This decree provided: "The purchaser or purchasers at said sale shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will pay off and satisfy any and all outstanding and unpaid receivers' obligations having priority over the lien of the mortgage hereby foreclosed, and all other claims filed in this cause, but only when the court shall allow such claims, and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto; and the purchaser or purchasers or their approved assigns shall be entitled to appeal from any and all orders or decrees of the court in respect to such claims or any of them, and shall have all the rights in respect to such appeals which the complainant, Central Trust Company of New York, would have in case such appeals had been taken by it. The purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assigns, approved by the court, will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers having possession of such property, which have not been or shall not be paid by said receivers or out of the proceeds of the sale or sales herein ordered or otherwise, and which shall be adjudged by the court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of the mortgage foreclosed in this suit. The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser or purchasers, or his or their assigns, approved by the court as aforesaid, to comply with any order of the court in respect to payment of prior lien claims above mentioned within twenty days after service of a copy of such order upon said purchaser or purchasers, or his or their assigns." And also that the fund arising from the sale should be applied among other things "to the payment of all outstanding and unpaid debts and obligations of the receivers incurred since their appointment in and about the actual operation of the railroad, and all such claims as are decreed by the court to be prior in lien, or equity to the lien of the mortgage foreclosed in this suit."

The road and franchises were thereupon sold, July 10, 1894, to the Southern Railway Company, and the sale confirmed, and conveyance executed. The order of confirmation contained this clause: "And the court further reserves full power from time to time to enter orders binding upon the said Southern Railway Company, as such purchaser, under its decree, requiring it to pay into the registry of

this court all such sums as have been or may be ordered by this court, for the payment of any and all receiver's debt or claims adjudged or to be adjudged by it as prior in lien or equity to the mortgage foreclosed in this cause, or entitled to preference in payment out of the proceeds of sale prior to such mortgage bonds."

On the same July 10, Joseph Bouknight filed a petition of intervention in the cause, alleging that on November 24, 1891, he was injured by the negligence of the employees of the Danville Company, then operating the Charlotte road as lessee; that he sued the Charlotte Company therefor within twelve months thereafter in the circuit court of common pleas of Edgefield county, S. C., and recovered judgment in March, 1898, for \$10,000, which judgment was affirmed by the supreme court of the state; that this judgment was superior to the lien of the mortgage of July 1, 1883, and was entitled to priority of payment out of the proceeds of sale or by the purchasers at such sale; and praying for relief accordingly.

The petition was referred to a special master, before whom the judgment roll was exhibited, from which it appeared that petitioner claimed that on November 24, 1891, he purchased from the Danville Company, at Trenton, S. C., a station on the Charlotte Company's road, a ticket from Trenton to Augusta and return, and on this ticket proceeded to Augusta, Ga., and that on his return, before the train had gone out of the Augusta station, he was injured in his person by the negligence of the agents of the Danville Company; that he brought his action against the Charlotte Company within twelve months thereafter, and subsequently, on issues joined, obtained a verdict and judgment, which judgment was affirmed by the supreme court of South Carolina. The master reported in favor of the priority of the judgment over the mortgage, and the Southern Railway Company filed exceptions, which were overruled, and a final decree entered January 9, 1895, awarding priority and ordering payment by the Southern Railway Company, as purchaser, of the intervenor's judgment, with interest and costs, from which decree this appeal was prosecuted. The opinion of the circuit court (Simonton, J.) is reported in 65 Fed. Rep. 267.

Messrs. Henry B. Tompkins and Henry Crawford for appellant.

Messrs. Sheppard Brothers and E. F. Verdery, for appellee:

A railroad corporation, accepting and operating under its charter, assumes duties to the public. Among these, perhaps the chief of them, is the safe carriage of passengers and freight.

It cannot escape from responsibility for the acts of its lessees.

National Bank v. Atlanta & C. A. L. R. Co., 5 S. C. 222; *Harmon v. Columbia & G. R. Co.*, 28 S. C. 406; *Singleton v. Southwestern Railroad*, 70 Ga. 471, 48 Am. Rep. 574; *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Vall. 450, 21 L. ed. 677; *Patterson, Railway Accident Law*, p. 122; 2 Wood, *Railway Law*, 345.

The question of the lessors' liability, as applicable to this case, is settled by the judgment of the supreme court of South Carolina.) L. R. A.

8 Abbott, Nat. Dig. 417, subd. 24; *Galpin v. Page*, 85 U. S. 18 Wall. 350, 21 L. ed. 959; *Cocks v. Halsey*, 41 U. S. 16 Pet. 71, 10 L. ed. 891; *Parker v. Kane*, 63 U. S. 22 How. 1, 16 L. ed. 286.

Section 1528 of the General Statutes of South Carolina is a part of the general law regulating railroad corporations.

All contracts are made with reference to the law of the state in which the subject-matter of the contract is, and in which the contract is made.

Morawetz, Priv. Corp. §1120; *Brins v. Hartford F. Ins. Co.* 96 U. S. 634, 24 L. ed. 961; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 643; *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506, 28 L. ed. 1102; *Toledo, D. & E. R. Co. v. Hamilton*, 184 U. S. 296, 33 L. ed. 905.

The rights of the purchaser are not higher than those of the mortgagee.

Bank of United States v. Longworth, 1 McLean, 35; *Hand v. Savannah & C. R. Co.* 12 S. C. 335.

Although the Charlotte, Columbia, & Augusta Railroad Company held a charter from three states, and was incorporated by each, for the purpose of contracting, suing, and being sued, it is a single corporation in fact and in law.

14 S. C. Stat. p. 232; *Morawetz, Priv. Corp.* § 996; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Graham v. Boston, H. & E. R. Co.* 118 U. S. 161, 30 L. ed. 196.

The action is for a tort, a transitory action, and could be brought wherever the defendant could be served.

Dennick v. Central R. Co. 103 U. S. 18, 26 L. ed. 441; *Northern P. R. Co. v. Babcock*, 154 U. S. 196, 38 L. ed. 960; *Pennsylvania Finance Co. v. Charleston, C. & C. R. Co.* 61 Fed. Rep. 369.

The priority according to judgments for personal injuries, under the provisions of section 1528 of the General Statutes of South Carolina, over mortgages executed subsequently to the enactment, should be recognized and enforced.

Hassall v. Wilcox, 180 U. S. 493, 32 L. ed. 1001.

The court has no authority to re-examine the validity of the contract, or the propriety of the original judgment—those questions have been finally adjudicated.

Louisiana v. Police Jury, 111 U. S. 721, 28 L. ed. 576.

Fuller, Circuit Justice, delivered the opinion of the court:

The main track of the Charlotte, Columbia, & Augusta Railroad Company, extending from the city of Augusta, in the state of Georgia, to the city of Charlotte, in the state of North Carolina, its other tracks, its bridges, depots, workshops, and other buildings, its rolling stock, equipment, and right of way, and its corporate rights and franchises, were sold to the Southern Railway Company as a unit, under a decree which provided that the purchaser at said sale should, as part of the consideration for the sale, pay off and satisfy all claims held and adjudged by the court to be prior in lien to the mortgage foreclosed in the suit; and the order of con-

affirmation reserved full power from time to time to enter orders binding the Southern Railway Company as purchaser under the decree, requiring it to pay into the registry of the court such sums as might be necessary for the payment of such claims.

Section 1528 of the General Statutes of South Carolina of 1882 (being section 117 of an act approved February 9, 1882) is as follows:

"Whenever a cause of action shall arise against any railroad corporation, for personal injury, or injury to property, sustained by any person or persons, and such cause of action shall be prosecuted to judgment by person or persons injured, or his or their legal representatives, such judgment shall relate back to the date when the cause of action arose, and shall be a lien as of that date, of equal force and effect with the lien of employees for wages, upon the income, property, and franchises of said corporation, enforceable in any court of competent jurisdiction, by attachment or levy and sale under execution, and shall take precedence and priority of payment of any mortgage, deed of trust, or other security given to secure the payments of bonds made by said railroad company: provided, any action brought under this section shall be commenced within twelve months from the time that said injury shall have been sustained."

Section 1416 declared the provisions of the general law regarding railroad corporations to be amendments of the charters of all railroad corporations created in the state. The date of the mortgage was July 1, 1883. Bouknight was injured November 24, 1891, and commenced his action in the circuit court of common pleas for Edgefield county, S. C., September 30, 1892.

The circuit court was of opinion that all contracts are made with reference to the law of the state in which the subject-matter of the contract is, and in which the contract is made. This certainly is true with regard to mortgages by a railroad corporation. The law enters into and becomes a part of the contract, as if it were there in express terms. *Brine v. Hartford F. Ins. Co.* 96 U. S. 634, 24 L. ed. 861; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Provident Inst. for Savings v. Jersey City*, 118 U. S. 506, 28 L. ed. 1102; *Toledo, D. & B. R. Co. v. Hamilton*, 134 U. S. 801, 33 L. ed. 908. In this particular case the section which is under consideration is a part of the general law regulating railroad corporations. The provisions of the chapter are declared to be amendments of the charters of all railroad corporations theretofore created in this state. Section 1416. This section restricts the power of railroad corporations to execute mortgages of the franchises and property, to the extent that they cannot create a lien superior to that of judgments obtained against them for personal injuries incurred in the exercise of their franchises. And the court considering that the mortgage of July 1, 1883, was subject to the law of 1882, further held that as that law provided that judgments for personal injuries recovered in actions commenced within twelve months from the time the injury was sustained should take precedence of any mortgage, deed of trust, or other security given

to secure the payment of bonds made by railroad companies, and as this provision entered into the mortgage contract, and in accepting the mortgage the mortgagee gave his assent thereto, Bouknight was entitled to priority of payment.

These views are in accordance with those expressed by the supreme court, and regarded as obnoxious to no constitutional objection.

In *Provident Inst. for Savings v. Jersey City*, *supra*, the supreme court ruled that an act making water rents a charge upon land in a municipality prior to the lien of all encumbrances gave the water rents priority over mortgages on such land made after the passage of the act, whether the water was introduced on the lot mortgaged before or after the giving of the mortgage, and that such act did no violation to that portion of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law. And Mr. Justice Bradley, delivering the opinion of the court, said: "What may be the effect of those statutes, in this regard, upon mortgages which were created prior to the statute of 1852, it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but long subsequent thereto. When the complainant took its mortgages, it knew what the law was; it knew that, by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to this law; and it is idle to contend that a postponement of its lien to that of the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act, its own consent, is an element in the transaction."

In *East Tennessee, V. & G. R. Co. v. Frazier*, 139 U. S. 288, 35 L. ed. 196, a law of Tennessee, enacted in 1877, provided that no railroad company should have power to give any mortgage or other kind of lien on its property which should be valid and binding against judgments for damages done to persons and property in the operation of the road. A mortgage was given by the company in 1881, and certain judgments were recovered subsequent to that time; and, there having been a foreclosure and sale in a state court, the judgment creditors filed petitions for the satisfaction of their judgments. Relief was accorded, and the decrees sustained by the supreme court of Tennessee. *Frazier v. East Tennessee, V. & G. R. Co.* 88 Tenn. 138. On writ of error the judgment of that court was affirmed by the Supreme Court of the United States, which said:

"The law in force at the time the mortgage was executed, with all the conditions and limitations it imposes, is the law which determines the force and effect of the mortgage. That law in this case was the law of 1877, which subordinated the mortgage to the lien of subsequent judgments for claims of the nature of those held by appellees."

Conceding the general doctrine, appellant nevertheless insists that priority should not have been awarded, because by the statute the

lien of the judgment related only to the date of the injury, which was long subsequent to the mortgage, and because the priority operated on property and mortgages in Georgia and North Carolina, and also on mortgages in South Carolina, given before the passage of the act; that as the mortgagee was not a party to the action against the railroad company, the judgment therein was *res inter alios acta*, and did not in itself establish the existence of the conditions necessary to obtain priority; that the recovery against the Charlotte Company was not justified, because the Danville Company was the intervener's carrier at the time of the injury; that the cause of action accrued in Georgia, and, if the Charlotte Company was liable at all, the liability was that of the Georgia corporation of that name, and not of the South Carolina corporation, and that the statute applied only to corporations of South Carolina and judgments recovered on causes of action arising in that state.

1. In order to settle priority between conflicting liens, the statute declared that the judgments referred to should be a lien as of the date when the cause of action arose; but this had no relation to the precedence over railroad mortgages specifically provided for in respect of such judgments, and in contemplation of the parties in entering into the mortgage contract. That priority was stipulated for by the consolidated company, whose entire property was mortgaged, and sold as a unit at the instance of the mortgagee; and the decree and the order of confirmation of the sale required the payment out of the fund produced by the sale, or paid into the registry by the purchaser, of all claims which might be adjudged to be entitled to precedence. The consolidated company had been clothed with the powers and franchises of the original companies, and was in reality for the purposes of acting, contracting, suing, and being sued, but a single corporation, formed to carry on business in a corporate capacity in three different states. Under these circumstances, it does not lie in the mouth of the purchaser to object because the proceeds of sale might be enhanced by reason of property situated in other states than that of the forum.

Nor are we impressed with the suggestion that priority awarded against the consolidated mortgage was equivalent to priority over mortgages executed prior to 1882. It is true that the bill to foreclose avers that the proceeds of part of the bonds issued under the consolidated mortgage were used to take up and cancel bonds to the amount of some \$195,500, secured by outstanding mortgages of the Columbia & Augusta and Charlotte & South Carolina Railroad Companies, but we do not preceive that the purchaser occupied a position entitling it to assert an equity for the revival of indebtedness canceled by means of the consolidated mortgage of 1882, so as to destroy the precedence existing in respect of that instrument, or to claim a proportionate reduction by reason thereof.

2. The judgment roll showed the date of suit brought, the cause of action, and when it arose, and the amount of the damages. The mortgagee was not, and could not have been, made a party to that action at law; nor is this 80 L. R. A.

intervention a proceeding against the mortgagee to recover over *in personam*. To what extent third parties may go in impeaching judgments collaterally need not be discussed. There is no pretense here of want of jurisdiction, or of fraud, collusion, or gross neglect in obtaining the judgment, or of any irregularity invalidating it. The only way in which the judgment was questioned was by exceptions to the master's report, which raised objections to its admission in evidence, to its sufficiency as proof of the allegations of the petition, to the award of priority, and that the master erred in not reporting that Bouknight, on the face of his petition, was guilty of contributory negligence, and not entitled to recover. The date of the mortgage appearing, the judgment record was sufficient to make out petitioner's case, if admissible in evidence; and we are clear that it was admissible under the statute, not simply as establishing the fact of its rendition, but as proof of when the action was brought, what for, and the amount. Being conclusive as to each of these matters as between the parties, it was certainly not less than *prima facie* against the mortgagee in respect of them, and that is enough to dispose of the inquiry here.

In *Hassall v. Wilcox*, 180 U. S. 493, 82 L. ed. 1001, the judgment in controversy was rendered on a complaint, counting on a note, the consideration of which appeared on its face to be in part for services which were not, and in part for labor claims which were, entitled to preference under the statute of Texas involved in the case; and this being so, it was held by the supreme court that the bondholders had the right to compel the plaintiff to prove affirmatively the amount for which he was entitled to a lien. The case is peculiar, and does not rule the point before us.

8. In *Bouknight v. Charlotte, C. & A. R. Co.* 41 S. C. 415 (being the case in which this judgment was affirmed), the liability of the Charlotte Company was contested, on the ground that the company had previously leased its property, franchises, etc., to the Danville Company, which latter company, if any, it was claimed, was liable. But the contention was overruled by the supreme court of South Carolina, which remarked: "After the repeated decisions of this court upon this subject, we can hardly think that it is necessary for us to go again into the argument."

National Bank v. Atlanta & C. A. L. R. Co. 25 S. C. 216, and *Harmon v. Columbia & G. R. Co.* 28 S. C. 405, were cited, in which the supreme court of South Carolina held that "when a railroad or other corporation receives its charter from the state, conferring certain franchises, rights, and privileges, it is upon the consideration that such corporation shall perform the duties and fulfil the obligations which it at the time incurs. The fact that the corporation chooses to perform those duties and fulfil its obligations to the community through another, whether as lessee or otherwise, cannot release it from the obligation which it has assumed by the acceptance of its charter."

And the court was of opinion that there was no ground for a distinction between the liability of a railroad company which had leased its line to another in actions *ex delicto* and actions *ex contractu*, nor for the distinction, often laid

down in judicial decisions, between the liability of the lessor for an injury sustained by reason of some omission of duty resting upon it—as, for example, from the defective condition of its track or of a bridge existing at the time of the lease—and an injury arising from the mere negligence of the lessee's servants in running the trains.

In *Singleton v. Southwestern Railroad*, 70 Ga. 471, 48 Am. Rep. 574, the same doctrine is announced, although there the railroad was operated by the lessee in the name of the lessor.

But if we could go behind the judgment, and were at liberty to disregard the settled rules in South Carolina and Georgia, still we should not reverse the order appealed from on this ground. The lease, which we assume must have been part of the record below, and which is referred to by the circuit court, disclosed that the Danville Company was conducting the road wholly in the interest of the Charlotte Company, its covenants providing that the receipts, income, and revenues derived from the use and operation of the lines should be applied to operating expenses, cost of new rolling stock, improvements, payment of all claims or charges growing out of the use of the property prior to the lease, insurance, and taxes, the payment of the necessary expenses (not exceeding \$1,500) to keep up the corporate organization of the Charlotte Company, the payment of interest on certain enumerated bonds; and that "any and all residue of said receipts, income, and revenues remaining after each and every of the above mentioned and specified payments have been made shall be paid over to the said party of the first part [the lessor], and be by it applied to the payment of dividends upon its capital stock, as its board of directors may direct." As held by the circuit court, the Danville Company occupied the position of operating agent, and the decisions of the Supreme Court in *Washington, A. & G. R. Co. v. Brown*, 84 U. S. 17 Wall. 445, 450, 21 L. ed. 875, 877, and *Pennsylvania R. Co. v. Jones*, 155 U. S. 338, 350, 39 L. ed. 176, 181, are in point and are decisive.

4. The cause of action upon which judgment was rendered arose in Georgia, and it is insisted that it so arose against the Charlotte Company, if at all, as a corporation of Georgia, and that the statute did not apply to causes of action arising in, or against a corporation of, any other state than South Carolina. As the judgment must be a judgment recovered in South Carolina, so it is said the words "whenever a cause of action shall arise against any railroad corporation for personal injury" must be held to mean arising in South Carolina, and that this construction is strengthened by the reference of the lien of the judgment to the date of the accruing of the cause of action; furthermore, that section 1528 is one of many sections prescribing regulations for the prevention of accidents and concerning responsibilities therefor, all of which constitute a purely local statute, and, like all other legislation of the kind, could have no application to accidents or injuries save only those occurring within the state. And it is also urged that, so far as the mortgagee is concerned, the statute was not a mere regulation of the remedy, but created a new liability conditioned on the action being

"brought under this section" within twelve months of the injury, and that such liability could not exist in respect of causes of action arising elsewhere. But the action was transitory, and brought as for a tort at common law, which it would be presumed, prevailed where the injury occurred, as it did where suit was brought. And that this was so in fact is not denied. Even if the cause of action had been a Georgia statutory delict, it would have been justifiable in South Carolina, since it was not inconsistent with the statutes or public policy thereof. *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 598, 36 L. ed. 829; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958. And see *Union P. R. Co. v. Wyler*, 156 U. S. 285, 39 L. ed. 983.

The objection really is that recovery should have been denied by the state court, because the injury was not inflicted by the South Carolina corporation, but by the Georgia corporation, while it was the South Carolina corporation only that was sued. Granting that, when a consolidated corporation is created by the legislation of three states, each state retains its control over its own charters, and the company exercises its powers in each state by virtue thereof, yet it does not follow that the consolidated corporation may not be held responsible for the acts and neglects of its constituent members as done by it as a whole. Petitioner was a citizen of South Carolina, who suffered injury through negligence when on carriage from South Carolina to Georgia and back; and the courts of South Carolina have adjudged his right of recovery against the consolidated company. The mortgage was executed by that company, as a single corporation, in South Carolina, and authorized and ratified in that state, under powers of consolidation derived from the legislation of three states. The mortgage was foreclosed in South Carolina, and the property sold there as a unit; and neither the mortgagee, nor the purchaser under it, can rid itself of the adjudication of liability on the theory that the mortgagor was not in fact and in law a single corporation, but three corporations, or claim that no judgment could come within the statute, although recovered against the consolidated company, if for a personal injury incurred in another state than that of the forum, on the ground that it was inflicted in the exercise of the franchises of a separate domestic corporation of such other state. In short, as the judgment was rendered on a cause of action cognizable in South Carolina, and as the language of the statute is general, we perceive no adequate ground for the exception contended for, notwithstanding the ingenuity of the argument, in the way of construction, in its support.

The statute did not create a new legal liability, as in *The Harrisburg*, 119 U. S. 199, 30 L. ed. 858, cited for appellant, but made provision for priority in respect of judgments for personal injury in actions brought in view of the statute within twelve months; and that priority, which was the legal consequence of the recovery in actions so brought, must be held to have been in contemplation of the parties when the mortgage was made. If the property of the company had not been in the

custody of the law, then this judgment would have been enforceable by attachment or by levy and sale under execution; and the intervening petition was nothing more than a dif-

ferent mode of collection, rendered necessary by the circumstances.

The Circuit Court was right, and its decree is affirmed.

MISSISSIPPI SUPREME COURT.

UNION MORTGAGE, BANKING, &
TRUST COMPANY *et al.*, *Appts.*,

PETERS & TREZEVANT *et al.*

(73 Miss. 1058.)

1. One who advances money at the instance of a debtor to be used by the latter in payment of a prior security is not a stranger or intermeddler in his affairs within the rule which denies to such persons a remedy by way of subrogation.

2. The relief by subrogation to earlier liens which have been paid off with money advanced by a subsequent mortgagee under agreement that he shall have a first lien is not destroyed by the fact that the early liens have been actually paid off and canceled in pursuance of the agreement that this should be done, since equity will consider them alive so long as justice requires.

3. The holder of an intermediate mortgage, who is not placed in any worse attitude by the subrogation of a subsequent mortgagee to the first lien on the property, which was paid off with money advanced by the last mortgagee on a promise that he should have the first lien, cannot defeat such subrogation, even if he has not waived or become estopped to assert his priority.

4. One who fraudulently obtains money on a mortgage by representing that his property is unencumbered is estopped to contest the mortgagee's right of subrogation to earlier liens on the ground that they are barred by the statute of limitations.

5. The representative of a deceased person, who stands in his shoes, is bound by an estoppel raised by the fraud of the decedent.

6. A mortgagee is not bound by election of remedy in selling land under his mortgage and attempting to defend his title thus acquired, so as to preclude his subsequent claim of subrogation to earlier securities.

(June 10, 1895.)

APPEAL by complainants from a decree of the Chancery Court for Coahoma County in favor of defendants in an action brought to restrain defendants from prosecuting an ejectment suit to recover possession of certain real estate which defendants claimed under a mortgage foreclosure, which decree awarded the property to defendants in accordance with the prayer of their cross-bill. *Reversed.*

The Union Mortgage, Banking, & Trust Company and C. M. Reynolds were plaintiffs, and

NOTE.—For right of subrogation on payment of mortgage debt, see *note* to *Crumlish v. Central Imp. Co.* (W. Va.) 23 L. R. A. 131.

30 L. R. A.

Peters & Trezevant, trustees under a deed of assignment from Thomas H. Allen & Company, Thomas H. Allen & Company, and J. H. Peace, as administrator of the estate of J. A. Peace, deceased, were defendants.

The bill alleged, in substance, that "on May 15, 1883, J. A. Peace borrowed from the American Freehold Land Mortgage Company of London, Limited, \$26,000 for which he gave four promissory notes of equal amounts due in May 15, 1885, 1886, 1887, and 1888 respectively, bearing interest at 8 per cent. He secured them by deed of trust on lands. On November 23, 1885, L. M. Hopson recovered a decree against Peace for \$6,608.63 with interest at 10 per cent which became a lien on the mortgaged land but subject to the prior trust deed. This decree was purchased for the Corbin Banking Co. On June 1, 1885, Peace executed a deed of trust for the benefit of Thomas H. Allen & Company on the lands covered by the American Freehold Land Mortgage Co., and other lands. Peace failed to pay his notes to the latter company and the Hopson judgment, and was pressed for payment upon both claims; he thereupon attempted to negotiate a new loan sufficient to satisfy them, and to enable him to do so Allen & Co. agreed to waive the priority of their trust deed from him over new security on the same land by canceling their deed and taking a new one after the deed securing the new loan should be executed. Allen & Co. were largely interested in procuring the new loan thereby preventing a foreclosure of the prior deed of trust. An application for the loan was forwarded to the Corbin Banking Company for \$38,000, the application stating that Peace was the owner of the land and that there were no pending suits against him and no liens of any kind except as stated therein. That application was accepted by the Union Mortgage, Banking, & Trust Co., the repayment to be secured by first mortgage on the lands of Peace described in the application. On April 29, 1889, Peace executed a trust deed to secure the loan, and on the next day a deed of trust to Allen & Co., who at once canceled their old deed and filed the new one for record supposing that the deed to the Union Company had been duly recorded. But that deed had not been recorded and record was not made of it until September, 1889. The Corbin Banking Company applied the money it received from the Union Mortgage Company to the Hopson decree held by it and the Freehold Company's claim. These satisfied securities were not in fact delivered to Peace but were retained in the hands of the agent who negotiated the mortgage loan, and in 1891 they were sent by him to the attorney of the Union Company. Peace died in 1890 and the Union

Company began a foreclosure proceeding; Allen & Co. always recognized the priority of the Union Company's debt and in August, 1891, agreed to pay off so much of it as was in arrears, but failed to do so. On January 15, 1892, the lands were sold under the Union Company's deed of trust and bought in for it, and were afterwards sold to complainant Reynolds in trust for the Union Company, and he has since been in possession. In December, 1890, Allen & Co. filed a bill to foreclose their trust deed making Peace's only heir sole defendant. Pending this suit they assigned to J. M. Peters and M. B. Trezevant. This suit resulted in a decree of foreclosure and the land was sold and purchased by Peters & Trezevant as trustees. They brought ejectment to recover possession of the land," and the bill in this case was then filed.

The bill sought to enjoin the further prosecution of the ejectment suit on the ground that plaintiffs were estopped by the agreement of Allen & Co. as stated in the bill from asserting their priority, and asked to be subrogated to the liens of the prior securities which had been paid by the money advanced by complainant.

Allen & Co. answered denying all knowledge at the time their security was taken of a loan made by the Union Company to Peace, and denying any agreement with any one to give the Union Company priority over their trust deed. They denied that they had any interest in securing the loan from the Union Company, and denied the right of the Union Company to be subrogated to the prior liens, and claimed a priority: first, because the freehold notes were paid off and extinguished; second, because all these notes were barred by the statute of limitations. The other defendants adopted this answer and the answer was made a cross bill with a prayer for possession of the lands and for rents and profits.

Evidence in the case tended to show that Allen & Co. were cotton factors at Memphis and that Peace had been for many years a customer of their house; he was always largely in their debt which was secured by trust deeds upon his property. The Allens claimed that about the time their new trust deed was executed the old debt being past due and Peace desiring new advances for the coming year the Allens requested him to meet them for the purpose of placing the matter on a satisfactory basis. The result of this conference was that the Allens agreed to take a new mortgage to cover notes for a renewal of the old indebtedness and the sum of \$5,000 to be added for the coming season, that they could not get a satisfactory description of the land at the time, so for more accurate description they inserted in the trust deed a reference for description to the mortgage made to the American Freehold Land Mortgage Company, "now of record in Coahoma county;" that Peace remarked that the name of the mortgage company was not correct and Allen sent him to Mr. Martin of Memphis, agent for the Corbin Banking Company, to learn the correct name of the mortgagee and that the name given was that of the Union Company, and that that name was substituted by Mr. Allen under the supposition that that company was the holder of the mortgage.

In reference to the claim for subrogation de-

fendants' testimony tended to show that the Union Company never at any time knew of the existence of the prior securities; that, on the contrary, that company was intentionally kept in ignorance of their existence, and that they never had any agreement with Peace that such securities should be kept alive for the benefit of the Union Company. Martin, complainants' agent, stated that these securities were forwarded to him by F. W. Dunton, the cashier of the Corbin Company and agent of the Union Company, to be by him canceled and delivered to Peace, and that Martin of his own motion neglected to surrender the notes or deliver the release which had been executed by the Freehold Company, but held the same in his possession until about the time of the institution of the foreclosure suit on the Union Company's mortgage, when he returned these securities to the Corbin Banking Company.

Further facts appear in the opinion.

Measrs. J. H. Watson and J. A. P. Campbell for appellants.

Mr. D. A. Scott, for appellees:

The doctrine of subrogation is broad enough to include every instance in which one party pays a debt for which another is primarily liable and which in equity and good conscience should have been discharged by the latter, but it is not to be applied in favor of one who has, officiously and as a mere volunteer, paid the debt of another, for which neither he nor his property was answerable; and it is not allowed where it would work any injustice to the rights of others.

Sheldon, Subrogation, § 1.

The doctrine of subrogation is, that one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all of the remedies which the creditor possessed against that other, and to indemnify from the funds out of which should have been made the payment which he has made.

Sheldon, Subrogation, § 11.

It will not be applied to relieve a vendee from the consequences of his own wrongful act, or of the wrongful act in which he has participated, or of the wrongful act of one under whom he claims, etc.

Sheldon, Subrogation, § 44.

The mere loaning of money to a debtor to be applied by him in or towards the payment of a debt which was a lien upon his action does not itself subrogate the lender, in whole or in part, to this lien, even though it was understood between the parties to the transaction that it should have this effect, unless there was such an agreement as to operate as a conventional subrogation.

Sheldon, Subrogation, § 243; *Bunn v. Lindsay*, 95 Mo. 250; *Wade v. Beldmeir*, 40 Mo. 456; *Wolff v. Walter*, 56 Mo. 295; *Woodbridge v. Scott*, 69 Mo. 669; *Price v. Courtney*, 87 Mo. 337, 36 Am. Rep. 453; *Sandford v. McLean*, 3 Paige, 122, 23 Am. Dec. 773; *Slaton v. Alcorn*, 51 Miss. 72; *Freem. Judgm.* §§ 446, 466; *Stevens v. Morse*, 7 Me. 88, 20 Am. Dec. 337; *Story*, Eq. Jur. § 1327; *Staples v. Fox*, 45 Miss. 667.

A person not a party to an execution may advance money upon it and by agreement have it assigned to himself and thus kept alive; but if he pay the execution in whole or in part, without an agreement that it is not to operate

as a discharge, or without taking an assignment, the execution will be *pro tanto* satisfied and cannot be enforced afterwards.

Morris v. Lake, 9 Smedes & M. 521, 48 Am. Dec. 724; *Banks v. Evans*, 10 Smedes & M. 85, 48 Am. Dec. 734; *Rollins v. Thompson*, 13 Smedes & M. 522.

The same principle is applied where a tax-collector pays taxes for a delinquent taxpayer. *Griffing v. Pintard*, 25 Miss. 175.

One who advances money to pay the debt of another in the absence of an agreement, express or implied, for subrogation would not be entitled to succeed to the rights and remedies of the creditor so paid, unless there is some obligation, interest, or right, legal or equitable, on the part of such person in respect to the matter concerning which the advance is made.

24 Am. & Eng. Enc. Law, p. 281; *Suppiger v. Garrels*, 20 Ill. App. 625; *Binsford v. Adams*, 104 Ind. 41; *Flannery v. Utley* (Ky.) 8 S. W. 412 (1887); *Re Schaller*, 10 Daly, 57; *Halselead v. Westerfelt*, 41 N. J. Eq. 100.

A voluntary payment by a stranger of the debt due to the vendor of land, which is a charge thereon, extinguishes the debt and the lien.

Rodman v. Sanders, 44 Ark. 504; *Nichol v. Dunn*, 25 Ark. 129; *Kline v. Ragland*, 47 Ark. 111; *Woodbridge v. Scott*, 69 Mo. 669; *Griffin v. Proctor*, 14 Bush, 571; *White v. Curd*, 86 Ky. 191; *Skinner v. Tirrell*, 159 Mass. 474, 21 L. R. A. 678 (1893); *Bank of United States v. Winston*, 2 Brock. 252; *Douglass v. Fagg*, 8 Leigh, 602; *Adams, Eq.* 611, and note; 1 Jones, *Mortg.* 874 a; *Holt v. Baker*, 58 N. H. 276; 1 Pingrey, *Mortg.* § 1095.

The doctrine of subrogation will not be exercised in favor of a volunteer or stranger, who officiously intermeddles, such as a person who pays without any obligation so to do, or one who, without any interest or contract, liquidates the debt of another.

1 Pingrey, *Mortg.* §§ 1090, 1091, and cases cited in note 8, § 1092.

The loan of money to a debtor to discharge his obligation does not cause the lender to be subrogated to the securities which the creditor held for the enforcement of the obligation.

Riggin v. Hillard, 56 Ark. 476; *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.* 86 Va. 1; *Wilton v. Mayberry*, 75 Wis. 191, 21 L. R. A. 61; *Elina L. Ins. Co. v. Middleport*, 124 U. S. 584, 81 L. ed. 537.

A party who claims the ownership of a note secured by mortgage and the subrogation of the mortgage by means of purchase, must be held to his pleadings, and be denied the right of proving his right to subrogation by some other mode.

Weil v. Enterprise Ginnery & Mfg. Co. 42 La. Ann. 492; *Nicholls v. His Creditors*, 9 Rob. (La.) 476; *Grady v. O'Reilly*, 116 Mo. 846; *Opp v. Ward*, 125 Ind. 241; *Kline v. Ragland*, 47 Ark. 111.

One loaning money to be applied to a lien on land is not thereby subrogated to the lienor's right, when the amount of the lien is so paid with the money thus furnished.

Kline v. Ragland, and *Fidelity Ins. T. & S. D. Co. v. Shenandoah Valley R. Co.*, *supra*; *Mosier's Appeal*, 56 Pa. 76, 98 Am. Dec. 788.

The right of subrogation may be expressly

waived, and the waiver may be implied from the acts of the claimant. Negligence and laches in the enforcement of a claim to subrogation will sometimes be held a waiver, especially so where such enforcement would result in injury to the rights of others.

28 Am. & Eng. Enc. Law, p. 820; *Cornwell's Appeal*, 7 Watts & S. 805; *Re Goswiler's Estate*, 8 Penn. & W. 200; *Gring's Appeal*, 89 Pa. 336; *Noble v. Turner*, 69 Md. 519; *Smith v. Thompson*, 7 Gratt. 112, 54 Am. Dec. 128; *Buffington v. Bernard*, 90 Pa. 63; *Forest Oil Co.'s Appeal*, 118 Pa. 138.

A second mortgagee who has foreclosed and bought in the property can plead the limitation against the first mortgagee seeking to foreclose, though the mortgagor has waived his right and the first mortgage was not barred when the second was given.

Dunn v. Smith (Tex.) 28 S. W. 449; *Scott v. Sloan*, 8 Tex. Civ. App. 302.

Appellees were not estopped from asserting any rights in this controversy by reason of alleged acts *in pais* by Thomas H. Allen, Sr., and other members of that firm.

All such acts on the part of said Allen & Co., or any member of said firm, were done by them when they were in total ignorance of the facts and of their legal rights.

Turnspeed v. Hudson, 50 Miss. 429, 19 Am. Rep. 15; *Kelly v. Wagner*, 61 Miss. 299; *Madden v. Louisville, N. O. & T. R. Co.* 66 Miss. 258; 1 Story, *Eq. Jur.* § 418; 7 Am. & Eng. Enc. Law, pp. 7, 8, and notes 12; *Blodgett v. Perry*, 97 Mo. 263; *Henshaw v. Bissell*, 85 U. S. 18 Wall. 255, 21 L. ed. 835; *Brant v. Virginia Coal & I. Co.* 98 U. S. 826, 23 L. ed. 927; *Stevenson v. McReary*, 12 Smedes & M. 9; *Den, Brinegar v. Chaffin*, 8 Dev. L. 108, 32 Am. Dec. 711; 1 Greenl. *Ev.* § 26.

Messrs. Smith & Trezevant, also for appellees:

The rule of estoppel is never applied unless it is shown that the party to be estopped had full knowledge of the facts.

2 Pom. *Eq. Jur.* 809.

If the law of estoppel is to be applied anywhere in this case it is against the Union Company, for with full knowledge and after deliberating and considering advice as to the true situation, they have elected a remedy, the opposite of subrogation.

2 Pom. *Eq. Jur.* § 810.

The Hopson decree is shown to have been paid off and canceled, and the greater part of the Freehold debt was also paid off by the rents received from Peace after he surrendered the possession to the Freehold trustee.

Therefore, if the Freehold Company, a mortgagee in possession, permitted these rents to go to Corbin, and not to their debt, they are bound nevertheless to exonerate the land from the mortgage to that extent.

1 Jones, *Mortg.* § 732; 2 Jones, *Mortg.* § 1116.

The Allens, being second mortgagees, were entitled to the benefit of the legal consequences of this possession, and could not be deprived of it, even by Peace's consent.

Ibid.

Under no sort of reasoning from the facts of this case can the rule of equitable subrogation be applied.

The Corbin Banking Company, and not the Union Company, paid off the old debts, and afterwards charged the amounts to the account of the Union Company.

Complainant, having failed to establish conventional subrogation, is therefore driven to subrogation by operation of law.

Upon this question *Howell v. Bush*, 54 Miss. 438, is conclusive.

This doctrine has never been applied to the case of a party who originally had a right to choose his position and avoid the difficulty in which he may become subsequently involved (*Howell v. Bush*, *supra*; 24 Am. & Eng. Enc. Law, p. 282, note), nor against a party who has acquired intervening rights.

Being the creature of equity, it will not be enforced where it will work an injustice to the rights of those having equal equities.

24 Am. & Eng. Enc. Law, p. 191, note 5; *Sheldon*, Subrogation, § 245.

It will be denied to one who, but for his own negligence, would not have been compelled to resort thereto, if the enforcement of such right would result in injury to others.

Moore v. Holcombe, 8 Leigh, 597; 24 Am. Dec. 683; *Conner v. Welch*, 51 Wis. 431; *Wall v. Mason*, 103 Mass. 818; *Bussey v. Page*, 18 Me. 459.

The Union Company is a volunteer. Prior to the alleged payment of its money to Peace, it had no interest in the property.

Sheldon, Subrogation, § 248; *Downer v. Wilson*, 88 Vt. 1; *Woods v. Gileon*, 17 Ill. 218; *Wilson v. Soper*, 44 Me. 118; *Wolff v. Walter*, 86 Mo. 293.

Subrogation only takes place in favor of a third party who has satisfied a prior mortgage, where such third party was himself a creditor at the time of the payment.

24 Am. & Eng. Enc. Law, p. 282, notes; *Sandford v. McLean*, 3 Paige, 117, 23 Am. Dec. 773; *Kitchell v. Mudgett*, 87 Mich. 82; *Stearns v. Godfrey*, 16 Me. 158; *Woolen v. Hillen*, 9 Gill, 185, 52 Am. Dec. 690; *Com. v. State*, 32 Md. 501; *Guy v. Du Uprey*, 16 Cal. 195, 76 Am. Dec. 518; *Dingman v. Randall*, 18 Cal. 512.

Where a mortgage has been discharged and satisfaction acknowledged, and a new security taken upon the same land for the same debt, the lien of the old mortgage is gone once for all and the new security must be postponed to such encumbrances as are prior to itself, though junior to the old mortgage.

Westfall v. Hintze, 7 Abb. N. C. 236; *Woolen v. Hillen*, and *Stearns v. Godfrey*, *supra*; *Hinchman v. Evans*, 1 N. J. Eq. 100; *Iowa County v. Foster*, 49 Iowa, 676; *Kitchell v. Mudgett*, *supra*; *Ohlids v. Stoddard*, 130 Mass. 110; *Belcher v. Wickersham*, 9 Baxt. 119; *Narr v. Ellis*, 6 Johns. Ch. 396; *Gardner v. Astor*, 3 Johns. Ch. 55, 8 Am. Dec. 465.

Ex post facto intention will not do.

Molloy v. Harris, 1 Lea, 577; *Dixon*, Subrogation, p. 167; *Nolle v. Their Creditors*, 7 Mart. N. S. 603; *Sheldon*, Subrogation, § 241; *Bunn v. Lindsay*, 95 Mo. 250.

The party having taken one security, the reasonable inference is that he does not intend to rely on or claim another.

Pridgen v. Warn, 79 Tex. 588; *Small v. Stagg*, 95 Ill. 89.

Subrogation is never applied to one who

could make terms for himself and choose his position and say whether he would or would not be bound.

Sheldon, Subrogation, § 240.

To these parties, the rule that the facts and circumstances at the time of the transaction must show that the parties intended to keep the securities alive for their benefit or there can be no subrogation, applies.

Howell v. Bush, 54 Miss. 438; *Belcher v. Wickersham*, 9 Baxt. 111; *Greenlaw v. Pettit*, 87 Tenn. 483.

If a party once deliberately elects his remedy he cannot come into a court of equity and ask to be allowed to make a different determination and to be restored to the right which he has once voluntarily waived.

Hendrickson v. Hinckley, 58 U. S. 17 How. 443, 15 L. ed. 123; *Barker v. Elkins*, 1 Johns. Ch. 465; *Greene v. Darling*, 5 Mason, 201.

Mr. Edward Moyes also for appellees.

Cooper, Ch. J., delivered the opinion of the court:

Repeated examination of the record has failed to satisfy us that Allen & Co. agreed that the mortgage executed by Peace to the appellant was to have priority over the one he executed to them. There is much in the record suggesting that they did, but the fact is not stated to be true by any witness having personal knowledge thereof. Martin, who was a party to the negotiations, is not clear, and seems to have made contradictory statements. Peace is dead, and the Allens both testify that they thought the debt having precedence over their security was that secured by the mortgage to the Freehold Company, as to which there is no controversy in reference to their waiver. The whole correspondence between the senior member of the firm while in New York with his firm in Memphis strongly supports his testimony that, in his negotiations with attorneys in New York, he thought the attorney was the representative of the Corbin Banking Company; that that company represented the creditor; and that the Freehold Company was the creditor. Strangely enough, the fact was not mentioned during these interviews that the debt to the Freehold Company had been paid, and a new loan secured by Peace from another company, the appellant. Mr. Allen spoke of the debt as a renewal, expressed surprise that the amount had been so greatly augmented by accumulated interest, and, though always recognizing the priority of the security over that of his firm, seems to have labored under the impression, not corrected by the attorney of the appellant, that the debt was that due to the Freehold Company. We do not understand how the junior member of the firm could then have been of the same opinion, for the year before he had been approached by Martin, and requested to consent for his firm that appellant's security should have precedence, and had declined, stating that if the Corbin Banking Company, in preparing the papers, had made a slip, by reason of which his firm had secured an advantage, it would not be waived. But it does appear that he, in all the correspondence with his father, rec-

ognized the priority of right of the claim asserted by the attorney with whom his father was negotiating, and we cannot understand why he should do so if at the time he remembered or recalled the fact that, by reason of mistake in preparing the new securities, his firm had secured priority. So, too, the recitals in the new security taken by Allen & Co., while suggestive of a distinct recognition of the mortgage to appellants, is not, in our opinion, so nearly conclusive as counsel for appellants contend. As originally written, it referred to a prior mortgage to the Freehold Company, which fact strongly supports the contention of the Allens that they were referring to the old mortgage. The name of the Freehold Company was, upon the suggestion of Peace, stricken out; and appellants contend, and with force, that this was for the purpose of recognizing the priority of the new mortgage. But the Allens reply that the change was not made for such purpose, but because Peace told them the name as written was not the full name of the creditor company, the company making the original loan, as they understood, and that the change was made, not to recognize the superior right of a new party, but to correctly name the old creditor; and in this the Allens find support in the fact that a part of this recital refers to the mortgage as "now of record," which the mortgage to the Freehold Company was, and which that to appellants was not. Considering the sums involved, the business seems to have been very loosely transacted. We cannot say, on the whole evidence, that the parties on one side were not referring to one thing, and those on the other to another, and so their minds never met. We can see no other explanation which does not impute perjury to some one, and in that view the testimony may be reasonably harmonized. We therefore are of opinion that no contract of waiver is established against Allen & Co., either in fact or by estoppel. But it is entirely certain that appellants or their representative understood from Peace that Allen & Co. had agreed to waive their priority in favor of the new mortgage to be given by him to secure them in the large loan they were to make. Peace's application for the loan states that the property to be mortgaged was unencumbered. The Freehold mortgage, for the payment of which a larger part of the money was desired, was unquestionably superior to that of Allen & Co., and there is nothing to suggest the improbable purpose of the lender to pay off the first mortgage, let in the second, and itself accept a third. Peace unquestionably agreed to give to the appellants similar security to that held by the Freehold Company; i. e. a first mortgage on the property. It is true that he did not agree to give the identical security,—the old mortgage, kept alive for the benefit of the new lender,—but the very essence of his agreement was to give a mortgage which should primarily bind the property. This, on the developed facts, he has failed to do.

The first question presented is whether, as between Peace and the appellants, the case made would entitle the appellants to relief by 30 L. R. A.

the remedy of subrogation. If this be answered in the affirmative, the next inquiry will be whether, by reason of the intervening rights of third persons (Allen & Co.), this relief should be denied. Cases may undoubtedly be found which would deny subrogation under the circumstances, even as between the appellants and Peace. Our dissenting brother will collect them in his opinion. They are cited in the briefs of appellees' counsel, and need not be here again set down. But there are other cases holding a different view, and we think with better reason. The principle of equitable subrogation does not arise from contract (for that is conventional subrogation), but is a creation of the court of equity, and is applied in the absence of an agreement between the parties, where otherwise there would be a manifest failure of justice. It is never enforced for the protection of mere strangers and intermeddlers in the affairs of others, nor can it be invoked to override and displace the real contract of the parties; that is, where the security contracted for is in fact given but its legal effect is not that expected, as in *Howell v. Bush*, 54 Miss. 437, equitable subrogation is in some of its characteristics nearly related to the principle of equitable estoppel, and may in a sense be called the acting and moving, while equitable estoppel is the obstructive, member of the same family.

The objections made by counsel for the appellees, (1) that appellants were strangers to the property, and therefore cannot invoke the rule of subrogation; and (2) that, since it was agreed that the securities to which subrogation is now sought should be paid off and discharged, there is nothing to which appellants can be subrogated,—are answered by many authorities.

1. One who, at the instance of the debtor, advances money to be used by the debtor in the payment of a prior security, is not a stranger or intermeddler in his affairs. *Sheldon, Subrogation*, § 247; *Willon v. Mayberry*, 75 Wis. 191, 6 L. R. A. 61; *Emmert v. Thompson*, 49 Minn. 386; *Johnson v. Barrett*, 117 Ind. 551; *Gilbert v. Gilbert*, 89 Iowa, 657; 8 Pom. Eq. Jur. § 1212.

2. The fact that the mortgage was paid and intended to be paid is immaterial. Equity will consider it as yet alive so long as the rights of parties require. *Walker v. King*, 45 Vt. 525; *Cobb v. Dyer*, 69 Me. 494; *Wheeler v. Willard*, 44 Vt. 640; *Barnes v. Mott*, 64 N. Y. 397, 21 Am. Rep. 625; *Texas Land & L. Co. v. Blalock*, 76 Tex. 85; *Crippen v. Chap-pel*, 85 Kan. 495, 57 Am. Rep. 187; *Cansler v. Sallis*, 54 Miss. 446.

In *Whitecell v. Texas Loan Agency* (Tex.) 27 S. W. 818, precisely the same questions here presented were decided. We have not had access to the report, but doubt not the quotations of counsel from the opinion are correct. The present case is, as to the matters hereinbefore referred to, fully covered by the decision of this court at the April term, 1894, in the case of *McMullen v. Investment Co.* in which no opinion was written. That case and *Cansler v. Sallis*, 54 Miss. 446, are decisive, also, that since Allen & Co. are, by applying the principles of subrogation, placed

in no worse attitude than they originally were, the fact that they have a mortgage upon the same property cannot defeat the right of subrogation invoked by the appellants. The fact that the debts protected by the securities to which subrogation is sought are now barred by limitation cannot avail. Peace's representative will not in equity be permitted to invoke the statute of limitations to defeat the security to which subrogation is sought. The fraud of Peace in representing that the property was unencumbered, and of accepting from the appellants the large sum of money they advanced on the faith of his representations, would preclude him, if alive, from invoking the lapse of time as a bar to the remedy by which the injury he has sought to inflict can be avoided. He would be estopped to interpose the defense, and his representative, who stands in his shoes, is bound by the same rule. *Staton v. Bryant*, 55 Miss. 261; *Barnett v. Nichols*, 56 Miss. 622; *Kelly v. Wagner*, 61 Miss. 299.

We see nothing inconsistent in the conduct of appellants in claiming under the mortgage executed by Peace, selling thereunder, entering into possession of the land, and attempting to defend their title thus acquired, and, falling in that aspect of the cause, invoking the right of subrogation to the securities the money they loaned has paid. They had reason to believe from the interviews with Mr. Allen that his firm recognized the priority of its security. Indeed, it appears that no other idea was entertained by Allen & Co., until long after the appellants had caused the mortgage they held to be executed, and after they had foreclosed their own mortgage, to which proceedings the appellants were not made parties, because it was then thought that they were the senioren encumbrancers, and therefore not necessary parties to the suit. The *status quo ante* the cancellation of the securities should be restored; the appellants held to account as mortgagees in possession of the land, entitled to charge against it all prior encumbrances discharged by the money they loaned.

The decree is reversed, and cause remanded, to be proceeded with in accordance with this opinion.

Whitfield, J., dissenting:

I dissent from the judgment of the court.

First. The case, as to subrogation, may be condensed thus: Peace, the common debtor of the Freehold Company, and Allen & Co., owed the former, say, \$26,000, and the latter \$25,000; the Freehold Company having the senior, and Allen & Co. the junior, mortgage. Peace wanted more money to pay off the Freehold Company, and to farm on. He applied to the Union Company, through its agent, the Corbin Banking Company, for a loan of \$38,000; the Corbin Banking Company intentionally and fraudulently keeping off the application the Freehold mortgage and all the Allen & Co. mortgages, and the Corbin Banking Company being the agent of the Union Company. The Union Company, through its said agent, and Dr. Peace, agreed expressly that the Freehold Company's mortgage should be paid off, satisfied, and forever

extinguished,—not kept alive. It was so paid off. The said mortgage was actually sent by the Corbin Banking Company, from New York, to Martin, at Memphis, to be delivered up to Peace, and, in the eye of the law, was as effectually in his hands as if actually delivered. Allen & Co. were entirely ignorant of all this; never knew or supposed there was any new creditor, but understood that the Freehold Company's debt was being renewed and continued. The Freehold Company's debt being thus paid off and satisfied by express agreement of the Union Company, through its agent, the Corbin Banking Company, and Peace, and in exact accordance with their actual intention, the Allen & Co. trust deed stood first, in legal priority; Allen & Co. having had nothing whatever to do with the dealings between Peace and the Union Company. My brethren do not differ from me as to Allen & Co.'s not knowing. They are driven from the ground of estoppel by the clear shining of manifest truth from the face of this record. The reason why the Corbin Company did, as the agent of the Union Company, so agree that the Freehold Company's mortgage should be paid and satisfied and not kept alive, is obvious. That company wanted to shift a bad debt from its shoulders to those of its principal, and secure, besides, to itself, the \$8,000 it was already out in the purchase of the Hopeon claim, and \$3,700 it charged as commissions for negotiating—as it puts it—the loan of \$38,000; and it purposely concealed from its principal the fact of the existence of the Freehold mortgage, by paying it, and discharging it, and sending it accordingly to Martin, to be delivered to Peace. The Union Company, through its agent, the Corbin Banking Company, finding out that Allen & Co. stood upon their legal rights (the Union Company's mortgage not having been executed for some months after the payment of the Freehold mortgage and the execution and recording of the Allen & Co. mortgage), that company asks this court not to apply the principles of subrogation to the facts as they were at the time of these occurrences,—not to the real case as thus made by the actual agreement and intent of the parties at the time,—but to a state of facts which it alleges, but signally fails to prove; to a case conjured up to suit the desperate exigency of its genuine situation. In short, it is an effort to work out subrogation by *ex post facto* intention,—precisely that; nothing more, nothing else. I have not so learned the law of subrogation. So to hold on the facts of this record is plainly to hold that in no case (where intervening rights do not appear), under any circumstances, where a prior mortgage is paid off by a new lender, can a junior mortgagee maintain his accruing legal priority; but that in all cases payment, and payment merely, payment only, payment without any qualification, entitles the lender to subrogation. This may be something else, it is not the creature of equity known as "subrogation." Sheldon, *Subrogation*, 2d ed. p. 364. §§ 240, 241, notes 8, 9; *Id.* p. 371, § 247, note 8, with the authorities therein cited; especially *Gardenville Permanent Loan Ass.* v

Walker, 52 Md. 452. I refer especially, also, to *Hewell v. Bush*, 54 Miss. 437, within the principle of which case this case, in my judgment, falls precisely. With all deference, I think the opinion of the court overrules that case. It is impossible for me to distinguish it in principle from the case at bar, and, in my judgment, it is controlling and decisive here.

But, secondly, the Union Company elected

its remedy. It repudiated the "Freehold" mortgage as a basis of its claim. It allowed it actually, as to Peace, to run past maturity, perhaps the full statutory time, without selling under it. It did sue under its own mortgage; bought under it; is in possession under it, and is sued in ejectment as so in possession. It is estopped now to change its election.

GEORGIA SUPREME COURT.

Joseph MARIL, *Plff. in Err.*,

v.

CONNECTICUT FIRE INSURANCE COMPANY.

(55 Ga. 804.)

- *1. Under a policy of insurance which covers a stock of material used in a particular business, and which contains a printed condition prohibiting the keeping and use of certain inflammable substances upon the premises in which such business is conducted, a recovery may be had in case of loss, even though it should appear that such inflammable substances were in fact kept and used upon the premises, provided it shall further appear that the business in the conduct of which the stock of material insured was used is of such a character as that the use of such inflammable substances is a necessary, usual, and customary incident to said business, and that such substances were kept only in such quantities, and used only in such manner, as, in view of the subject of the insurance, must have been in contemplation of the parties at the time the policy was issued.
2. If the business in question be of such a character as that some of the inflammable substances against the keeping of which provision is made in the printed conditions of the policy themselves constitute component parts of the stock of material used in such business, the policy would cover such inflammable substances, and a recovery could be had for loss thereof, notwithstanding the printed condition against the keeping of such inflammable substances.
3. If in the stating clause of a policy of insurance the thing insured be described in general terms as a stock of "watchmaker's materials," and there be nothing in the policy itself indicating with exactness what articles were embraced in and intended to be covered by such general terms, parol evidence is admissible to explain the ambiguity, and to apply the policy to the subject of the insurance.

(February 18, 1893.)

ERROR to the City Court of Savannah to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

*Headnotes by ATKINSON, J.

NOTE.—See also *Faust v. American F. Ins. Co.* (Wis.) ante, 783.

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The official report sent up with the case for the consideration of the supreme court was as follows:

The policy was written upon "watches, jewelry, diamonds, silver and plated ware, clocks, musical instruments, fancy goods, bric-a-brac, and other merchandise usual to a jewelry stock in and out of safes," and "watchmaker's material; all while contained in the three-story brick, metal-roofed building situated at number 24 Barnard street, in Savannah, Ga." The policy on its face provides that it shall be void "if the risk be increased by any means within the control of the assured, or if . . . benzine, gasoline, petroleum, or crude earth or coal oils are kept or used on the premises without written consent." There is this further clause in the policy: "Kerosene oil, if of the legal standard, may be used for lights; lamps to be filled by daylight only. One barrel may be kept on the premises for this purpose, and may also be kept for sale in stores, in quantities not exceeding five barrels at any one time. If kept in greater quantities, without written consent, this policy shall be void."

The plaintiff's testimony was: "On the 7th day of June, 1892, a fire occurred on the premises covered by this policy. The value of my stock was at that time \$9,200. I was engaged in the jewelry business. Four thousand five hundred dollars of this stock was in my safe. An appraisal was made on the stock, which appraisal placed the damage at \$3,440. I have never been paid that amount, or any part of it. The loss on my stock by the fire was \$3,440. I am twenty-six years old. I have been in Savannah ten years in November next. I was born in Russia. Lived there until I was fourteen years old, when I went to New York, where I lived two years; since which time I have lived in Savannah. The fire occurred between three and four o'clock in the morning, and started on the north side of the store. Mr. Sack, my watchmaker, had the key to the shop. He did my repairing in consideration of which I allowed him bench room. I do not know the cause of the fire, and have no idea what caused it. It looked as if the fire started under the counter. There was paper there. The fixtures were burned up. They were a total loss. A good deal of the stock could not be used. The fixtures were of wood. The walls and sides were badly charred. I do not know whether it looked like a flash fire or not, and to this day I have no

theory as to how the fire started. The store was lighted by gas. I never kept kerosene oil or benzine or naphtha for sale. None of these belong to a jewelry stock. I had a demijohn, with kerosene oil in it. I do not know how big it was. It may have been a three-gallon demijohn, but my opinion is that it was not less than two nor more than three. Six or eight weeks before the fire, I bought the kerosene. I cannot tell the exact date. The kerosene in this demijohn was bought and used for the purpose of cleaning clocks. I never used it myself. I am not a watchmaker. I had it there for that purpose. I am positive it was used for cleaning clock movements, and maybe, if the movements were rusty, it was used for watches too. It was my oil, but Mr. Sack used it. I saw him use it for cleaning clock movements. After he would use it, he would pour it back in the demijohn. I looked at the demijohn the morning after the fire. I testified at the former trial that it looked as if this demijohn had as much kerosene in it after the fire as it had before the fire. There must have been two quarts or a half gallon, in it. I do not know how much was in it before the fire. I presume there was the same amount in it after the fire as there was before. After the fire I did not see any cork. I swore on the last trial that it was uncorked, and my memory was fresher then than it is now. I was probably right then. The demijohn was sitting on a shelf in the rear of the store, on the south side. It was in a safe place. It had been sitting there for three months, and had never fallen off. That was the place we always kept it. On this occasion there was one lamp that had oil in it, that I know of. That was a student lamp Mr. Sack used. It was on the bench, and fell off, I presume. Kerosene was used in it. Then there was a piano lamp. It was one that I had sold, and it was brought back. It had some oil in it. It was a large lamp I presume which would hold a quart. It was not nearly half full, but there was some kerosene in it. There was about a pint or a little more of benzine on hand. It was in a bottle that might hold a quart. I saw one can of oil on hand. There were two cans there. One had very little in it, and the other was about full. I had no turpentine there. On the morning after the fire the insurance gentlemen and the firemen showed me some paper, which they said was saturated with turpentine. I do not know whether it was or not. I do not know whether the paper was wet with kerosene or benzine. Maybe it was water. Maybe there was some kerosene on the paper. I do not know. I do not know how kerosene got there if it was there. Maybe I said at the time that I did not know how it got there. On January 1, 1892, in making my tax returns, I swore that the market value of my stock was \$1,000. Mr. Sack used the student lamp on his bench for night work. The benzine and kerosene that were there were used for cleaning purposes, cleaning the movements of clocks and watches. Benzine is used for cleaning watches. The amount of kerosene purchased was ten cents' worth. The benzine was kept near Mr. Sack's bench. I had nothing whatever to do with it. It was kept in a glass bottle. The benzine had nothing

whatever to do with the fire as far as I could see. The kerosene can that was full, or nearly full, would hold about two or three quarts. That kerosene was used by Mr. Sack, and was kept near Mr. Sack's bench, on his side. He used it to put in his lamp. Maybe he used it for cleaning purposes, too. The fire did not start near that can of kerosene. The other kerosene can was one that Mr. Sack said leaked, and we did not use it much. If there was kerosene on the paper there, I presume that the lamp must have turned over, and some kerosene reached the paper. The piano lamp was turned over. At the time I made my tax return I owed about \$5,000. I did not think that I should pay taxes on my debts. My idea was to deduct the amount of purchase money, and the balance represented what was liable for taxes. I counted that \$9,200 less \$5,000 would make \$1,800. I simply owed the money, but owned the stock. The lamp that was upset was on the same side the paper was lying, on the north side. The paper was not right at the lamp. The oil might have spread there. The paper was under the shelving and the lamp was on the other side of the shelving. I do not know what quality of kerosene was in the demijohn. I just sent out and got ten cents' worth of kerosene. This oil was in the demijohn. I got it for cleaning purposes. The can which Mr. Sack used for his lamp maybe was a gallon can."

Defendant moved for a nonsuit. Plaintiff offered to testify that at the time the insurance was effected he was carrying on a jewelry business, selling and repairing watches and clocks; that he intended to continue such business, and this fact was known to defendant; that in this business, and as a part of the watchmaker's materials, and as incidental, necessary, usual, customary, and naturally pertaining to the stock and business, the kerosene and benzine were used in small and reasonable quantities for such business in cleaning the works of watches and clocks, the kerosene being used in part in the student's lamp; and that said kerosene and benzine did not cause the fire, nor contribute to it, and were not even consumed, in whole or in part, by the fire. The court refused to admit this testimony, and granted the nonsuit.

Messrs. Garrard, Meldrim, & Newman for plaintiff in error.

Messrs. Denmark & Adams for defendant in error.

Atkinson, J., delivered the opinion of the court:

With the addition that evidence was introduced, showing that proofs of loss were submitted to the defendant company within the time prescribed, and a demand for payment made in writing; that the demand was never complied with; that suit was brought within the time limited by the policy; and proof made that from \$300 to \$350 would be a proper allowance for counsel fees for the prosecution of this litigation,—the facts as stated in the official report are sufficiently full for the determination of the questions made in this record. It will be seen from an examination of the official report, as amended, *supra*, that the

plaintiff proved his loss, the submission of proofs of loss, a demand for payment in accordance with the terms of the policy sued on, and the value of counsel fees, and closed. A motion for nonsuit was made,—upon what special ground does not appear in the record,—but we may presume from the line of argument pursued here, and the fact that the plaintiff made such a case as would undoubtedly have authorized a finding for him, that the motion for nonsuit was predicated upon the ground that the plaintiff had rendered void his policy of insurance by keeping and using upon the premises occupied by him benzine and kerosene contrary to the conditions of his policy of insurance, which prohibited the same. The evidence showed that in his store the assured kept a small quantity each of kerosene and benzine,—of the former all told, including that in lamps, about one gallon; of the latter about one pint or a little more. None of either was destroyed by fire. After the court had signified its intention to grant a nonsuit, but before the order to that effect had been taken, the plaintiff offered to prove, in addition to the evidence already submitted, that at the time the insurance was effected he was carrying on a jewelry business, selling and repairing watches and clocks; that he intended to continue such business, and this fact was known to the defendant; that in the conduct of this business, and as a part of a watchmaker's material, and as incidental, usual, customary, and naturally pertaining to the stock and business, kerosene and benzine were used in small and reasonable quantities in cleaning the works of watches and clocks, the kerosene being used in part in a student's lamp (kept in the store); and that said benzine and kerosene did not cause the fire, nor contribute to it, and were not even consumed, in whole or in part, by the fire. This testimony was repelled by the court as being inconsistent with the contract as expressed in the policy, whereupon the court granted a nonsuit, and to this judgment exception is taken.

We are not now to consider whether, in view of the very trifling and inconsiderable quantities in which the prohibited inflammable substances were used and kept, and the fact that they were so kept as not materially to have affected the risk of the insurer, or in any manner to have contributed to the loss, the court would, in the first instance, have been authorized to grant a nonsuit; but whether, with the supplemental evidence offered, it should have done so. The first question to consider is whether the testimony offered was competent. The contract of insurance was in writing, and the rule of law is that parol evidence is inadmissible to add to, take from, or vary the terms of an unambiguous written contract; and the kindred rule to this is that, if the written agreement appears from its terms to be so ambiguous as not fully to express the contract between the parties, parol evidence is admissible to explain such ambiguity. If the written agreement is full, explicit, and unambiguous, it must be taken as conclusively representing the real contract between the parties, and neither will be permitted by parol to in any manner vary its terms. If for want of fullness of statement, the contract be

indefinite or uncertain, parol evidence is admissible, not to vary, add to, or take from the contract, but to explain and so illuminate it as to make the real intention of the parties apparent. It will be seen by an examination of its provisions that the policy of insurance covers a number of articles specifically, including watches, diamonds, clocks, etc., and finally by the use of the words "watchmaker's materials," such articles as would be comprehended within that general descriptive term. In order to determine what was covered, or by the parties intended to be covered, by that general term, it is necessary to inquire somewhere what it means. No index to its meaning is afforded by any other expression contained in the policy. There is nothing in that instrument to indicate what the parties intended should be its meaning. It is therefore an expression which must be classed as ambiguous, and, being ambiguous, parol evidence is admissible to explain its meaning. The plaintiff offered to prove that both kerosene and benzine in reasonable quantities were used in his business as a part of a watchmaker's material, and that their use as such was necessary, customary, and usual in the conduct of such business; that he was engaged in the conduct of this business at the time this insurance was effected, and that the defendant knew such to be the fact. Had he proven these facts to the satisfaction of the jury then he would have shown that the very articles for the keeping and use of which he was nonsuited were in fact themselves made, by the terms of his policy, the subject of the insurance; and the jury would have been authorized to find that the policy was written with reference to the continuance of such a business. If they were a part of a watchmaker's material, they were as much covered by the policy of insurance as the springs, hands, dials, tools, glasses, or any other articles used by a watchmaker in the conduct of his business. If, then, by the staling clause of the policy itself, an article were insured, it surely could not be seriously insisted that the policy would be avoided because of the printed conditions thereafter appearing, to the effect that the keeping and use of the very article insured in the manner contemplated by the parties should render the policy void. One of the elementary rules for the construction of policies of insurance is, that if there be a conflict between the written statement of the subject of insurance and the printed conditions of the policy, the former must prevail. A contrary doctrine would present the strange anomaly of an insurance company issuing to another a policy of insurance containing such conditions, as that, under no circumstances could payment of a loss be thereunder legally demanded. A rule which permitted the printed conditions to control the written statement of the subject upon which the insurance was issued, would place the insurance company in the peculiar condition of saying, in effect: "I issue you this policy. I accept your money in satisfaction of my demand for premiums. I insure your property to be used in your business, but if you use it your policy is void." A parallel case, and one which alone adequately expresses the peculiar paradox in the case supposed, is to be found in the sage advice given to her

youthful daughter when an affectionate but overcautious mother, in reply to the simple request:

"Mamma, may I go out to swim?"

—said to her:

"Yes, my darling daughter;
Hang your clothes on a hickory limb,
But don't go near the water."

Even if the inflammable substances, the keeping and use of which it is claimed avoided the policy of insurance, were not of themselves a subject of the insurance, yet, if the articles were employed by the assured in the conduct of the particular business, and the use of such article is a necessary incident to the conduct of such a business, the parties will be presumed to have contracted with reference thereto, and at the time the insurance policy was issued the insurer will be presumed to have had in contemplation the use of such substances by the assured when he assumed the risk; and, under such circumstances, will be presumed to have waived the condition under which the use of such substance would render the policy void. For instance, if he insured a powder manufactory, he must have contracted with reference to the use of combustible materials necessary to be employed in its manufacture. Thus, where a policy covered property described as a "stock such as is usually kept in a general retail store," and the keeping of gunpowder was prohibited by the printed portions of the policy, it was held that, if gunpowder formed a part of the general stock usually kept in a retail store, then the keeping of the powder was not a violation of the conditions of the policy. *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202. So, if the insurance be upon a printing establishment, and the keeping or use of camphene was prohibited, as the policy covered a print-

er's stock and materials, and it was shown that camphene was necessary to clean the type, and was usually employed by printers for that purpose, the prohibition was held not to apply. *Harper v. New York City Ins. Co.* 23 N. Y. 441. So, also, the use of kerosene was prohibited, but, as the policy covered a photographer's stock, materials, etc., and it being shown that kerosene was usually employed in the business for heating paper and other purposes, it was held that the prohibition did not apply, even though gas could have been used equally as effectually for that purpose. *Hall v. Insurance Co. of N. A.* 58 N. Y. 292, 17 Am. Rep. 255.

Those cited are a few of the many cases illustrating the principle which we here announce. We have seen that parol evidence was admissible to explain the meaning of the term "watchmaker's materials," as employed in the policy, and therefore the court erred in repelling the testimony offered by the plaintiff to the effect that benzine and kerosene in the quantities in which he kept and used them, were necessary to be used in the conduct of that business; and the testimony so excluded, coupled with such testimony as was already introduced, makes such a case as that, whether we treat the kerosene and benzine in question as included among those articles insured under the general term "watchmaker's materials," or whether we treat them as simply inflammable substances used in connection with and as a part of the business in which the assured was engaged, the property employed by him in which business was covered by this insurance, — in either event the jury would have been warranted in finding in his favor against the company. We therefore conclude that the court erred in granting a nonsuit, and the judgment is accordingly reversed.

TENNESSEE SUPREME COURT.

SUPREME LODGE KNIGHTS OF PYTHIAS, *Plff. in Err.*, v.

Ernestine LA MALTA *et al.*

(35 Tenn. 187.)

1. The holder of a benefit certificate who agrees to be bound by all laws of the order "now in force or that may hereafter be enacted" will be subject to a subsequent rule regularly passed destroying liability on certificates in case of the suicide of their holders.

2. The adoption, certification, promulgation, and printing as one full and complete instrument, of a constitution by the proper body of a benefit society, will cause that instrument to annul and supersede all portions of former constitutions which are not embodied in it.

3. Power given by the supreme lodge

of a benefit association to the board of control of the endowment rank to have "entire charge and full control" of such rank does not authorize the board to enact laws.

4. The supreme lodge of a benefit society cannot delegate to a board of control its power to enact general laws affecting the whole endowment rank of the order, without express authority in the charter.

(June 15, 1895.)

ERROR to the Circuit Court for Shelby County to review a judgment in favor of plaintiffs in an action brought to enforce defendant's liability on a benefit certificate which had been issued to Frederick Schuman, deceased. *Affirmed.*

The facts are stated in the opinion.

Mr. Frank P. Poston for plaintiff in error.

NOTE.—As to some of the questions in the above case, it is said to be one of first impression. Considering the growth of great organizations similar to that involved in this case, their constitutional law 80 L. R. A.

must be regarded as important. For somewhat similar questions in case of religious bodies, see *Krecker v. Shirey* (Pa.) 20 L. R. A. 478.

Messrs. Smith & Tresevant, for defendants in error:

The charter of a corporation, or incorporated society of any sort, is the fundamental law; and by laws not made in accordance with it are void.

1 Morawetz, Priv. Corp. § 494; 1 Bacon, Ben. Soc. §§ 48, 71, 72, 91; Niblack, Ben. Soc. pp. 41, 210; *Martin v. Nashville Bldg. Asso.* 2 Coldw. 418.

The charter does not confer on the supreme lodge the right to confer the lawmaking power on the board of control of the endowment rank.

1 Morawetz, Priv. Corp. §§ 145, 534 *et seq.*; Niblack, Ben. Soc. pp. 11, 60, 61, 254, 255.

It was not intended to reserve to the association the power to change or avoid its contracts, or lessen its responsibilities. This is not the proper office of the by-law; and from the stipulation it cannot be presumed that it was intended to apply to any by-law other than such as it was in the competency of the association to make.

Niblack, Ben. Soc. § 25, pp. 58, 59; 1 Morawetz, Priv. Corp. §§ 491-501; Ang. & A. Corp. last ed. chap. 10; 2 Am. & Eng. Enc. Law, p. 178, notes.

If the board of control had the power to make this amendment, it had no power to make it retroactive.

Sedgw. Stat. & Const. L. pp. 407, 408; *Horne v. Memphis & O. R. Co.* 1 Coldw. 72; *Hannum v. Bank of Tennessee*, Id. 398; *Collins v. East Tennessee, V. & G. R. Co.* 9 Heisk. 841; *Gap & C. R. Co. v. Murrell*, 11 Heisk. 715; Niblack, Ben. Soc. pp. 61-65.

A by-law which violates the obligation of a contract is invalid.

1 Morawetz, Priv. Corp. § 496; *People v. Fire Dept. of Detroit*, 81 Mich. 458; Ang. & A. Corp. 11th ed. §§ 382, 383; Niblack, Ben. Soc. pp. 41, 126.

The certificate being silent as to suicide, the insurer was bound to pay, even though the insured commit suicide.

Phadenhauer v. Germania L. Ins. Co. 7 Heisk. 567, 19 Am. Rep. 628; Niblack, Ben. Soc. p. 305.

The remedy or means of enforcing a contract is a part of that "obligation" of a contract which the Constitution protects against being impaired by any law passed by the state.

Walker v. Whitehead, 88 U. S. 16 Wall. 814, 31 L. ed. 857; *Chicago, St. L. & N. O. R. Co. v. Pounds*, 11 Lea, 127; Sedgw. Stat. & Const. L. p. 188; *Hannum v. Bank of Tennessee*, 1 Coldw. 399.

These orders have been all the while attempting to take these certificates out of the rules of life insurance; but the courts have been all along inclined to treat them as other life policies.

Weil v. Trafford, 3 Tenn. Ch. 108; *Tennessee Lodge v. Ladd*, 5 Lea, 716; Cent. L. J. Aug. 4, 1893.

Caldwell, J., delivered the opinion of the court:

On the 14th day of May, 1889, the Supreme Lodge Knights of Pythias of the World issued to Frederick Schuman, of Memphis, Tenn., a "Certificate of Membership" in the 30 L. R. A.

endowment rank of that order, whereby it bound itself to pay to his children, Lotta S. and Frederick E. Schuman, the sum of \$3,000 upon his death in good standing. The children so named as beneficiaries died on the 30th of January, 1893, and Schuman himself died the next day. By the terms of the certificate and the laws of the order, all interest of the children ceased and determined upon and in consequence of their death in the father's lifetime, and upon his death without having nominated some other beneficiary all rights under the certificate passed to his next of kin and legatees under his will. Upon refusal to pay, Frederick Schuman's executrix and next of kin brought this suit in the circuit court of Shelby county to recover from the Supreme Lodge Knights of Pythias the full sum named in the certificate. Verdict was returned and judgment pronounced in favor of the plaintiffs, and the defendant appealed in error. The only real defense made in the court below was that Schuman, the assured, took his own life, and thereby, under the laws of the order, forfeited and annulled his certificate of membership, and absolved the defendant from all obligations to pay the same; and the rulings of the trial judge, in his charge as given, and in his refusal to instruct the jury as requested, upon the question of suicide, are in this court assigned as error.

It was admitted on the trial in the court below "that on the morning of the 30th of January, 1893, the two children of Fred Schuman were found in bed with him, dead, and that he was then insensible, and died on the 31st of January, 1893, and that his death and that of his children was caused by opium, or morphine, given by him to the children and taken by himself." It was also admitted that "Fred Schuman was much attached to these children and treated them very tenderly," that he died in good standing, and that payment of his certificate was refused alone upon the ground that he committed suicide."

The order of Knights of Pythias is not a regular life insurance company; but it is a benevolent association, with life insurance as one feature, to be enjoyed or not by each particular member at his own election, and upon certain terms and conditions. The laws of this order, as of other benevolent associations, when applicable and not in conflict with Federal and state laws, or contrary to public policy, are to be taken as parts of its contracts with its members, and as such are of great moment in the determination and enforcement of their respective rights and obligations under those contracts. Bacon, Ben. Soc. §§ 161, 185; *Tennessee Lodge v. Ladd*, 5 Lea, 720, 721; *Catholic Knights of America v. Kuhn*, 91 Tenn. 216. At the time Schuman applied for and obtained the certificate in suit, the order of Knights of Pythias had no law against suicide, but the defendant insists that such a law was enacted before his death, and that it became binding upon him at once, and upon those who should claim under him. His written application for membership in the endowment rank contains this statement: "I hereby agree to conform to and obey the laws, rules, and regulations of the order

governing this rank, now in force or that may hereafter be enacted, or submit to the penalties therein contained," and the certificate of membership recites upon its face that the consideration upon which it is issued is, among other things, "the full compliance," by Schuman, "with all the laws governing this rank, now in force or that may hereafter be enacted." These stipulations in the application and certificate were binding upon Schuman while he lived, and they are equally binding upon the plaintiffs since his death, and in consequence thereof the anti-suicide law, relied upon as a defense to this action, though enacted subsequent to the filing of the application and issuance of the certificate, became operative against him and them from the time it was passed, provided, only, that its passage was accomplished in such a manner as to make it a valid law of the order. *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 486, 46 Am. Rep. 832. The law in question was passed by the Board of Control of the Endowment Rank, Knights of Pythias, in regular quarterly session, on the 12th and 18th of January, 1898, as an amendment to article 6, section 1 of the general laws of said rank, and it is as follows: "If the death of any member of the endowment rank heretofore admitted into the first, second, third, or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then in such case the certificate issued to such member, and all claims against said endowment rank on account of such membership, shall be forfeited."

Had the board of control legal authority and power to pass such a law? His honor, the trial judge, instructed the jury in effect that it had not, and that, for that reason, the supposed law was invalid, and without force or virtue in this case, and, entertaining that opinion, he also refused to instruct the jury, upon the request of the defendant, that such law was operative against the plaintiffs, and, upon the admitted facts, a complete answer and bar to their action. Undoubtedly, such a provision against self-destruction is reasonable, and, being so, it is, as previously stated herein, binding upon Schuman and upon those claiming under him, if validly enacted. The fact that its enactment was subsequent to the date of his certificate is rendered unimportant by the stipulations in the application and in the certificate itself, whereby he bound himself irrevocably to full obedience and submission to all legislation, then in existence or thereafter enacted for the government of the endowment rank, of which he was becoming a member. Those stipulations, however, though in the broadest terms, must be construed as relating to and embracing only such laws as the order had the legal right to make, and as it should make in a legal and binding form.

The Supreme Lodge Knights of Pythias of

the World was incorporated, under an act of the Congress of the United States, on the 5th day of August, 1870. As then existing, the fundamental and general laws of the order contemplated one supreme lodge for all its membership in the world, one grand lodge for each state and territory of the Union, etc., and subordinate lodges for different towns and cities in those states, etc. All the powers of grand and subordinate lodges emanated from the supreme lodge. The grades of membership or of advancement in the subordinate lodges are three in number, called "Ranks;" and a member of the first rank is designated as a "Page," of the second rank as an "Esquire," and of the third rank as a "Knight." Representatives from all the subordinate lodges of any given state or territory compose the grand lodge of that particular jurisdiction, and representatives from all the grand lodges make up the membership of the supreme lodge. By the ninth and last section of its charter, obtained in 1870, the supreme lodge was granted ample "power to alter and amend its constitution and by-laws at will." Through an amendatory act of incorporation, obtained October 5, 1875, the charter of 1870 was changed in many particulars. One change was the complete annulment of section 5, and another was the appropriate substitution and diminution of the numbers of all succeeding sections until section 9 of the charter of 1870 became section 8 of the amended charter of 1875. The other amendments have no relation to the subject now under consideration, and hence will not be stated. On the 24th day of May, 1883, the charter of 1875 was amended, and among the changes made was the addition of a new section, at the end, as follows: "9. That the said supreme lodge shall have power to establish the Uniform Rank and the Endowment Rank upon such terms and conditions, and governed by such rules and regulations, as to the said supreme lodge may seem proper." This last amendment of its fundamental law undoubtedly conferred upon the supreme lodge plenary power to establish, maintain, and control the endowment rank (which was, in fact, established several years prior to 1883); and if, in the exercise of that power, that body had enacted the law invoked by the defendant in this case, there could be no serious question as to its validity. But the truth is that only the board of control, and not the supreme lodge, passed that law. Had that board the requisite legal power for the enactment of such a law?

At its regular biennial session in April, 1884, the supreme lodge enacted a code of "General Laws" and adopted a "Constitution for the Government of Sections of the Endowment Rank." The endowment rank was not intended to be, and under the power granted to the supreme lodge could not have been, established as a separate organization, with full power to make its own laws. "Sections" of the endowment rank are intimately related to and connected with subordinate lodges. Only members of subordinate lodges, having obtained the rank of knight, and continuing in good standing as such, can have and maintain membership in sections of the

endowment rank. The establishment of the endowment rank only introduced into the order of Knights of Pythias a means of mutual insurance among knights desiring such a benefit and willing to bear the additional burdens thereof. Knights are not all members of the endowment rank, but all members of endowment rank must be knights. By article 6 of the general laws enacted by the supreme lodge in 1884 for the endowment rank, a "Board of Control" was created, with general powers of supervision of the business of that rank; and by article 7 of those laws, as well as by article 15 of the constitution adopted at the same time, the supreme lodge expressly reserved to itself full power of alteration and amendment of those laws and of that constitution, at any regular session. Amendments of both were made in 1886, and again in 1888. The constitution, as amended in the latter year, was very lengthy and consisted of sixteen articles. Article 8 comprised 19 sections, relating especially to the board of control, its composition, and powers. Section 5 is in these words: "The board shall have entire charge and full control of the endowment rank subject to such restrictions as the supreme lodge may from time to time provide." Section 9 is as follows: "The board is hereby authorized to enact general laws, rules, and regulations in conformity with this constitution, for the government of sections and the membership of the endowment rank, and alter and amend such general laws, rules, and regulations, when in their judgment the needs of the rank require such action."

Here, for the first time, was it attempted to transfer the power of making laws for the endowment rank from the supreme lodge to the board of control; and this was done, not by an amendment of the charter of the supreme lodge, but only by legislation of the supreme lodge, passed in the ordinary way. That constitution continued in force until 1892, when the supreme lodge adopted another one of only six articles in its stead. Section 5 of article 8 of the constitution of 1888, as quoted above, became the fifth and last section of article 1 of the constitution of 1892; but section 9 of article 8 of the constitution of 1888, *supra*, was entirely omitted from the constitution of 1892, and no like provision was substituted for it. The constitution of 1892 was the one in force on the 12th and 13th of January, 1893, when the board of control passed the anti-suicide law, interposed by the defendant in this case.

Henry B. Stolte, a member of the board of control at that time, testified in this case, and, among other things, he said, in effect, that the said section 9 of article 8 of the constitution of 1888 was still in force when the anti-suicide law was passed in January, 1893; but that is only the opinion of the witness upon a legal question. The constitution of 1892 was adopted, certified, and promulgated as the "Constitution of the Endowment Rank, Knights of Pythias of the World," and it was published by proper authority in pamphlet so entitled, as had been all former constitutions. Each of the instruments so adopted and promulgated was, for its time, the complete and only constitution of the 80 L. R. A.

endowment rank; and no part of the former constitution became a part of the latter one, unless embodied in it. The constitution of 1892 was adopted, certified, promulgated, and printed as one full and complete instrument, and as the only constitution of the endowment rank so long as it should remain unchanged by the supreme lodge. It superseded the constitution of 1888 entirely, and left only such parts of it in force as were reproduced in the new instrument. This follows as a matter of law. No provision found in the constitution of 1892 conferred, or seems to have been intended to confer, upon the board of control power to make laws, as did section 9, article 8, of the constitution of 1888. Section 5, article 1, of the constitution of 1892, which is but a reproduction of section 5, article 8, constitution of 1888, did not bestow legislative power, as is readily seen by reference to its terms, which are as follows: "The board should have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may from time to time provide."

Obviously, this provision relates alone to the administration of laws, and not to the enactment of them. The words, "entire charge and full control," as there employed, import executive, rather than legislative, functions. Section 9, article 8, of the constitution of 1888, whose terms were unmistakable, and ample in scope for the purpose contemplated, contained the only provision to be found in any constitution of the endowment rank or elsewhere, intended to authorize the board of control to pass general laws for that rank; and it is evident that the members of that board believed that provision to be still in force, and that they thought they were acting under its authority when they passed the law involved in this case. As has already been observed, however, that provision ceased to exist, and had no further force or vitality, when it was omitted from the constitution of 1892, which completely superseded the constitution of 1888 with all its provisions. It follows that the board of control was without even the appearance of the requisite legislative power when it passed that law in January, 1893, and, consequently, that the law was invalid *ab initio*. Even the authority granted by the supreme lodge to enact laws had been withdrawn from the board.

But if it were conceded that the witness Stolte, and the other members of the board of control, were right in their belief that the ninth section of article 8 of the constitution of 1888 was of the same virtue after, as before, the adoption of the constitution of 1892, the result in this case would be the same; because the supreme lodge had no power to confer general legislative functions upon the board of control, and its effort to do so was ineffectual and void. Section 9 of article 8 of the constitution of 1888, whereby the supreme lodge attempted in plain and comprehensive language to clothe the board of control with authority to enact general laws, was itself *ultra vires*, and without legal efficacy, and, if embodied in the constitution of 1892, it would have afforded no legal authority for the passage of the anti-suicide law. The ninth

section of the second amended charter of the supreme lodge vested in that body alone the power to legislate with respect to the endowment rank, and the supreme lodge could not legally delegate that power to another. That provision of the fundamental law fully authorized the supreme lodge to enact all such reasonable laws as it might deem proper for the establishment and government of the endowment rank, and, in the exercise of that broad authority, it might well create a board of control, or any other like agency, for the management of the business of that rank, but it could not abdicate its high position and transfer its lawmaking power to such board, or other agency. Though the supreme lodge may have had the fullest power, under its charter, to pass the law in question in this case, as we think it had, we have no hesitation in holding that it could not bestow such power upon the board of control. Under the existing charter, a general law of that character could be passed by the supreme lodge alone.

We do not hold that the supreme lodge may not lawfully authorize subordinate lodges

and sections to pass by-laws for their local government, nor that the board of control may not be empowered to adopt mere rules and regulations to facilitate the transaction of the business of the endowment rank. On the contrary, we think the supreme lodge may well grant such authority and power, and that they may be lawfully exercised, such grant and exercise not being inconsistent with the terms of the charter. 1 Bacon, Ben. Soc. new ed. § 80. Our holding is that only the supreme lodge has power to pass a general law affecting the whole endowment rank, such as that against self-destruction, and under consideration in this case. The rulings of the trial judge with respect to that law were correct for two reasons—First, because the supreme lodge had no power to authorize the board of control to enact that, or any other general law; and, secondly, because the authority to pass such laws, attempted and intended to be granted by section 9 of article 8 of the constitution of 1888, was withdrawn by the adoption of the constitution of 1892, which embraced no such provision.

Affirm the judgment, with costs.

VIRGINIA SUPREME COURT OF APPEALS.

W. B. GOODE & COMPANY, *Plffs. in*
Err.,
v.
GEORGIA HOME INSURANCE COM-
PANY.

(.....Va.....)

1. The acts of clerks or employees of insurance agents to whom they delegate authority to discharge their functions, within the scope of their agency, bind the insurer to the same extent as the acts of the agents.
2. Failure to mention encumbrances and other insurance in an application for insurance cannot be set up by the insurer when the omission was made by advice of the solicitor, who issued the policy in the name of the agent and had full knowledge of the facts.
3. A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the insurance company.

(December 19, 1896.)

ERROR to the Circuit Court for Fauquier County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. Jeffries & White, for plaintiffs in error:

Any acts, declarations, or course of dealing

NOTE.—For acts of clerks or agents of insurance agents, see also *Steele v. German Ins. Co.* (Mich.) 18 L. R. A. 85, and *Arrif v. Star F. Ins. Co.* (N. Y.) 10 L. R. A. 609, and brief note thereto.
30 L. R. A.

by the insurer, with knowledge of the facts constituting the breach of a condition in the policy, recognizing and treating the policy as still in force, will amount to a waiver.

Georgia Home Ins. Co. v. Kinnier, 28 Gratt. 88; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 396, 26 Am. Rep. 364; *Southern Mut. Ins. Co. v. Yates*, 28 Gratt. 595; *McLean v. Piedmont & A. Life Ins. Co.* 29 Gratt. 372; *Lynchburg F. Ins. Co. v. West*, 76 Va. 578, 44 Am. Rep. 177; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 419.

Robert E. Harris was the agent of the appellee when he secured this risk.

Whatever these appellants said to Robert E. Harris as a matter of law was said to Thomas B. Harris and to the corporation, the Georgia Home Insurance Company.

Whepatrick v. Hartford Life & A. Ins. Co. 56 Conn. 116.

The acts of clerks of insurance agents, who solicit insurance, make out applications and policies, and generally attend to the business of such agent, are as binding as though done by the agents themselves.

Steele v. German Ins. Co. 93 Mich. 81, 18 L. R. A. 85.

Robert E. Harris was a general agent.

Howard Ins. Co. v. Owens, 94 Ky. 197; *Stickley v. Mobile Ins. Co.* 37 S. C. 56; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575, 44 Am. Rep. 177; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117, 10 Am. Rep. 566.

The maxim *delegatus non potest delegare* does not apply.

Story, Agency, § 14.

The acts of agents of the company are binding upon the company.

Meyers v. Lebanon Mut. Ins. Co. 156 Pa. 420; 11 Am. & Eng. Enc. Law, p. 334.

And this is true of a subagent or solicitor appointed by the local agent.

Commercial Ins. Co. v. Ives, 56 Ill. 402; *Woodbury Sav. Bank & Bldg. Assn. v. Charter Oak F. & M. Ins. Co.* 81 Conn. 517.

That Robert E. Harris was not "a mere broker" in connection with this insurance, is a proposition too plain to admit of argument.

Arff v. Star F. Ins. Co. 125 N. Y. 57, 10 L. R. A. 609.

A general agent of insurance companies may delegate his power to the clerk, assistant, or subagent to the extent of authorizing the latter to agree that a policy to be issued shall contain a permission permitting the building insured to remain vacant for a period not exceeding thirty days without notice to the insurer.

Bodine v. Exchange F. Ins. Co. 51 N. Y. 117, 10 Am. Rep. 586; *Continental Ins. Co. v. Ruckman*, 127 Ill. 864; *Arff v. Star F. Ins. Co.* *supra*; *Deite v. Providence Washington Ins. Co.* 38 W. Va. 528; *Phoenix Ins. Co. v. Ward*, 7 Tex. Civ. App. 18; *Hartford F. Ins. Co. v. Jacey*, 6 Tex. Civ. App. 290; May, Ins. p. 158, § 154; 11 Am. & Eng. Enc. Law, pp. 820, 821.

Mr. Eppa Hutton, Jr., with *Messrs. W. W. Crump* and *B. T. Crump*, for defendant in error:

This insurance was negotiated by Robert E. Harris, a son of T. B. Harris. The Georgia Home, so far as this record discloses, had no knowledge of the existence of this young man. It certainly never appointed him its agent. He was an utter stranger to its business.

Whether the appellants were aware that he was not the agent, or whether they thought he was, cannot change the fact that he was not.

Buchanan, J., delivered the opinion of the court:

Upon the trial of this cause, which is an action of assumpsit upon a fire insurance policy, the court excluded from the jury certain evidence offered by the plaintiffs in error. The court also gave judgment in favor of the defendant upon its demurrer to the evidence.

The action of the court, both in excluding evidence and in giving judgment in favor of the defendant, is assigned as error in this court.

The propriety of the rulings of the court in refusing to allow the rejected evidence to go to the jury depends upon the question whether the defendant company was affected by the knowledge of certain material facts which came to the subagent or employee of the agents of the company through whom the insurance was effected.

The defense relied on by the defendant was that the plaintiffs, in making out their application for insurance, had stated that there was no lien and no other insurance upon the property insured, when in fact there was a deed of trust upon it for \$390, and insurance in another company to the extent of \$1,200, and that by reason of these false statements the policy was void.

The plaintiffs sought to show that Robert E. Harris, through whom their insurance was effected, had full knowledge of both the deed of trust and the other insurance upon the property, and that it was by his advice that their application did not disclose these facts, 30 L. R. A.

and that the defendant was estopped from relying on such facts to avoid the policy. The defendant denied that Robert E. Harris was its agent, or that it was affected by his knowledge.

The plaintiffs' evidence showed that Thomas B. Harris & Son were the agents of the defendant company for Culpeper and its vicinity, and that they were authorized "to receive proposals for insurance against loss or damage by fire; fix rates of premium; receive moneys; countersign, issue, and renew policies duly signed by the president and secretary; and grant permission of transfer of policies on behalf of said company,—subject to the rules and regulations of the company, . . ." It also tended to show that while the plaintiffs were taking an inventory of their goods, in order to have them insured, Robert E. Harris came to their store, "representing himself to be the son of T. B. Harris, of Culpeper, Va., who were the agents" both of the defendant company and the Virginia Fire & Marine Insurance Company; that this was the first time they had ever seen him; that after three trips to their store, soliciting their insurance, they insured their property in both of the companies; that their applications for insurance were signed "by the hand of Robert E. Harris, signing the firm name of Thomas B. Harris & Son; and that the measurement of the storehouse was made and diagrams drawn by him."

Thomas B. Harris was called by the plaintiffs, and testified that Robert E. Harris was his son, but was not a member of the firm of Thomas B. Harris & Son, and was not at any time the agent of the defendant; that the son who was a member of his firm was at Richmond College, Va., when the insurance of the plaintiffs was taken; that he often had more than one of his sons working for him in the insurance business; that Robert E. Harris had solicited a great deal of business for the firm of Thomas B. Harris & Son; that he (Robert) solicited, with his knowledge, the insurance of the plaintiffs, took the applications therefor, and that in pursuance thereof the two policies were issued through himself (T. B. Harris), as a member of the firm of Thomas B. Harris & Son, agents of the defendant, but that he had no knowledge of the facts and circumstances attending the soliciting and placing of the insurance, except what appeared in the application and policy of insurance, until after the loss occurred; that the special agent and adjuster of the defendant had frequently been in his insurance office at Culpeper, Va., and had there seen his several sons at work.

The trial court was of opinion that the evidence introduced by the plaintiffs did not show that Robert E. Harris occupied such a relation to the defendant company that it could be affected by knowledge acquired or declarations made by him while engaged in soliciting and taking the applications for the insurance in controversy, and refused to allow such evidence to go to the jury.

In this, we are of opinion the trial court erred.

This question has been much discussed, but the better view now seems to be that the

insurer is not only responsible for the acts of its general agents, but also for the acts of the clerks or employees of the agents to whom they delegate authority to discharge their functions within the scope of their agency.

Insurance companies know, or ought to know, when they appoint general agents, that, according to the ordinary course of business, they have clerks and other persons to assist them, and that their agents, in many instances, could not transact the business intrusted to them if they were required to give their personal attention to all of its details. It being necessary, therefore, and according to the usual course of business, for their agents to employ others to aid them in doing the work, it is just and reasonable that insurance companies should be held responsible, not only for the acts of their agents, but also for the acts of their agents' employees, within the scope of the agents' authority.

It is no sufficient answer to this view to say that the insurers did not authorize their agents to delegate their authority to others. It may be that they did not do so expressly, but they appointed agents whom they knew, or ought to have known, would, according to the usage or the necessities of the business, engage the services of others in doing the work intrusted to them; and, having this knowledge, they will be held to have impliedly authorized their agents to do what was usual or necessary in the business.

The general rule, it is true, is that, when it is intended that agents shall have power to delegate their authority, it should be given them by express terms, but there are cases in which such authority may be implied, as where it is indispensable by the laws to accomplish the end, or it is the ordinary custom of trade, or it is understood by the parties to be the mode in which the particular business would or might be done. Story, Agency, 9th ed. § 14.

"Generally," says May in his work on Insurance, "agents of insurance companies, authorized to contract for risks, receive and collect premiums, and deliver policies, may confer upon a clerk, or subordinate, authority to exercise the same powers. The service is not of such a personal character as to come under the maxim, *delegatus non potest delegare*. 1 May, Ins. 8d ed. §§ 154, 154a.

Wood, in his work on Insurance, says that "not only is the insurer responsible for the acts of its agent, but also for the acts of the agent's clerks, or any person to whom he delegates authority to discharge his functions for him. Of course, the act must be done by some person authorized expressly, or impliedly by the agent, and under such circumstances that the insurer knew, or ought to have known that other persons would be employed by and to act for the agent." 2 Wood, Ins. 2d ed. § 433.

It was held in the case of *Bodine v. Exchange F. Ins. Co.* reported in 51 N. Y. 117, 10 Am. Rep. 566, that an insurance agent can employ a clerk, and authorize him to contract for risks, to deliver policies and renewals, to collect premiums, and to give credit therefor, and the act of the clerk in such cases is the act of the agent, and binds the company. In 30 L. R. A.

that case the clerk of the agent waived the prepayment of a premium, and the company was held bound by it, although there was a condition in the policy of insurance that no insurance, whether original or continued, should be considered as binding until the premium was actually paid.

In the case of *Arff v. Star F. Ins. Co.* reported in 125 N. Y. 57, 10 L. R. A. 609, the court of appeals of New York held (Judge Peckham delivering the opinion of the court) that "an ordinary agent of a fire insurance company has the power to employ such clerks as may be necessary to discharge the usual business of his agency, and a waiver which the agent himself could make is to be attributed to him when made by his clerk."

In that case a policy of insurance issued by the company required the insured to notify the company of any other insurance upon the property, and declared the policy void in case of neglect to comply with that condition.

It also provided that "only such persons as shall hold the commission of this company shall be considered as its agents in any transaction relating to this insurance."

The plaintiff, having obtained other insurance on the property, informed the person upon whose solicitation he made the application for the policy, and he said it was all right. That person, at whose solicitation he applied for the policy, was employed to solicit insurance by a firm who were commissioned agents of the defendant company, having authority to give permits for further insurance. He had a desk in their office, and was paid for his services by a commission on the business he procured. He testified that he worked for no one except the defendant's agents. The plaintiff was nonsuited. The court held that to be error, and said that, if he was exclusively employed by the agents of the company, he was not an ordinary insurance broker, but one of the clerks or employees of the company's agents, and as such was authorized to receive notice, and to consent to other insurance, and the testimony as to his exclusive employment being contradictory, the case should have been submitted to the jury.

In a later case decided by the same court the two cases above referred to were cited with approval, and the doctrine laid down in them reaffirmed. In that case the policy of fire insurance in question contained a condition that if the insured were not the sole owners of the property insured, or did not have title to the land on which it was situated in fee simple, and this fact was not expressed in the policy, it should be void. The assured held the land under an agreement to purchase. This fact was not expressed in the policy but had been communicated to the clerk of the general agent of the insurer, who had been sent to make an examination of the premises preparatory to the risk. In an action on the policy it was held that notice to the subagent, while so engaged in soliciting the insurance, was notice to the company, and bound it to the same extent as though it had been given directly to the agent himself, and, this being so, the policy was not avoided by the condition in the policy. *Carpenter v.*

German American Ins. Co 185 N. Y. 298.

See *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Hartford F. Ins. Co. v. Joney*, 6 Tex. Civ. App. 290; *Duluth Nat. Bank v. Knoxville F. Ins. Co.* 85 Tenn., at page 81.

The authority conferred upon the firm of Thomas B. Harris & Son constituted them general agents of the defendant company; for it is settled that a person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by insuring and renewing policies, must be regarded as the general agent of the company. 1 May, Ins. 3d ed. § 126; *Manhattan F. Ins. Co. v. Weill*, 28 Gratt. 889, 26 Am. Rep. 364; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364.

The evidence introduced by the plaintiffs tended to prove a state of facts which entitled the plaintiffs to prove any act or declaration of Robert E. Harris while engaged in negotiating with the plaintiffs in reference to their insurance, which they would have had the right to prove if the act or declaration had been made by Thomas B. Harris & Son, the agents in person; and, if it appeared from the whole evidence that Robert E. Harris was the employee of Thomas B. Harris & Son,

agents of the defendant, and was in the habit of soliciting insurance for them, and that he solicited the plaintiffs' insurance with the knowledge and assent, or by authority of said agents, then his acts and declarations while negotiating the plaintiffs' insurance were the acts and declarations of the agents, and bound the defendant company to the same extent that they would if done or made by such agents in person.

It is unnecessary to consider in detail the several bills of exceptions taken by the plaintiffs to the action of the court in excluding evidence. It will be sufficient to say that any material evidence which tended to prove the acts or declarations of Robert E. Harris while negotiating the plaintiffs' insurance was admissible against the defendant, to the same extent that the acts or declarations of Thomas B. Harris & Son, the commissioned agents of the defendant, would have been admissible if they had negotiated the insurance in person.

Neither is it necessary to consider whether the court erred in sustaining the defendant's demurrer to the evidence, as *the judgment must be reversed*, the verdict set aside, and a new trial awarded, for the reasons hereinbefore stated.

WISCONSIN SUPREME COURT.

James B. CANTERBURY, *Appt.*,

v.

BANK OF SPARTA, *Resp't.*

(.....Wis.....)

A bank which at its customer's request mails its own draft to his creditor in payment of the creditor's draft on him cannot defeat

the creditor's right to its draft by intercepting it in the mail although it extended credit for the amount of the draft to its customer in ignorance of the fact that he was insolvent.

(September 23, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Monroe County in favor of defendant in an action brought to

NOTE.—*Right to stop payment of check.*

CANTERBURY v. BANK OF SPARTA is decided on the theory that the draft had been delivered to the payee and that after such delivery payment of the draft could not be stopped so as to defeat the payee's rights. The decisions are not numerous as to the right to stop payment of a check as against the payee. The few decisions upon the subject seem to agree that as between the bank and the drawer the latter may countermand the check at any time before the bank has committed itself to its payment.

In *Dykens v. Leather Mfrs. Bank*, 11 Paige, 612, it is said that all the witnesses agree that it would have been contrary to the usages of banks to have accepted and paid any of the checks after the drawer had directed the bank not to pay them.

A check, being simply a written order of the depositor to his banker to make a certain payment out of his fund, is executory and of course revocable at any time before the bank has paid it or committed itself to its payment. *Kahn v. Walton*, 46 Ohio St. 196.

In *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 216, the court in considering the liability of a bank which had paid a note contrary to the depositor's orders said, in dealings between a depositor and a bank, whatever may be their legal relations, they act substantially upon the principles of agency.

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Having received the fund of the depositor, it pays his draft, and is bound to obey all his directions for the disposal of his fund. It cannot disobey his orders either wilfully or innocently, and then claim a new and different relation with rights inconsistent with such as before existed. In paying a draft after payment has been stopped, a bank cannot be protected without an essential change in the accustomed common-law understood duty which it owes to its depositors, or a total disregard of its obligations to them.

In *Schneider v. Irving Bank*, 80 How. Pr. 190, it is said that the check was but an order upon the bank which it had not accepted, and upon which therefore it was not liable. It was perfectly competent, therefore, for the drawer to revoke the authority which he had given to the bank to apply the funds to the payment of the check. The bank had not accepted or promised to pay the check, and therefore owed no duty in the premises except to the drawer.

A check upon a bank in the usual form, not accepted or certified, does not constitute a transfer of the money nor create any lien on the money which the holder can enforce against the bank. It is simply an order which may be countermanded before paid, and does not of itself operate as an equitable assignment. *Florence Min. Co. v. Brown*, 124 U. S. 385, 31 L. ed. 424.

recover the value of a draft which defendant had mailed to plaintiff's assignor but intercepted in the mail before it reached its destination. *Reversed.*

Statement by Cassoday, Ch. J.:

It appears from the record, in effect: That January 6, 1892, W. E. Coats & Co., of Sparta, were indebted to James B. Canterbury, of La Crosse, in the sum of \$2,250 or thereabouts. That on that day the plaintiff made his draft, of which the following is a copy:

La Crosse, Wis., Jan. 6, 1892.

Pay to the order of State Bank, \$700.70 (seven hundred and $\frac{70}{100}$ dollars,) with exchange, value received; and charge to the account of James B. Canterbury.

To W. E. Coats & Co., Sparta, Wis.

That thereupon the plaintiff discounted

In *Jacks v. Darrin*, 3 E. D. Smith, 557, it appears that payment of a check had been stopped, but the court does not pass upon the question of the right to do so further than to say that, as against a person who stopped the payment, presentment and notice were unnecessary.

In *Lunt v. Bank of North America*, 40 Barb. 321, it is said as an argument to support the conclusion that a check does not constitute an assignment of funds, that it is always revocable by the drawer until payment or acceptance.

In *Louisville Bkg. Co. v. Paine*, 67 Miss. 673, the court held that there was no trust which the payee of a note could enforce against the assets of a bank which had failed after sending its draft in payment of a note of its customers in accordance with the directions in a check of the maker of the note, on the ground that the maker of the note had a legal right to revoke the check, and that therefore the bank had not become a trustee for the payee.

If the bank pays the check after notice not to do so it is liable to the drawer for the amount so paid. *Schneider v. Irving Bank*, 1 Daly, 500.

If payment of a check is stopped, notice of presentment and nonpayment is not necessary in order to hold the drawer liable upon the debt for which it was drawn. *Purchase v. Mattison*, 6 Duer, 587.

The drawer of a check on a bank can countermand its payment before the same is paid, he being liable for the consequences of his act in so doing. *Albers v. Commercial Bank*, 35 Mo. 173, 55 Am. Rep. 355.

But although the drawer of the check may require the bank not to pay it, he cannot change his relation to his creditor by such act. He still remains liable upon the old debt, and in case he is insolvent, with a fund to his credit in the bank, it frequently makes a vast difference to the creditor whether he can compel payment of his check or must look to the general assets of the drawer for his claim. In states where it is held that the check constitutes an assignment of the account *pro tanto*, and that the payee may maintain an action against the bank, there is no difficulty. There it is held that after a check has passed into the hands of a bona fide holder, the drawer cannot countermand the order of payment. *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185. And the doctrine of that case was referred to with approval in *National Bank v. Indiana Bkg. Co.*, 114 Ill. 463.

So, in *Roberts v. Corbin*, 20 Iowa, 315, 36 Am. Dec. 146, it is held that an assignee for creditors cannot stop payment of a check that had previously been given, so as to make the fund against which it was 30 L. R. A.

that draft at the State Bank of La Crosse and that bank thereupon indorsed thereon, "Pay Bank of Sparta or order for collection account of State Bank of La Crosse," and thereupon sent the draft by letter to the defendant. That the draft was received by the defendant in the forenoon of January 7, 1892. That W. E. Coats & Co. then had an account with the defendant bank, which was then overdrawn. That W. E. Coats & Co. then accepted the draft, and requested the defendant to pay the same. That the defendant then made its draft on the Atlas National Bank of Chicago, in favor of J. M. Holley, cashier of the State Bank of La Crosse, for \$700.70, and inclosed the same in a letter, of which the following is a copy:

Sparta, Wis., Jan. 7, 1892.

J. M. Holley, Esq., La Crosse, Wis. :—

Dear Sir: Your favor of the 6th is re-

drawn applicable to his use rather than to the benefit of the person in whose favor the check was given.

In other jurisdictions also it would seem that the power to defeat the payee's right to the amount represented by the check is not unlimited.

In *Wienholt v. Spitta*, 3 Camp. 376, it is said: "If I give a draft upon a condition, and I find the condition is to be eluded, I may stop payment. This is a conditional delivery of the draft."

Of course that ruling is limited to the case of a conditional delivery, but the very fact that the ruling was so limited, and not made generally, would indicate that the right might not be a general one.

So, in Wisconsin it has been held that the drawer cannot arbitrarily stop payment. *Pease v. Landauer*, 63 Wis. 29, 53 Am. Rep. 247. In that case the court admits that the decided weight of authority is in favor of the proposition that the drawer might before presentation stop payment so that the bank would have no authority to make payment, but states that the question is whether, in equity as between the holder of a check for value and the drawer the bank standing indifferent, the check holder should be paid in preference to the drawer, and it holds that upon equitable principles the drawer is estopped from stopping payment except for some good cause, and that if he does so, he is guilty of a fraud which a court of equity will not sanction.

The question of the general liability of the bank after sending a draft to pay a customer's note is not considered in *CANTERBURY v. BANK OF SPARTA*, so that subject is not appropriate to this note, but attention is called to two cases in which the question has been considered.

In *Whiting v. City Bank*, 77 N. Y. 363, payment of a draft sent in payment of a note was stopped, and the court without discussing the right of stoppage held that unless the draft was sent by mistake the bank had assumed liability for the note so as to render it liable for the amount.

By way of contrast, in *Steinhart v. National Bank*, 94 Cal. 362, a bank which had mailed its check to pay the note of a customer recovered possession of it from the postoffice and canceled it. In much the same way as was done in *CANTERBURY v. BANK OF SPARTA*. The decision of the case does not turn upon the right to stop payment of the check as much as upon the question whether the customer's note was to be considered paid or not, and the court held that it was not to be so considered, and that therefore there could be no recovery against the bank.

H. P. F.

ceived, with the stated inclosures. I inclose our draft on Chicago for \$700.70 in payment of draft on W. E. Coats & Co.

Respectfully yours,
E. H. Canfield, Cashier,

—and posted the same about half-past 4 o'clock in the afternoon of January 7, 1892, and entered the plaintiff's draft as paid on the books of the defendant. That the defendant, having ascertained that W. E. Coats & Co. had failed, attempted to get the letter containing the draft back out of the post-office, but found it had gone to La Crosse. That by telephoning the defendant succeeded in getting the letter and draft out of the post-office at La Crosse, and the next morning destroyed the draft and the letter, and erased all entries respecting the payment of the draft in defendant's books, and protested the plaintiff's draft for nonpayment, and returned it to the State Bank of La Crosse, and that bank thereupon assigned to the plaintiff its cause of action against the defendant by reason of the facts stated. Upon these facts the plaintiff brings this action to recover the value of the draft so taken from the postoffice. At the close of the testimony the court directed a verdict in favor of plaintiff and against the defendant for the amount of that draft and interest. Upon a motion for a new trial the court directed judgment in favor of the defendant, notwithstanding the verdict. From such judgment, entered accordingly, the plaintiff brings this appeal.

Messrs. Winter, Esch, & Winter, for appellant:

If the Bank of Sparta intentionally, relying on the credit of Coats & Co., the drawee, paid the Canterbury draft, it releases Canterbury, the maker, and the payee, the State Bank, has a right of action.

Whiting v. City Bank, 77 N. Y. 863; *Pratt v. Foote*, 9 N. Y. 463; *Oddie v. National City Bank*, 45 N. Y. 785; *Levy v. Bank of United States*, 4 U. S. 4 Dall. 284, 1 L. ed. 814; *Pacific Bank v. Mitchell*, 9 Met. 297.

If this payment was made through mistake, then the bank of Sparta can rescind its action, unless the State Bank would, by its rescission, be put in a worse condition.

Irving Bank v. Wetherald, 86 N. Y. 835.

The bank, having cashed the check on the credit of the maker supposing he had ample funds, cannot rescind owing to a mistake as to the amount of those funds deposited.

Boylston Nat. Bank v. Richardson, 101 Mass. 287.

But here the cashier knew that the account of Coats & Co. was overdrawn, and hence made no mistake in paying the Canterbury draft and in charging the amount to Coats.

When the draft had been deposited in the postoffice to be carried, that was such a delivery of the draft to the State Bank as to vest the title to the draft in it.

Johnson v. Sharp, 81 Ohio St. 611, 27 Am. Rep. 529; *McKinney v. Rhoads*, 5 Watts, 843.

If the sender made use of the mails either from custom of the parties or in obedience to the instructions of the addressee, the loss of the draft or thing sent falls on the addressee.
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Buell v. Chapin, 99 Mass. 594, 97 Am. Dec. 58; *Morgan v. Richardson*, 18 Allen, 410.

Steinhart v. National Bank, 94 Cal. 862, is a case directly in point both in respect to the acts of the defendant in canceling the Canterbury draft and marking it paid, and in respect to the delivery of the Atlas draft to the mails. Mailing the paper is sufficient delivery.

I Randolph, Com. Paper, § 218, and cases cited; *Tiedeman*, Com. Paper, § 84a; *United States v. Jackson*, 29 Fed. Rep. 503; *United States v. Jones*, 31 Fed. Rep. 725.

Any act which clearly shows the intention of the maker to deliver the instrument and to consider it as delivered is sufficient.

Williams v. Galt, 95 Ill. 172; *Tiedeman*, Real Prop. § 812.

The delivery of merchandise to a common carrier, not for the purpose of transportation, but to be shipped to a third person, terminates the right of stoppage *in transitu*.

1 Parsons, Notes & Bills, *606, and note a; *Bowley v. Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Stubbs v. Lund*, 7 Mass. 453, 5 Am. Dec. 68; *Treadwell v. Aydlott*, 9 Helsk. 388; *Guyn v. Richmond & D. R. Co.* 85 N. C. 429, 39 Am. Rep. 708; *Eaton v. Cook*, 32 Vt. 58.

Messrs. Morrow & Masters, for respondent:

It is the rule and regulation of the postoffice department that any letter may be recalled or recovered by the sender before it is delivered to the person to whom it is addressed.

Official Postal Guide, last ed. pp. 847, 848.

A letter, and of course its contents, is subject to the control of the writer and sender until it is actually delivered to the addressee.

18 Am. & Eng. Enc. Law, p. 855; *United States v. Tanner*, 6 McLean, 128.

Marking this draft paid, and the entries in its books by defendant, did not make it liable to plaintiff or the State Bank.

Aetna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; *Indig v. National City Bank*, 80 N. Y. 107; *Irving Bank v. Wetherald*, 86 N. Y. 835; *Waterdriet Bank v. White*, 1 Denio, 608; *Steinhart v. National Bank*, 94 Cal. 362; *Buell v. Chapin*, 99 Mass. 595, 97 Am. Dec. 58; *Gurney v. Howe*, 9 Gray, 408, 69 Am. Dec. 299; *Manufacturers' Nat. Bank v. Nevell*, 71 Wis. 309; 7 Wait, Act. & Def. p. 888; 1 Edwards, Bills & Notes, §§ 232-237.

A valid delivery is necessary to give legal existence to negotiable instruments.

Chipman v. Tucker, 88 Wis. 48, 20 Am. Rep. 1; *Leonard v. Lent*, 48 Wis. 88; *Furriance v. Jones*, 120 Ind. 162; *Steinhart v. National Bank*, *supra*.

Defendant might recover back its draft before it came to the possession of the State Bank under the principles of the doctrine of stoppage *in transitu*.

2 Kent, Com. 542, 548; 1 Parsons, Notes & Bills, 6th ed. 600; *Muller v. Pondtr*, 55 N. Y. 825, 14 Am. Rep. 259; Wait, Act. & Def. 212; *Smith v. Bowles*, 2 Esp. 578.

Cassoday, Ch. J., delivered the opinion of the court:

It may be conceded that the vendor of negotiable paper has the right of stoppage *in transitu* to the same extent as the vendor of

other species of personal property. Here the La Crosse bank discounted the plaintiff's draft on W. E. Coats & Co., and forwarded the same to the defendant for collection. The defendant was under no obligation to pay that draft, especially as the account of W. E. Coats & Co. at the defendant bank was then considerably overdrawn. Nevertheless, the defendant, on the request of the managing agent of W. E. Coats & Co., whose authority is not questioned, made its own draft on the Chicago bank for the amount, payable to the cashier of the La Crosse bank, and sent the same in a letter by mail to the cashier of the La Crosse bank "in payment of draft on W. E. Coats & Co.," and that letter, with the draft inclosed, reached La Crosse in the regular course of mail. Undoubtedly, the defendant, in making its draft on the Chicago bank, gave a corresponding credit to W. E. Coats & Co. on the faith of their solvency; but it did so voluntarily, and for their accommodation, and without being induced to do so by any fraud or mistake of fact. While the defendant retained the actual or constructive possession of that draft, it could undoubtedly, withhold its application in payment of the draft on W. E. Coats & Co.; but if, by sending the draft by mail to La Crosse, it parted with such possession, and vested the title to the draft in the La Crosse bank, then, manifestly, it lost all rightful authority to take the same from the

mail. In thus mailing and sending the draft the defendant acted as the agent of the La Crosse bank. Such mailing of the letter inclosing the draft was in legal effect a delivery of the draft to the La Crosse bank. 1 Randolph, Com. Paper, § 218; 1 Dan. Neg. Inst. § 67; *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58; *Kirkman v. Bank of America*, 2 Coldw. 397; *Mitchell v. Byrne*, 6 Rich. L. 171; *Sichel v. Borch*, 2 Hurlst. & C. 954; *Punk v. Lawson*, 12 Ill. App. 239. The mere fact that after the draft was so sent by mail the defendant ascertained that W. E. Coats & Co. had failed, and hence that it had injudiciously given them further credit to the amount of the draft, did not authorize the defendant to stop payment of the draft, or take it from the mail. The draft was not transmitted to W. E. Coats & Co., but was transmitted by them through the defendant, to the bank at La Crosse. In support of the views expressed, see *Boylston Nat. Bank v. Richardson*, 101 Mass. 287; *Pacific Bank v. Mitchell*, 9 Met. 297; *Pratt v. Foote*, 9 N. Y. 468; *Whiting v. City Bank*, 77 N. Y. 363; *Eaton v. Cook*, 82 Vt. 58.

The judgment of the Circuit Court is reversed, and the cause is remanded, with direction to enter judgment against the defendant for the amount of the verdict directed in favor of the plaintiff, with interest and costs.

Newman, J., took no part.

SOUTH DAKOTA SUPREME COURT.

HURON WATERWORKS COMPANY,
Resp't.,

v.

City of HURON, *Appt.*

H. Ray MYERS *et al.*, *Appts.*,

v.

City of HURON *et al.*, *Resp'ts.*

(.....S. D.....)

*1. The waterworks of a city, constructed under a power conferred upon the city by its charter "to construct and maintain waterworks" for protection against fires and for furnishing the inhabitants thereof with a supply of pure water for domestic purposes, and constructed and maintained at the expense of the inhabitants of such city, are held as the property of the municipal corporation, for public use, and charged with a public trust, of which the inhabitants of such city are the beneficiaries.

2. The power to construct a waterworks system for a city is not a necessary incident of its incorporation, but must, like all

*Headnotes by CORSON, P. J.

its other powers, be derived directly from the legislature of the state; and the power "to construct and maintain" such a system implies a duty of the municipality, through its corporate authorities, to maintain and preserve possession for the benefit of the public.

3. When a municipality is vested by its charter with power to construct and maintain a system of waterworks at the public expense and for the public use, and accepts such charter, and proceeds to exercise this authority in the manner designated, by the construction and maintenance of such waterworks at the expense of the citizens of the municipality, the waterworks so constructed and maintained are clothed with a public trust and are devoted to a public use.

4. The waterworks of a city, constructed and maintained by the municipality at the expense of its citizens and for the public use, being held by such municipality charged with a public trust, such trust, and the duty of the municipality under it, cannot be discharged and devolved upon another, by a sale by the city's common council, without legislative authority, of such waterworks, and the right and duty of the city to maintain and use them in execution of such public trust.

NOTE.—The above case, in which opinion and briefs present a very valuable discussion of the subject, is believed to be one of first impression on the power of a city to sell its waterworks, although it is held in *Terre Haute v. Terre Haute Waterworks Co.* 94 Ind. 306, that a city may sell

shares of stock which it owns in a water company.

On the question of the right to claim a return of the consideration paid on the *ultra vires* sale by the city, see *Nashville v. Sutherland* (Tenn.) 19 L. R. A. 619, and *note*.

80 L. R. A.

5. Power was conferred upon the city of Huron, by its charter, "to construct and maintain waterworks." Said city accepted the charter, and proceeded to erect, at the expense of about \$45,000 to the citizens of said city, waterworks for preventing fires and furnishing the inhabitants of said city with a supply of pure water. These works were kept and maintained for several years, when the city council of said city, without legislative authority, assumed to sell and dispose of the entire plant and franchise. *Held*, that the waterworks of said city were held for public use and charged with a public trust, and that such attempted sale was void.

6. Upon such attempted sale by the city council, the purchasers paid into the city treasury the sum of \$45,000 as the purchase price of said waterworks, but it was not found that said purchase money was appropriated by the common council to any lawful purpose of the corporation, or was in any manner used by the corporation. *Held*, that the payment of the consideration into the city treasury was unauthorized, and that its receipt by the city treasurer did not estop the city from recovering possession of its waterworks system without repayment of the sum so paid into the city treasury.

(April 20, 1895.)

A PPEAL by defendants from a judgment of the Circuit Court for Beadle County in favor of plaintiff in an action to enjoin defendants from interfering with its property. *Reversed*.

A PPEAL by plaintiffs from a judgment of the Circuit Court for Beadle County in favor of defendants in a proceeding brought to have a sale of property by defendant city to defendant waterworks company adjudged to be void and of no effect. *Reversed*.

The facts are stated in the opinion.

Messrs. A. W. Wilmarth and H. Ray Myers, for appellants:

Waterworks are property of a public nature and held for a public use.

Dill. Mun. Corp. 4th ed. § 508.

Bonds may be issued therefor.

It is unlawful to issue bonds in aid of private industrial enterprises.

15 Am. & Eng. Enc. Law, p. 1240; *Citizens' Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 655, 23 L. ed. 455; *Opinion of Judges*, 58 Me. 590; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *Commercial Nat. Bank v. Iola*, 2 Dill. 353; 2 Morawetz, Priv. Corp. § 1114.

The business of constructing and maintaining waterworks by a city under special legislative grant for the purpose of supplying itself with water for the extinguishment of fire, and furnishing the people with pure and wholesome water for domestic use, is not an ordinary business that every individual may be engaged in. It is a business of a public nature.

Rochester v. Rush, 80 N. Y. 810; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469; *Hanpen v. Albina Light & W. Co.* 21 Or. 411, 14 L. R. A. 426; *Olmsted v. Morris Aqueduct Proprs.* 47 N. J. L. 388; *West Hartford v. Hartford Water Comrs.* 44 Conn. 880; *Thompson & H. Electric Co. v. Newton*, 42 Fed. Rep. 725; *Daggett v. Colgan*, 92 Cal. 58, 14 L. R. A. 474; *Tiedeman*, Mun. Corp. ed. 1894, § 144a. 30 L. R. A.

The nature of the business of furnishing water for fire protection and for domestic use to the inhabitants of a city cannot be distinguished in principle from the business of gas companies, railroads, street railways, public wharves, electric lights, canals, toll bridges, and other works of immediate and general utility.

These are matters within the scope of the functions which have by general consent been attributed to the government, and all of which are for public uses and public purposes.

State v. Toledo, 48 Ohio St. 112, 11 L. R. A. 729; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Lumbard v. Stearns*, 4 Cush. 60; *New York v. Bailey*, 2 Denio, 488; *Hildreth v. Lowell*, 11 Gray, 345; *Re Central Park Comrs.* 63 Barb. 282; *Opinion of the Justices*, 150 Mass. 596, 8 L. R. A. 487; *Crawfordsville v. Braden*, 180 Ind. 149, 14 L. R. A. 268; *Fellows v. Walker*, 89 Fed. Rep. 651; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530; *Western U. Tele. Co. v. American U. Tele. Co.* 65 Ga. 160, 83 Am. Rep. 781; *Detroit v. Moran*, 44 Mich. 602; *New Orleans Gaslight Co. v. Louisiana Light & H. & P. Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Louisville Gas Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525; *People v. Chicago Gas Trust Co.* 180 Ill. 268, 8 L. R. A. 497; *Citizens' Sav. & L. Assn. v. Topeka*, 87 U. S. 20 Wall. 661, 22 L. ed. 460; 2 Morawetz, Priv. Corp. § 1114.

The power of eminent domain can only be exercised for public purposes.

The power of eminent domain is always granted for the purpose of supplying cities with water for the extinguishment of fires and for domestic purposes.

6 Am. & Eng. Enc. Law, p. 566; *Cooley*, Const. Lim. 1665, and cases cited in note 2 and note 4; *Talbot v. Hudson*, 16 Gray, 417; *Land, Log, & Lumber Co. v. Brown*, 78 Wis. 294, 3 L. R. A. 473; *Ross v. Davis*, 97 Ind. 79; *O'Reilly v. Kankakee Valley Draining Co.* 82 Ind. 169; *Riche v. Bar Harbor Water Co.* 75 Me. 91; *State v. Hibernia U. R. Co.* 47 N. J. L. 48; *Bloomfield & R. Nat. Gaslight Co. v. Richardson*, 68 Barb. 437; *Oheabrough v. Putnam & Paulding Counties Comrs.* 87 Ohio St. 508; *State v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 738; *Wayland v. Middlesex County Comrs.* 4 Gray, 501.

The words "public use" mean public utility, or what is of public benefit.

Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221; *Cooley*, Taxn. 189; *Seely v. Sebastian*, 4 Or. 26; *Lewis*, Em. Dom. 165; *Taylor v. Thompson*, 42 Ill. 9; *Broddhead v. Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; *Gilmer v. Lime Point*, 18 Cal. 251; *Stockton & V. R. Co. v. Stockton*, 41 Cal. 172; *Booth v. Woodbury*, 83 Conn. 118; *West Chicago Park Comrs. v. McMullen*, 184 Ill. 170, 10 L. R. A. 215; *Tiedeman*, Mun. Corp. § 234, note 2; 2 Dill. Mun. Corp. 4th ed. § 597.

Waterworks owned by cities cannot be sold on execution for the reason that waterworks are property charged with a public use and trust.

Dill. Mun. Corp. 4th ed. § 575; 15 Am. &

Eng. Enc. Law, p. 1068; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184; *Merritt v. Garrett*, 103 U. S. 473, 26 L. ed. 197; *Chicago v. Hasley*, 25 Ill. 595; *Foster v. Fowler*, 60 Pa. 27; *Leonard v. Brooklyn*, 71 N. Y. 498, 27 Am. Rep. 80; *Birmingham v. Ramsey*, 68 Ala. 852; *Palestine v. Barnes*, 50 Tex. 538; *Curry v. Savannah*, 64 Ga. 290, 37 Am. Rep. 74.

The waterworks property cannot be sold.

8 Am. & Eng. Enc. Law, p. 586; 2 Morawetz, Priv. Corp. § 1114; Cooley, Const. Lim. pp. 668, 664; 26 Am. L. Rev. 1892, p. 679; Dill. Mun. Corp. 4th ed. § 89; Tiedeman, Mun. Corp. § 144a; *Roberts v. Louisville*, 92 Ky. 95, 18 L. R. A. 844; *Lord v. Oconto*, 47 Wis. 386; *Illinois, St. L. R. & Canal Co. v. St. Louis*, 2 Dill. 84; *Ottawa v. People*, 48 Ill. 239; *Taggart v. Detroit*, 71 Mich. 92; *McCullough v. San Francisco Bd. of Edu.* 51 Cal. 418; *Com. v. Rush*, 14 Pa. 191; *San Francisco v. Itell*, 80 Cal. 57; *New Orleans v. Morris*, 105 U. S. 600, 26 L. ed. 1184.

A corporation cannot sell, or lease, or in any manner transfer, the property necessary to perform its obligation and duties imposed by its charter to the public, without special legislative authority.

2 Morawetz, Priv. Corp. §§ 1120-1129; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 887; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748; *Munn v. Illinois*, 94 U. S. 130, 24 L. ed. 85; *York & M. L. R. Co. v. Winans*, 58 U. S. 17 How. 80, 15 L. ed. 27; *Pickard v. Pullman Southern Car Co.* 117 U. S. 84, 29 L. ed. 785; *Gue v. Tide Water Canal Co.* 65 U. S. 24 How. 257, 16 L. ed. 635; *Davis v. Old Colony R. Co.* 131 Mass. 271, 41 Am. Rep. 221; *Middlesex R. Co. v. Boston & C. R. Co.* 115 Mass. 347; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572; *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.* 121 Ill. 530; *Balsley v. St. Louis, A. & T. H. R. Co.* 119 Ill. 68, 59 Am. Rep. 784; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 63 Ill. 489; *Roper v. McWhorter*, 77 Va. 214; *Kenton County Ct. v. Bank Lick Turnp. Co.* 10 Bush, 529; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Ohio & M. R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *Hart v. Burnett*, 15 Cal. 590; *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 180.

Enumerated powers exclude all others.

Farmers & M. Nat. Bank v. School Dist. No. 53, 6 Dak. 259; *Goodnow v. Ramsey County Comrs.* 11 Minn. 81; *Pullman's Palace Car Co. v. Central Transp. Co.* 139 U. S. 64, 35 L. ed. 70; Cooley, Const. Lim. p. 236.

It being necessary for municipal governments to obtain special power to construct and maintain waterworks, and waterworks of a city being of so much importance to it, it is incredible of belief that the power to sell the Huron waterworks plant and franchise could be implied from the first section of the charter, especially when we consider that all the powers granted to municipal corporations are granted 30 L. R. A.

for the special benefit of the people, and not for the benefit of the corporation.

15 Am. & Eng. Enc. Law, p. 1047, § 6; *East Hartford v. Hartford Bridge Co.* 51 U. S. 10 How. 511, 13 L. ed. 518; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 887; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Branch v. Jensep*, 106 U. S. 469, 27 L. ed. 279.

Corporations organized for public purposes cannot by contract of sale, lease, or otherwise, render themselves incapable of performing their duties to the public, or in any way absolve themselves from the obligation which forms the main consideration for giving them a corporate existence.

Central Transp. Co. v. Pullman's Palace Car Co. supra; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 284; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 887; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748; *Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 692; *Black v. Delaware & R. Canal Co.* 22 N. J. Eq. 180; 2 Morawetz, Priv. Corp. §§ 1120, 1129; *Davis v. Old Colony R. Co.* 131 Mass. 271, 41 Am. Rep. 221; *Middlesex R. Co. v. Boston & C. R. Co.* 115 Mass. 347; *Abbott v. Johnstown, G. & K. Horse R. Co.* 80 N. Y. 27, 36 Am. Rep. 572.

One gas company cannot transfer to another gas company.

Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co. 121 Ill. 530; *Balsley v. St. Louis, A. & T. H. R. Co.* 119 Ill. 72, 59 Am. Rep. 784; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 63 Ill. 489; *Roper v. McWhorter*, 77 Va. 214; *Kenton County Ct. v. Bank Lick Turnp. Co.* 10 Bush, 529; *Gue v. Tide Water Canal Co.* 65 U. S. 24 How. 257, 16 L. ed. 635; *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

Lots dedicated for public purposes cannot be sold.

Alton v. Illinois Transp. Co. 12 Ill. 59, 59 Am. Dec. 479; *Hart v. Burnett*, 15 Cal. 590.

Acceptance of the franchise involves the duty to maintain it and use it for the public welfare.

Taggart v. Detroit, 71 Mich. 92; *Gulf, C. & S. F. R. Co. v. Morris*, 67 Tex. 692; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Ottawa v. People*, 48 Ill. 239; *Lord v. Oconto*, 47 Wis. 386.

The general powers usually granted in a city charter are not sufficient for a city to confer a franchise for owning and operating waterworks.

National Foundry & Pipe Works v. Oconto Water Co. 52 Fed. Rep. 29; *Webb v. Demopolis*, 95 Ala. 116, 21 L. R. A. 62; 2 Morawetz, Priv. Corp. § 1128; Tiedeman, Mun. Corp. 144a. p. 255.

The property being held in trust by the city council for public purposes, the city council was incapable of selling and transferring the same, and the waterworks company, knowing, and being by law charged with the duty of knowing, that it was trust property, and obtaining the same in violation of said trust, is an involuntary trustee for said property, for the benefit of the city of Huron.

Comp. Laws, § 3920; 1 Perry, Tr. 3d ed. § 217;

Perry, Tr. 3d ed. § 828; *Mechanics' Bank of Alexandria v. Seton*, 26 U. S. 1 Pet. 299, 7th ed. 152; *Cooley*, Const. Lim. p. 250; 2 Dill. Mun. Corp. 4th ed. §§ 575-577, and note; 15 Am. & Eng. Enc. Law, pp. 1064, 1068; *Ransom v. Boal*, 29 Iowa, 68, 4 Am. Rep. 195; *Brockman v. Oreston*, 79 Iowa, 587; *Alton v. Illinois Transp. Co.* 12 Ill. 88, 52 Am. Dec. 479; *Meriwether v. Garrett*, 103 U. S. 477, 26 L. ed. 197.

It would be contrary to all principles of justice and equity, to permit a party who, in violation of law, purchased the property from the officers of such corporation, to hold and retain the same from the people, until the money claimed to have been paid for it, and the money claimed to have been expended on it, had been returned and to insist on reimbursement of such expenditures before the people could recover back the property.

Litchfield v. Ballou, 114 U. S. 190, 29 L. ed. 132; *Evans v. Hughes County*, 8 S. D. 244; *Herzo v. San Francisco*, 88 Cal. 184; *Agawan Nat. Bank v. South Hadley*, 128 Mass. 507.

Fraud may be imputed to the principles either by co-operation in the original design or constructive co-operation from notice of it, and then carrying the design into operation with such notice.

Stovall v. Farmers' & M. Bank, 8 Smedes & M. 316, 47 Am. Dec. 85; *Perry*, Tr. 3d ed. § 828; *Bump*, Fraud. Conv. p. 594; *Bleakley's Appeal*, 66 Pa. 187; *Brooks v. Caughran*, 8 Head, 467; *Allen v. Berry*, 50 Mo. 91; *How v. Camp*, Walk. Ch. (Mich.) 436; *Holland v. Cruft*, 20 Pick. 387; *Goodwin v. Hammond*, 13 Cal. 169, 78 Am. Dec. 574; *Borland v. Walker*, 7 Ala. 269; *Pettibone v. Stevens*, 15 Conn. 25, 38 Am. Dec. 57; *Sands v. Codwise*, 4 Johns. 385, 4 Am. Dec. 805.

On rehearing.

Where there is an absolute want of power to make a contract or to do an act, and money is paid upon such contract or obligation, in law it is a voluntary payment of money, and money so paid cannot be recovered back, even if it has been appropriated by the party receiving it to a legitimate and lawful purpose.

Evans v. Hughes County, 8 S. D. 244; *Thomas v. Richmond*, 79 U. S. 349, 20 L. ed. 453; *Clark v. Dutcher*, 9 Cow. 674; *Johnson v. McGinness*, 1 Or. 292; *Harper v. Rowe*, 53 Cal. 233; *Mays v. Cincinnati*, 1 Ohio St. 268; *M. Adams & E. P. T. R. Co. v. Cincinnati*, 23 Ohio L. J. 68; *Brumagim v. Tillinghast*, 18 Cal. 265; *Onondaga County Supers. v. Briggs*, 2 Denio, 26; 2 Deasy, Taxn. pp. 791, 792.

Where an officer receives more money than he is entitled to, it is in law a voluntary payment, and the money cannot be recovered back.

Onondaga County Supers. v. Briggs, 2 Denio, 26; *Snyder v. Laframboise*, 1 Ill. 268, 12 Am. Dec. 187; *Owings v. Thompson*, 4 Ill. 502; *Harper v. Rowe*, 53 Cal. 233.

The principle of law upon which money voluntarily paid under a mistake of law cannot be recovered back is that no cause of action can arise out of an unlawful act, as no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act whether the same is knowingly or ignorantly done.

Ribbans v. Crickett, 1 Bos. & P. 264; *Light-*
30 L. R. A.

foot v. Tenant, 1 Bos. & P. 552; *Parkin v. Dick*, 11 East, 503; *Langton v. Hughes*, 1 Maule & S. 596; *Aubert v. Mase*, 2 Bos. & P. 873; *Cannan v. Bryce*, 8 Barn. & Ald. 179; *Mitchell v. Smith*, 4 U. S. 4 Dall. 269, 1 L. ed. 828; *Maybin v. Coulton*, 4 U. S. 4 Dall. 298, 1 L. ed. 841; *Bank of United States v. Owens*, 27 U. S. 2 Pet. 527, 7 L. ed. 508; *Hannay v. Eze*, 7 U. S. 3 Cranch, 242, 3 L. ed. 437; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 334, 14 L. ed. 961; *Mayer v. Whyte*, 65 U. S. 24 How. 317, 16 L. ed. 657; *Middleton v. Arnolds*, 18 Gratt. 469.

The court justly held that "it would be manifestly unjust and inequitable to require the city of Huron to refund the consideration paid for these waterworks, before it can be restored to the possession of the same, because the same was paid to, and received by, an officer of the city unauthorized to receive it."

Herzo v. San Francisco, 88 Cal. 184; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 508; *Atkinson v. Minot*, 75 Me. 192.

Mr. John N. Pyle, for respondent:

The property in controversy in this action is property which the city has purchased for her own exclusive use, and is that class of property which could be sold and alienated.

Alton v. Illinois Transp. Co. 12 Ill. 88, 53 Am. Dec. 479; *Bailey v. New York*, 8 Hill, 531, 38 Am. Dec. 669; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 780; *Adams v. Memphis & L. R. R. Co.* 2 Coldw. 645; *Detroit v. Corey*, 9 Mich. 163, 80 Am. Dec. 78; *Dill. Mun. Corp.* 4th ed. §§ 19, 21-23; *Grogan v. San Francisco*, 18 Cal. 590; *People v. Detroit*, 23 Mich. 228, 15 Am. Rep. 209; *Small v. Danville*, 51 Me. 363; *Philadelphia v. Fox*, 64 Pa. 180; *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Webb v. New York*, 64 How. Pr. 10; *Richland County v. Lawrence County*, 13 Ill. 1; *Touchard v. Touchard*, 5 Cal. 806; *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 108; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43, 3 L. ed. 650; *Paulet v. Clark*, 13 U. S. 9 Cranch, 292, 3 L. ed. 785; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 694, 4 L. ed. 678; *New Orleans, M. & O. R. Co. v. New Orleans*, 26 La. Ann. 478.

While they had power to "erect waterworks" and the power to "maintain waterworks," there is no duty imposed upon the city council to do either, and like all of the other powers conferred upon them it is a discretionary one, to be exercised or not according to the judgment of the city council.

The municipal corporation cannot be required to exercise these legislative or discretionary powers.

Grant v. Erie, 69 Pa. 420, 8 Am. Rep. 278; *Wheeler v. Cincinnati*, 19 Ohio St. 19, 2 Am. Rep. 368; *Fair v. Philadelphia*, 83 Pa. 309, 33 Am. Rep. 455; *Mills v. Brooklyn*, 32 N. Y. 489; *Smith v. New York*, 66 N. Y. 295, 23 Am. Rep. 53; *Carr v. Northern Liberties*, 35 Pa. 324, 78 Am. Dec. 342; *Rivers v. Augusta*, 65 Ga. 376, 38 Am. Rep. 787; *Forsyth v. Atlanta*, 45 Ga. 152; *Freeport v. Isbell*, 83 Ill. 440, 25 Am. Rep. 407; *Joliet v. Verley*, 85 Ill. 58, 85

Am. Dec. 342; *Hill v. Charlotte*, 75 N. C. 55, 21 Am. Rep. 451; *Tainter v. Worcester*, 123 Mass. 811, 25 Am. Rep. 90; *Vanhorn v. Des Moines*, 68 Iowa, 447, 50 Am. Rep. 850.

Even though it should be held that the city had no authority to convey this property, it is still estopped from setting up its right to convey the property until it has returned to the waterworks company the consideration received for such conveyance.

West Carroll Parish v. Gaddis, 84 La. Ann. 928; *Grant v. Davenport*, 18 Iowa, 179; *Louisville v. Com.* 1 Duv. 295, 85 Am. Dec. 624; *Vanarsdall v. State*, 65 Ind. 176; *Sturgeon v. Daviess County Comrs.* 65 Ind. 802; *Branham v. San José*, 24 Cal. 585; *Adams v. Memphis & L. R. R. Co.* 2 Coldw. 645; *Adams v. Rome*, 69 Ga. 765.

Where the consideration received by a corporation under an *ultra vires* contract can be restored, equity will not relieve a corporation from a performance of the contract without a restoration of the consideration.

Turner v. Gruen, 70 Iowa, 202; *Pratt v. Short*, 58 How. Pr. 506; *Leonard v. Canton*, 85 Miss. 189; *Argenti v. San Francisco*, 16 Cal. 282; *Moore v. New York*, 78 N. Y. 288, 29 Am. Rep. 184; *Lucas County Comrs. v. Hunt*, 5 Ohio St. 438; *Montgomery v. Montgomery Waterworks*, 79 Ala. 238; 15 Am. & Eng. Enc. Law, pp. 715, 1084, 1102, 1116; *Hackensack Water Co. v. Hoboken*, 51 N. J. L. 220; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 878; *Livingston v. Pippin*, 81 Ala. 542; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Nichol v. Nashville*, 9 Humph. 268; *Grant v. Davenport*, 86 Iowa, 402; *Memphis v. Memphis Water Co.* 5 Heisk. 528; *Warren v. Chicago*, 118 Ill. 329; *Sherlock v. Winnetka*, 59 Ill. 398; *Goodrich v. Chicago*, 20 Ill. 445; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Touchard v. Touchard*, 5 Cal. 806; *Coopers v. San José*, 55 Cal. 599; *State Board of Agriculture v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 167; *First Nat. Bank v. Graham*, 100 U. S. 699, 25 L. ed. 750; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 698; 1 Story, Cont. § 610; *White v. Franklin Bank*, 29 Pick. 181; *Taylor v. Weld*, 5 Mass. 109; *Warren County Supers. v. Patterson*, 66 Ill. 111; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 458; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *Heyward v. New York*, 7 N. Y. 814.

Railroads have always been held to be of public utility, and in a sense for the use of the public, and it is upon that ground alone that municipal aid bonds have been sustained in very many cases, but it has always been held that such property is private and in the property itself the public has no concern whatever.

Bussell v. Michigan S. & N. I. R. Cos. 22 N. Y. 258; *Chicago R. Co. v. Atty. Gen.* 9 West. Jur. 347; *People v. New York C. & H. R. R. Co.* 28 Hun, 547; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 879; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 409, 18 Am. Rep. 457; *Roper v. McWhorter*, 77 Va. 218; 2 Morawetz, Priv. Corp. 2d ed. § 1114; 8 Am. & Eng. Enc. Law, p. 680; *Olcott v.* 80 L. R. A.

Fond du Lac County Supers. 83 U. S. 16 Wall. 678, 21 L. ed. 382; *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718.

While, then, it may be true that ownership of property may sometimes bear upon the question whether the uses of the property are public, it is not the test.

Re Fay, 15 Pick. 248; *New Orleans v. New York Mail S. S. Co.* 87 U. S. 20 Wall. 387, 22 L. ed. 354; *Putnam v. Grand Rapids*, 58 Mich. 416.

In some of the aspects of the case at bar, it may be regarded as an action to rescind or set aside a contract upon the ground of fraud.

Merrill v. Wilson, 66 Mich. 252; *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 698; *Union Water Co. v. Murphy's Flat Flaming Co.* 23 Cal. 620; *Morris & E. R. Co. v. Sussex R. Co.* 20 N. J. Eq. 542; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453; *Congress & E. Spring Co. v. Knowlton*, 108 U. S. 49, 26 L. ed. 347; *Story, Eq. Jct.* 298; *Detroit City R. Co. v. Mills*, 85 Mich. 684.

The mere usurpation of corporate authority does not confer upon the individual the right to bring suit to restrain the unlawful exercise of authority or to raise it collaterally.

Chicago, R. I. & P. R. Co. v. Union P. R. Co. 47 Fed. Rep. 15; *Cooper v. Detroit*, 42 Mich. 584; *People v. Hurbit*, 24 Mich. 86, 9 Am. Rep. 108; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Detroit v. Corey*, 9 Mich. 164, 80 Am. Dec. 782; *Detroit v. Moran*, 44 Mich. 602; *Niles Waterworks v. Niles*, 59 Mich. 324; *Darlington v. New York*, 81 N. Y. 164, 88 Am. Dec. 248; *Petz v. Detroit*, 95 Mich. 166; *O'Rourke v. Sioux Falls*, 4 S. D. 47, 19 L. R. A. 789; *Huron v. Campbell*, 3 S. D. 309.

In one aspect of this case, the defendant undertakes to impugn the motives of the members of the city council in passing the ordinance and in making the conveyance. This cannot be done.

Soon Hing v. Crowley, 118 U. S. 703, 28 L. ed. 1146; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Western San. Fund Soc. v. Philadelphia*, 81 Pa. 185, 72 Am. Dec. 730; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Taylor v. Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Newport v. Newport Light Co.* 84 Ky. 163; *Searcy v. Yarnell (Ark.)* 1 S. W. 319; *Louisville v. Wilde*, 84 Ky. 290; *State v. Crete*, 23 Neb. 568; *Merrill Railway & Lighting Co. v. Merrill*, 80 Wis. 358; *Burlington v. Burlington Water Co.* 86 Iowa, 266; *Smith v. Dedham*, 144 Mass. 177; *Atlantic City Waterworks Co. v. Atlantic City*, 48 N. J. L. 473; *Des Moines Street R. Co. v. Des Moines Broad-Gauge Street R. Co.* 78 Iowa, 513; *Grant v. Davenport*, 18 Iowa, 179; *Whitney v. New Haven*, 58 Conn. 450; *Capital City Water Co. v. Montgomery*, 92 Ala. 366; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *Carlyle Water, Light, & Power Co. v. Carlyle*, 81 Ill. App. 825; *Atkins v. Randolph*, 31 Vt. 226; *Reynolds v. Stark County Comrs* 5 Ohio, 204; *Newark v. Elliott*, 5 Ohio St. 113; *Beach v. Haynes*, 12 Vt. 15; *Memphis v. Mem-*

this Water Co. 5 Heisk. 495; *Valparaiso v. Gardner*, 87 Ind. 1, 49 Am. Rep. 416; *Vincennes v. Collender*, 86 Ind. 484; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Wells v. Atlanta*, 48 Ga. 67; *New Orleans, M. & O. R. Co. v. New Orleans*, 26 La. Ann. 478.

Mr. Americus B. Melville, in support of petition for rehearing:

Klemme, the city treasurer of the city of Huron, had the possession of the money in question by virtue of an act of the city.

By an act of the city of Huron, which Klemme could not oppose, which could not be attacked collaterally, this money was paid into the city treasury. Therefore the city was bound to account for it before it could recover the property.

Chapman v. Douglas County Comrs. 107 U. S. 351, 27 L. ed. 380; *Mittenberger v. Cooke*, 85 U. S. 18 Wall. 421, 21 L. ed. 864; *Thomas v. Richmond*, 79 U. S. 12 Wall. 349, 20 L. ed. 453; *Pollock, Cont.* 264; *Johnson v. Meeker*, 1 Wis. 436; *Morville v. American Tract Soc.* 123 Mass. 129, 25 Am. Rep. 40; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. ed. 659; *Clark v. Saline County Comrs.* 9 Neb. 516; *Pimental v. San Francisco*, 21 Cal. 862; 15 Am. & Eng. Enc. Law, p. 1081; *Paul v. Kenosha*, 22 Wis. 256, 94 Am. Dec. 598; *Thomas v. Port Huron*, 27 Mich. 822; *Brown v. Atchison*, 39 Kan. 37; *State Board of Agriculture v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702.

Corson, P. J., delivered the opinion of the court:

These two actions were consolidated and tried together in the court below, as they involved substantially the same question. Judgments were rendered in both actions in favor of the Huron Waterworks Company, and from the judgments the city of Huron and H. Ray Myers and Henry Schaller have appealed to this court.

A few paragraphs from the complaint of H. Ray Myers and Henry Schaller and three findings of fact by the court will sufficiently present the case for the purposes of this decision.

It is alleged in the complaint: "(3) that heretofore, and during the years 1888 and 1884, under and by virtue of the power conferred by said charter of the city of Huron, the city of Huron did construct, and cause to be constructed, a system of waterworks, consisting of engine, boiler, pumps, water mains, pipes, hydrants, sewers, and all other appurtenances necessary to a complete system of waterworks, at a great expense, to wit, as informed and believed by the plaintiffs, to be the sum of \$40,000; and to pay for said waterworks and sewer, said city council issued the bonds of the city of Huron, for said \$40,000 payable fifteen years after date, bearing interest at the rate of 7 per cent per annum, having first been directed to issue said bonds by vote of the people, at an election duly called and held for that purpose, as provided by said charter. (4) that heretofore, and during the year 1886, the said city of Huron caused to be bored and constructed a large 6-inch artesian well, as part of an addition to the aforesaid system of waterworks, and, as informed and believed, at an expense of \$4,600." "(6) That said city of Huron,

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from the year 1888 to July 21, 1890, through its city council, operated, controlled, and maintained said waterworks, and made all needful rules and regulations concerning the distribution and use of water supplied by said waterworks for the prevention and extinguishment of fires, and to supply the citizens and taxpayers at a moderate and reasonable rate, in accordance with the provisions of section 7, subd. 9, of the charter of said city." "(8) That at the time of the commission of the grievances hereinafter mentioned said waterworks were owned by, and were of great value to, said city and taxpayers of said city of Huron, amounting, as informed and believed by the plaintiffs, to at least \$100,000." "(12) That "the mayor and city council of said city of Huron, on or about the 21st day of July, 1890, did unlawfully and wrongfully, and in violation of the city charter and their high and legal duties and trust reposed in them by the taxpayers and corporators of the city of Huron, execute and deliver to the defendant, the Huron Waterworks Company, a deed in terms conveying to said defendant, the Huron Waterworks Company, the entire valuable waterworks system of and belonging to the city of Huron, including all machinery, buildings, grounds, engines, boilers, water mains, hydrants, artesian well, pumps, and all property and effects of every description appertaining to said waterworks system, and placed the said defendants the Huron Waterworks Company in full possession and control of the same, without the consent and to the great injury of the taxpayers and corporators of the city of Huron."

The plaintiffs conclude with a prayer that the sale and conveyance might be declared null and void; that the officers of said city be enjoined from paying over to the Huron Waterworks Company the rents for the use of water for the city purposes contracted to be paid by the common council of the city; and that the possession of said waterworks property be restored to the city.

The court, among others, found the following facts: "Fourth. That the city of Huron made said conveyance in pursuance of an agreement to make the same, entered into on the 16th day of July, 1890, at which time \$10,000 was paid into the city treasury by the Dakota Farm Mortgage Company, for the use of said Huron Waterworks Company, and on the 21st day of July, 1890, the balance of \$35,000 of the purchase price was paid into the city treasury by the Dakota Farm Mortgage Company for the use of said Huron Waterworks Company, and on that day the city executed said deed of conveyance, and delivered the same to said Huron Waterworks Company, and placed said company in possession of said waterworks." "Seventh. That said waterworks plant was constructed and used by said city of Huron for the convenience of the citizens of the compact community embraced within the corporate limits of said city, for furnishing water to private consumers, for domestic and power purposes, and for the protection of said city and its inhabitants from the ravages of fire, and the same has at all times been used for those purposes, both by the city before the sale, and by said waterworks company since said sale." "Tenth. I find that neither the

city, nor the taxpayers of the same, have ever paid or tendered back to said waterworks company any part of the purchase price of the said waterworks, or any part of the sum paid out for the repairs or extensions of said waterworks system, and no effort has been made on the part of the city or taxpayers to place the waterworks company in the same condition as they were before the sale and delivery of the said property."

The material facts in the action of *Huron Waterworks Co. v. Huron* are stated in the opinion delivered in that case on a former appeal, reported in 8 S. D. 610, and, it is sufficient to say, its object was to obtain an injunction against the officers of the city, restraining them from interfering with the waterworks property.

It will not be necessary to notice the numerous assignments of error, as we shall confine ourselves to the discussion of only two questions raised by the record, which are: First. Did the common council of the city of Huron possess the power, unaided by state legislation, to sell and transfer the Huron waterworks system to the Huron Waterworks Company, a private corporation? Second. If the city council did not possess the power to dispose of the waterworks property, can the city of Huron regain possession of the same, without refunding to the Huron Waterworks Company the money advanced or paid by it as consideration for the same?

The learned counsel for the appellants the city of Huron, H. Ray Myers, and Henry Schaller, contend: First. That the waterworks system of the city of Huron, having been constructed, by virtue of a power conferred upon the city, at the expense of the corporation, became the property of the city, for public use, and was charged with a trust, and that the common council of said city, without the sanction of state legislation, did not possess the power to sell or dispose of the same. Second. That the waterworks system of the city of Huron, having been constructed, kept, and maintained for public purposes, namely, for the supply of water for the extinguishment of fires within the corporate limits of the city, and for the supply of the inhabitants of said city with pure and wholesome water for domestic purposes, was clothed with a public trust of which the inhabitants of said city were the beneficiaries, and the common council of said city could not, without the consent of the legislative power of the state, divest said city of the trust. Third. That the only power conferred upon the city of Huron by its charter was the power to "construct and maintain" waterworks for the city, and that the power to "construct and maintain" does not include the power to sell or dispose of the same. Fourth. That the attempted sale and transfer of the said waterworks by the mayor and common council was without authority and void; and that such sale being void, the city of Huron, in its corporate capacity, is entitled to the possession of said waterworks property, without refunding to the pretended purchasers, the Huron Waterworks Company, the amount paid by it as the consideration of said purchase.

The learned counsel for the respondents insists: "First. The city had power under its 80 L. R. A.

charter to dispose of this property, because it was erected for the private advantage of the people of the compact community of which the municipality was composed, and is not charged with any public trust for the general public. Second. That the property was not devoted to a different use from that for which it was erected, and the city had the power to contract with a private corporation, and for such purpose, and for its maintenance, the location of the legal title is a matter of no concern whatever. Third. That, even if the city has made a contract in excess of its powers, it cannot be relieved from the effects of such contract until it has placed the plaintiff in the same position as it was before the contract was entered into. Fourth. That if the city has exercised a power beyond its charter, only the state can complain of such action in an appropriate proceeding instituted by the state. . . . Sixth. The city, while it was authorized to, was not bound to maintain these waterworks, and the court cannot compel it nor its officers to do so. . . . Eighth. All the contracts and deeds, taken together, are only an appropriate means of carrying out the powers conferred upon the city. They are only an appropriate means of providing for the maintenance of the waterworks system and for extensions to the same. . . ."

The city of Huron was incorporated under a special charter, and there are only three sections called to our attention as bearing upon the question, which are as follows:

Section 1 provides: "That the city of Huron . . . shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer, and convey real and personal property for the use of the city. . . . and to exercise all the rights and privileges pertaining to a municipal corporation."

Section 7, pt. 8, provides as follows: "The city council shall have power . . . to organize and support fire companies, hook and ladder companies, and provide them with engines and all apparatus for extinguishment of fires. . . . to construct and furnish reservoirs, wells, cisterns, aqueducts, pumps, and other apparatus for protection against fires, and to establish regulations for the prevention and extinguishment of fires."

Section 7, pt. 9, provides as follows: "The city council shall have power . . . to construct and maintain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks."

The waterworks of said city, as found by the court, were constructed and used by said city of Huron for protection against fire and for domestic purposes, and it had been so maintained and used for a number of years prior to said alleged sale. They were constructed by the corporation and at the expense of the same. No express power to sell or convey said property has been conferred upon the mayor and common council of said city, nor upon the corporation itself, unless such power is included in the powers conferred upon the city by section 1, which, as we have seen, provides "that the city of Huron . . . shall have power . . . to purchase, hold, lease, transfer,

and convey real and personal property for the use of the city . . . and to exercise all the rights and privileges pertaining to a municipal corporation." The counsel for the respondents concedes that there is a class of property owned by a city that the common council of a city do not possess the power to sell, and he admits that public parks, squares, commons, cemeteries, etc., come within this class; but he insists that the waterworks of a city, though constructed by the city at the expense of the corporation, and used for protection against fire, and for the purposes of supplying pure and wholesome water to the citizens, do not belong to this class. It is necessary therefore, to determine the nature and character of waterworks properly held by a city. The grounds upon which municipal corporations are denied the power to sell and convey the class of property above referred to are that such property is held by the corporation for public use, and is therefore charged with a public trust of which the corporation cannot divest itself, except by the express authority of the lawmaking power of the state.

The duties imposed upon municipal corporations for governmental purposes purely need not be considered, as it cannot be claimed that the exercise of the power to create and maintain city waterworks is strictly a governmental purpose, so far as it relates to the state at large. Neither are public squares, parks, wharves, cemeteries, landing places, fire apparatus, etc., held for governmental purposes, in the sense that they relate to the general public of the state; but they are governmental in the sense that they exist for public use,—that is, for that portion of the public embraced within the limits of the city. This distinction is well stated by Judge Dillon in his work on *Municipal Corporations*. That learned author says: "As respects the usual and ordinary legislative and governmental powers conferred upon a municipality, the better to enable it to aid the state in properly governing that portion of its people residing within the municipality, such powers are in their very nature public, although embodied in a charter, and not conferred by laws general in their nature and applicable to the entire state. But powers or franchises of an exceptional or extraordinary or nonmunicipal nature may be, and sometimes are, conferred upon municipalities, such as are frequently conferred upon individuals or private corporations. Thus, for example, a city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense, they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large. In this limited sense, and as forming a basis for the implied civil liability for damages caused by the negligent execution of such powers, it may be said that a municipality has a private as well a public character. And so, as hereafter shown, a municipality

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may have property rights which are so far private in their nature that they are not held at the pleasure of the legislature." 1 Dill. Mun. Corp. § 27.

While parks, squares, wharves, landing places, fire apparatus, etc., are not absolutely necessary to enable a municipal corporation to perform its strictly governmental duties, so far as they relate to the state at large, they are so far held for governmental purposes that they cannot be appropriated to any other use without special legislation. Mr. Chief Justice Waite, in speaking of this class of city property in *Meriwether v. Garrett*, 102 U. S. 473, 26 L. ed. 197, says: "(1) Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, engineering instruments and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation." And Mr. Justice Field, in the same case (page 513, L. ed. 204), says: "What, then, is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own uses; and, secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the state. In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses." It is difficult to perceive upon what principle a distinction can be made between the waterworks of a city, constructed at the expense of the corporation and used to supply water for fire purposes, domestic use, and other city purposes, and public parks, squares, fire apparatus, public buildings, etc., used for public purposes, and the courts in the later decisions seem to make no such distinction. Judge Dillon, in his work above referred to, says: "In some of the states it is held that the private property of municipal corporations—that is, such as they own for profit, and charged with no public trusts or uses—may be sold on execution against them.

. . . On principle, in the absence of statutable provision, or legislative policy in the particular state, it would seem to be a sound view to hold that the right to contract and the power to be sued give to the creditor a right to recover judgment; that judgments should be enforceable by execution against the strictly private property of the corporation, but not against any property owned or used by the corporation for public purposes, such as buildings, hospitals, and cemeteries, fire engines and apparatus, waterworks, and the like; and that judgments should not be deemed liens upon real property, except when it may be taken in execution." Dill. Mun. Corp. § 576.

It will be noticed that Judge Dillon places

waterworks in the same class with public buildings, hospitals, cemeteries, etc., and in this the learned author is fully supported by the very able decision of the Supreme Court of the United States in *New Orleans v. Morris*, 105 U. S. 600, 28 L. ed. 1184. Mr. Justice Miller, speaking for the court, says: "The learned counsel, in the oral argument and in the brief, substantially concedes that the waterworks themselves, in the hands of the city, were not liable to be sold for the debts of the city. And, if no such concession were made, we think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility and necessity that they were held in trust for the use of the citizens. In this respect they were the same as public parks and buildings, and were not liable to sale under execution for ordinary debts against the city. . . . In the next place, the city was not situated, as regards this property, as a private person would be in the purchase and acquisition of ordinary property. The city could not have sold this property as the law stood. It could not have put it into a joint-stock company without the aid of a new law. The legislature, in authorizing the change in the form of the ownership of the waterworks, could, since it injured nobody and invaded no one's rights, say, as to the city, whether it be called new property or not, that such ownership could continue exempt from execution. As the city was using no means in acquiring this stock which could have been appropriated under any circumstances to the payment of the debts of the appellees, the legislature impaired no obligation of the city in declaring the stock thus acquired exempt from liability for debts." This decision is important, not only as being made by the highest court of the nation, but as being the unanimous opinion of that court upon the question, and made subsequently to the decision in the *Meriwether Case*, above cited.

It is clear and to the point that the waterworks of a city belong to the same class of property as "wharves, parks," etc., and holds distinctly that the waterworks property of a city cannot be sold, except by authority of the legislature, and the court says: "We think it quite clear that these works were of a character which, like the wharves owned by the city, were of such public utility that they were held in trust for the use of the citizens." The same view is taken by the court of appeals in the state of New York in the case of *Rochester v. Rush*, 80 N. Y. 802. In that case the court says: "The argument of the appellant that the property in question would properly be exempt from a city tax, as it was procured by a tax upon property within the city, but not from a county tax, but the people of the county were not taxed to procure it, would apply with equal force to the city hall and engine houses and machines and equipments which make those houses necessary, and, if sound, would subject them to the hazard of sale under a treasurer's warrant for the enforcement of the county tax. I am unable to perceive that in any sense the waterworks can be regarded as the private property of the city, as distinguished from property held by it for public use. These considerations lead to the opinion that the property

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was not taxable, and that the proceedings on the part of the assessors of the town of Rush in regard thereto cannot be sustained."

The supreme court of Connecticut, in the well considered case of *West Hartford v. Hartford Water Comrs.* 44 Conn. 860, lays down the same doctrine. In that case the court says: "The introduction of a supply of water for the preservation of the health of its inhabitants by the city of Hartford is unquestionably now to be accepted as an undertaking for the public good, in the judicial sense of that term, not, indeed, as the discharge of one of the few governmental duties imposed upon it, but as ranking next in order. For this purpose the legislature invested the city with a portion of its sovereignty, and authorized it to enter within the territorial limits of West Hartford, and condemn by process of law certain lands therein for the purpose of storing water for its own inhabitants. It authorized the assessment of a tax upon property within the city of Hartford for money wherewith to pay for this land, because the taking and holding was for the public good."

Having, as we think, established the proposition that the waterworks of a city, when constructed and owned by the city, are to be regarded the same as other city property held for public use, and therefore charged and clothed with a public trust, it would seem to follow that such property cannot be sold and conveyed by the mayor and common council of the city, unless under special authority conferred upon them to so sell and convey the same, by the legislative power of the state. Judge Dillon says, in his work before referred to, that they (municipal corporations) cannot dispose of property of a public nature in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons. See 2 Dill. Mun. Corp. § 575, and cases cited. In the recent case of *Roberts v. Louisville* (decided in 1891) 92 Ky. 95, 13 L. R. A. 844, the same doctrine was laid down by the supreme court of Kentucky as to the wharves held by the city of Louisville. In that case the court says: "The power of a municipal corporation to acquire land for the purpose of erecting wharves thereon, and to charge wharfage, is not a necessary incident of its charter, but must, like all its other powers, be derived directly from the legislature, of course to be exercised within the limits and upon conditions of the grant. Dill. Mun. Corp. § 110. And, looking to the nature and purpose of such special grant, it must be regarded as a trust, involving duties and obligations to the public and individuals which cannot be ignored or shifted; for the power to acquire implies the duty of the municipality, through its governing head, to maintain and preserve wharf property for benefit of the public, without discrimination or unreasonable charges for individual use. In every instance, so far as we have observed, wharf property of the city of Louisville has been acquired under act of the legislature and paid for by taxation; and in no case is there evidence of legislative intention that it should be held otherwise than in trust for use of the public, and in aid of trade and commerce. The wharf property being so held,

the city of Louisville cannot transfer its title or possession, nor, according to a plain and well-settled principle, can the general council, which is by statute invested with power of control, and burdened with duty of maintaining, preserving, and operating the wharves, either delegate the power or disable itself from performing the duties." In that case the judgment of the court below dismissing the bill for an injunction was reversed, the court, in effect, holding that an injunction enjoining the mayor and common council from making the sale should be granted. In the case of *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, also a late decision made in 1890, the supreme court of Tennessee says: "It is seen at once that the waterworks are corporate property. That is not denied. The debate is with respect to the nature of the use. As to that, for the sake of convenience, we divide all the purposes for which the city furnishes water into three classes: (1) To extinguish fires and sprinkling the streets; (2) to supply citizens of the city; (3) to supplying persons and factories adjacent to but beyond the corporate limits. If the business were confined to the first class, there would be no ground to base a decision on, so clearly would the use be exclusively for public advantage. We think there can be but little more doubt about the second class, especially in view of certain words in the city charter, to which we will advert presently. . . . Having accepted the charter, and undertaken to exercise this authority in the manner detailed by the witness, it cannot be held that the city in doing so is engaging in a private enterprise, or performing a municipal function for a private end. It is the use of corporate property for corporate purposes, in the sense of the revenue law of 1877. It can make no difference whether the water be furnished the inhabitants as a gratuity or for a recompense, the sum raised in the latter case being reasonable, and applied for legitimate purposes."

From this examination of the authorities, we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, court-houses, fire engines, and apparatus, and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city, except under the authority of the state legislature. Such property, as before stated, is private property, in the sense that the municipality cannot be deprived of it without compensation, no more than can a private corporation be deprived of its property by the law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality, for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not permit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same.

Counsel for respondents has called our attention to a number of cases which he contends 80 L. R. A.

hold a contrary doctrine from those to which we have directed attention. But, after a careful examination of those authorities, we are inclined to the opinion that there is no such conflict as the counsel suggests. The leading case cited is *Bailey v. New York*, 8 Hill, 538, 88 Am. Dec. 669, in which Chief Justice Nelson, in the course of the opinion, uses language, taken by itself, that possibly might be construed as favorable to the respondents' contention, but it must be construed with reference to the case before the court. The questions we are now considering were not involved, the only question there being whether or not the city of New York was liable for damages caused by a defective dam erected in the construction of its water system. The views expressed by the chief justice in that case have been repudiated by the courts of New York. In *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248, the court of appeals expressly disapprove of the doctrine announced by Chief Justice Nelson. That court, on pages 200 and 201, says: "If this case of *Bailey v. New York* had rested where it was left by the supreme court, though I should be obliged to acknowledge my inability to appreciate the distinction suggested between the public and private functions of the city government, the judgment would have been entitled to a certain weight as authority. But a new trial took place, pursuant to the judgment of the supreme court, when the plaintiff recovered a very large verdict, and the case was presented to the court for the correction of errors, whose judgment of affirmance is reported in 2 Denio, 433. The chancellor and three senators delivered written opinions in favor of affirmance, and the president of the senate an opinion for reversal. None of the opinions even alluded to the ground taken in the opinion of the supreme court. . . . The liability of the defendants being established by the court of ultimate review, on an entirely different theory from that which affirmed the enterprise of conveying water into the city to be a private work, as distinguished from an act of municipal government, the doctrine of the opinion of the supreme court was substantially repudiated, and cannot, therefore, be considered as a precedent. It is but the opinion of the eminent chief justice and learned associates, and does not, like a final adjudication upon the cause of action, settle any principle of law." And that court, speaking of the question now before us, says: "The subjects of the several actions, in the cases I have been examining, were as clearly matters of municipal government as any which could be presented. Nothing could, in the nature of things, partake less of a private character than the supplying of water to and the cleaning of the streets of a town containing nearly a million of inhabitants. If these were not public subjects, and under the control of the legislature, the city is not subordinate to the supreme legislative power on any conceivable subject. It is an *imperium in imperio*." We have already seen that in the case of *Rochester v. Rush*, 80 N. Y. 802, the court of appeals of New York distinctly placed waterworks in the class of property held for public use, and therefore exempt from taxation. Georgia held that the common council of the city of Rome had power to mortgage the water-

works for money advanced for its construction. The court in that case was construing a charter in which the powers conferred upon the common council of the city of Rome were exceedingly broad and comprehensive,—much more so than those conferred upon the city of Huron as a corporation,—and they were conferred directly upon the common council itself. The decision is one of too local a character and too dependent upon the provisions of the charter to be of much weight, and so it seems to have been regarded, as it is rarely referred to by the courts; and Judge Dillon, in citing the decision, adds: "Query, as to implied power to mortgage waterworks, see *supra*, section 576, and note 577,"—thus indicating that that learned author does not regard the doctrine of the court as sound in principle. The case of *Adams v. Memphis & L. R. R. Co.* 2 Coldw. 645, involved the sale, by the common council of the city, of some outlying lands donated to the city. The land had not been devoted to any public use, and was not held by the city in trust for public purposes. It was therefore strictly private property of the city, held like the private property of a natural person or private corporation. The decision in that case, therefore, has no application to the case at bar.

The doctrine laid down in the case of *Western Soc. Fund Soc. v. Philadelphia*, 81 Pa. 175, 73 Am. Dec. 780, does not seem to be applicable to this case. The contest there was between the city and a private gas company in which the city held stock. The case is somewhat complicated, and it is not easy to determine the question actually decided by the court. There is language used by the judge writing the opinion that cannot be sustained in the light of more modern authority, but we discover nothing in the decision itself that is in conflict with the doctrine that waterworks, when constructed and owned by the city, are held for public use, and therefore charged with a public trust. Our conclusion is that the waterworks in controversy were held by the city of Huron for public use, and therefore charged and clothed with a public trust, and that the mayor and common council of the city had no authority to sell and transfer the same. "Municipal corporations are created and exist for the public advantage, and not for the benefit of the officers or of particular individuals or classes. The corporation is the artificial body created by the law, and not the officers, since these are, from the lowest up to the council or mayor, the mere ministers of the corporation." 1 Dill. Mun. Corp. § 31.

The common council of the city of Huron was, to a certain extent, at least, but agent of the corporation, and possessed only such authority as was conferred upon it by its charter. While it probably possessed the power of disposing of strictly private property held by the city, and not held for public use, and therefore not charged with a trust, it did not possess the power to dispose of the city waterworks constructed by the corporation, and held for public use; and the power conferred by the first section of its charter to sell and dispose of the property of the city must be held to be lim-

ited to that class of property held as strictly private property, and not charged with any public use.

Having arrived at the conclusion that the sale of the waterworks by the city council was made without authority, and was void, it becomes necessary to determine the second question presented, namely, is the city of Huron entitled to the possession of the waterworks property without refunding to the Huron Waterworks Company the money paid by it to the city treasurer as the consideration therefor, and the money expended by said company in making improvements and repairs thereon? It will be noticed, from the finding of fact in reference to the payment of the consideration, that it was paid to the city treasurer, or "into the city treasury." It is not found that the treasurer paid out the same by the order of the common council, upon any legitimate or other indebtedness of the city, or that he has appropriated it to any city purpose whatever. The act of the city treasurer in receiving the money cannot bind the city to refund it. As city treasurer, his only authority is to receive and receipt for moneys properly due the city, or that are legally paid into the city treasury. The money paid for this waterworks property did not belong to the city, and the money was therefore paid to one who had no authority, as treasurer or agent of the city, to receive it in the name of the city, and apply it in the payment of city indebtedness. The money in the hands of the treasurer did not belong to the city, and there being no finding that the city, in its corporate capacity, accepted and appropriated the money, the city is not liable to refund the same. This subject was very fully considered and discussed in *Hero v. San Francisco*, 33 Cal. 184. That was an action brought to recover of the city money paid by the plaintiff for "City Slip property," the sale of which by the city had been held illegal and void. The supreme court in that case held that the plaintiff could not recover, as he had failed to show, and the court below had failed to find, that the corporation in its corporate capacity had appropriated the money paid, although it was shown that the money paid for the property had been paid into the city treasury and paid out by the treasurer on city indebtedness. The court in that case, on page 147, says: "The city, in our opinion, not being responsible for the acts of her assumed agents up to and including the placing of the money in the treasury, and the money being then the money of the plaintiff, responsibility for the money does not attach to her till she has converted it to her own use. The unauthorized act of the treasurer in paying it out to a third person is not the act of the city, and it makes no difference in this respect whether he pays it to a creditor of the city or to any other person. Suppose that he or the secretary of the land committee, while the money was in his hands, acting upon the fact, of which all persons concerned had notice, that the sale was a nullity, had returned the money to the plaintiff, it could not be said that the act of payment was the act of the city. She could not rightfully do anything with the money, and, to be responsible for it, she must have wrongfully converted it to her own use, and this she must

have done by some corporate act, and the only act competent for that purpose was an appropriation, for that is the only manner in which she can dispose of money. The reports of the secretary of the land committee and of the treasurer, and the acceptance of the reports by the common council, neither changed the ownership, the custody nor control of the money,—it still remained in the hands of the treasurer, and continued the property of the plaintiff." In the case of *Pimental v. San Francisco*, 21 Cal. 357, one of the same class of "City Slip cases" above referred to, the plaintiff was held entitled to recover back the money paid; but upon the ground that it was shown, not only to have been received by the city treasurer, but appropriated by the corporate authority of the city, by ordinances and resolutions. In that case Chief Justice Field, speaking for the court, on page 361 says: "The moneys paid by the bidders went into the treasury of the city, and were afterward, by different ordinances and resolutions, appropriated to municipal purposes. To the different actions, as we have mentioned, various defenses have been interposed. In some of them, as already stated, the entire transactions giving rise to or connected with the alleged sale have been treated as transactions to which the city was an absolute stranger; in other words, a want of privity, as it is termed, between the bidders and the city has been alleged. This alleged want of privity, as we understand it, amounts to this: That, inasmuch as the mayor and land committee had no authority to make the sale, they had no authority to pay the money which they had received from the bidders into the treasury of the city, and therefore no obligation can be fastened from such unauthorized act upon the city. The position thus restricted in its statement is undoubtedly correct, but the facts of the cases go beyond this statement. They show an appropriation of the proceeds, and the liability of the city arises from the use of the moneys, or her refusal to refund them after their receipt." The same doctrine is laid down in *Agawam Nat. Bank v. South Hadley*, 128 Mass. 508. In that case the court says: "But the plaintiff contends that it is entitled to recover upon the last count in the declaration for money had and received, and at the trial offered to show that the money paid or credited to the town treasurer upon the notes in suit was used by him in the payment of debts due from the town. This evidence was properly rejected. It fails to show that the money was received by the town in its corporate capacity, or that the act of the treasurer in applying it to the payment of its debts was ever authorized or ratified by the town. The difficulty is that the money was paid to one who had no authority as treasurer or as agent of the town to receive it in the name of the
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town, and apply it to the payment of town debts. If a town could be held in an action for money had and received, under such circumstances, then the purpose of the second and third sections of the statute would be wholly defeated. It makes no difference that the treasurer used this specific money in payment of the town debts. There is nothing to show any appropriation of such payments by the town to its own use, or any ratification of the act. The money in the hands of the treasurer did not belong to the town." *Litchfield v. Ballou*, 114 U. S. 190, 29 L. ed. 132. It would be manifestly unjust and inequitable to require the city of Huron to refund the consideration paid for these waterworks, before it can be restored to the possession of the same, because the same was paid to and received by an officer of the city unauthorized to receive it. If it had been further found by the court in this case that the city of Huron, through its proper corporate authorities, had appropriated the money so paid to the payment of the legitimate debts of the city, another question might have arisen, not necessary now to consider. But it is clear that, upon principle and authority, upon the findings in this case, the conclusions of law and the judgment should have been in favor of the city of Huron, H. Ray Myers, and Henry Schaller. The circuit court, in arriving at a different conclusion, in our opinion, committed error.

The judgments of the court below are reversed, and the case remanded, with instructions to the circuit court to correct its conclusions of law in accordance with this opinion, and render the proper judgments in favor of the city of Huron, H. Ray Myers, and Henry Schaller, as prayed for in their complaint, and against the Huron Waterworks Company; and it is so ordered, all the judges concurring.

On January 8, 1896, Kellam, J., handed down the following opinion in response to the petition for rehearing:

An application for a rehearing of this case having been duly made and an oral argument by special order having been allowed and heard, the majority of the court now adhere to the former opinion published in — S. D.

— For myself I think the case should be remanded for further investigation of the question, whether the consideration claimed to have been paid for the waterworks was actually received and beneficially used by the city. As this question is not considered material by the majority of the court, I do not discuss it, merely suggesting my own opinion that if it was so received and used, the city should not be allowed to recover the plant and at the same time retain the consideration which it received for a conveyance of it.

The petition for a rehearing is denied.

MINNESOTA SUPREME COURT.

J. J. DOUGLASS COMPANY, *Appt.*,
v.
MINNESOTA TRANSFER RAILWAY
COMPANY, *Respnt.*

(.....Minn.....)

*Five barrels of whiskey were delivered for transportation to a common carrier, accompanied by a written statement of the shipper that the value of the property was \$20 per barrel, and also, as one of the conditions upon which the property should be transported, that "the amount of loss or damage for which any carrier becomes liable shall be computed at the value of the property at the time and place of shipment under the bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation." The carrier executed, and the shipper accepted, a bill of lading in accordance with these terms, in which the value of the goods was stated to be \$20 per barrel, and classifying them as second-class freight, and fixing the rate of freight at \$2.78 per 100 pounds. The bill of lading also contained a stipulation that, "in consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at the agreed valuation of \$20 per barrel." If the valuation of the goods had been at their full actual value, they would have been classified as first-class freight, and the rate of freight would have been \$3.45 per 100 pounds. The shipper fixed and agreed to such valuation in order to obtain, and he did thereby obtain, the lower rate of freight, the charge for transportation being based on such valuation. The goods were lost by the negligence of the carrier. Held, in an action for such loss, that the stipulation that such loss should be adjusted at the agreed valuation of \$20 per barrel was valid, and that the recovery by the shipper is limited to the value named.

(October 30, 1895.)

APPEAL by plaintiff from an order of the District Court for Hennepin County overruling a motion for new trial after verdict in favor of defendant in a case submitted upon an agreed statement of facts without action for the purpose of determining defendant's liability for the value of certain property delivered to it for transportation and which was forwarded contrary to orders so that it reached the insolvent consignee notwithstanding plaintiff's efforts to stop it *in transitu*. *Affirmed*.

The facts are stated in the opinion.

Messrs. Merrick & Merrick, for appellant:

The words: "In consideration of rates inserted it is agreed that in case of loss or damage the same shall be adjusted at agreed valuation of \$20 per barrel"—stamped upon the face of the bill of lading, if they can be construed into a contract to limit the liability of

the carrier to the sum of \$20 per barrel in case of loss or damage, must be so construed as to limit such liability only in case of loss without the fault or negligence of the carrier.

Black v. Goodrich Transp. Co. 55 Wis. 319, 42 Am. Rep. 718; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *New York O. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 173, 23 L. ed. 872; *Candee v. Western U. Teleg. Co.* 34 Wis. 471, 17 Am. Rep. 452; *Hubbard v. Western U. Teleg. Co.* 83 Wis. 558; *Morrison v. Phillips & C. Constr. Co.* 44 Wis. 405, 28 Am. Rep. 599.

In order to exempt a carrier from liability for the want of ordinary care or negligence of any kind on the part of its servants or agents, the contract must so expressly provide, and, in the absence of such express agreement, it will be presumed that there was no intention on the part of the carrier to exempt himself from such liability.

Westcott v. Fargo, 61 N. Y. 543, 19 Am. Rep. 800; *Christenson v. American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Moulton v. St. Paul, M. & M. R. Co.* 81 Minn. 85, 47 Am. Rep. 781; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 506, 81 Am. Rep. 353; *New York O. R. Co. v. Lockwood*, and *Bank of Kentucky v. Adams Exp. Co.* *supra*; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191.

The facts in the case at bar are entirely different from those in the case of *Alair v. Northern P. R. Co.* 53 Minn. 160, so that this decision is in no sense applicable to the principle which we contend for.

United States Exp. Co. v. Backman, 28 Ohio St. 144; *New York O. R. Co. v. Lockwood*, *supra*; *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. ed. 535; *Southern Exp. Co. v. Moon*, 39 Miss. 822; *Moulton v. St. Paul, M. & M. R. Co.* *supra*; *Garnett v. Willan*, 5 Barn. & Ald. 53; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Davidson v. Graham*, 2 Ohio St. 131; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Boehl v. Chicago, M. & St. P. R. Co.*, and *Christenson v. American Exp. Co.*, *supra*; *Black v. Goodrich Transp. Co.* 55 Wis. 319, 42 Am. Rep. 718; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Orndorff v. Adams Exp. Co.* 8 Bush, 194, 96 Am. Dec. 207; *Kirby v. Adams Exp. Co.* 3 Mo. App. 899; *Davis v. Garrett*, 6 Bing. 718; *American Exp. Co. v. Sands*, 55 Pa. 140; *Lamb v. Camden & A. R. & Transp. Co.* 46 N. Y. 271, 7 Am. Rep. 827; *Lawson, Carr*, chap. 2, § 29, and cases cited; *Michigan S. & N. I. R. Co. v. Heaton*, 37 Ind. 448, 10 Am. Rep. 89; *Westcott v. Fargo*, 61 N. Y. 547, 19 Am. Rep. 800.

When a carrier accepts goods to be carried with the directions on the part of the owner to carry them in a particular way or by a specified route, it is bound to obey such instructions, and if it attempts to perform the contract different from the directions, it becomes an insurer, and cannot avail itself of any exceptions in the contract.

Lawson, Carr, chap. 7; *Galveston, H. & H.*

*Headnote by MITCHELL, J.

Note.—For power to limit amount of carrier's liability in case of negligence, see note to *Ballou v. Earle* (R. L.) 14 L. R. A. 433.
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R. Co. v. Allison, 59 Tex. 198; *Duneth v. Wade*, 8 Ill. 285; *Robinson v. Merchants' Despatch Transp. Co.* 45 Iowa, 470; *Hastings v. Pepper*, 11 Pick. 41; *Maghee v. Camden & A. R. Transp. Co.* 45 N. Y. 514, 6 Am. Rep. 124; *Sleat v. Fogg*, 5 Barn. & Ald. 348; *Angell, Carr.* §§ 269, 271; *Hutchinson, Carr.* §§ 249, 257, 260; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Johnson v. New York C. R. Co.* 88 N. Y. 610, 88 Am. Dec. 416; *Ackley v. Kellogg*, 8 Cow. 225.

It cannot be held that when the contract in this case was made it had any reference whatever to an anticipated gross violation of it, in forwarding the goods in a mode prohibited by the owner.

The loss and damage spoken of in the stipulation can only have reference to loss or damage occurring in the ordinary and usual mode of transportation.

Butler v. The Arrow, 6 McLean, 470; *Magnin v. Dinmore*, 56 N. Y. 168; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Ayres v. Western R. Corp.* 14 Blatchf. 9; *Union Mut. Ins. Co. v. Indianapolis & C. R. Co.* 1 Disney (Ohio) 480; *St. Louis & S. E. R. Co. v. Smuck*, 49 Ind. 302; *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Southern Exp. Co. v. Moon*, 89 Miss. 823; *Black v. Goodrich Transp. Co.* 55 Wis. 819, 42 Am. Rep. 718; *Hooper v. Wells, F. & Co.* 27 Cal. 11, 85 Am. Dec. 311; *Edsall v. Camden & A. R. & Transp. Co.* 50 N. Y. 861; *Westcott v. Fargo*, 61 N. Y. 553, 19 Am. Rep. 300; *Hutchinson, Carr.* § 270; *Lawson, Carr. chap. 6*, p. 71, and cases cited in notes.

Although a common carrier may limit his liability as an insurer he is not allowed to contract against the consequences of his own negligence, or that of his servants.

Christenson v. American Exp. Co. 15 Minn. 270, 2 Am. Rep. 122; *Moulton v. St. Paul, M. & N. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Boehl v. Chicago, M. & St. P. R. Co.* 44 Minn. 191; *Shriver v. Sioux City & St. P. R. Co.* 24 Minn. 508, 31 Am. Rep. 358; *Ortt v. Minneapolis & St. L. R. Co.* 36 Minn. 396.

A distinction should be made between the violation of the contract on the part of the carrier by reason of which the property is lost, and the loss of property occurring through some accident in the running or operation of the trains.

Ibid.

The requirement of the law has ever been, and is now, that the common carrier shall be diligent and careful in the transportation of its freight, and public policy forbids that it shall throw off that obligation by stipulation for exemption, in whole or in part, from the consequences of negligent acts. This view is sustained by sound reason and also by the weight of authority.

Coward v. East Tennessee, V. & G. R. Co. 16 Lea, 225, 57 Am. Rep. 227; *Moulton v. St. Paul, M. & N. R. Co.* 31 Minn. 85, 47 Am. Rep. 781; *Kanone City, St. J. & C. B. R. Co. v. Simpson*, 80 Kan. 645, 46 Am. Rep. 104; *Chicago, St. L. & N. O. R. Co. v. Abels*, 60 Miss. 1019; *United States Exp. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Transp. Co.* 55 Wis. 819, 42 Am. Rep. 718; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *Rosenfeld v. Peoria, D. & E. R. Co.* 108 Ind. 121; *Missouri P. R. Co. v. Fagan*, 72 Tex. 127, 2 L. R. A. 75.

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Mr. W. H. Norris, for respondent:

The liability, if any, of respondent, if a carrier, whether protected by this contract or not, whether the contract is itself valid or invalid, is not a carrier's common-law liability as an insurer.

Such liability is confined to safe carriage and delivery to the consignee; to liability for loss of or injury to the goods themselves.

Christenson v. American Exp. Co. 15 Minn. 270, 2 Am. Rep. 122; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. 6 How. 381, 12 L. ed. 481; *Alair v. Northern P. R. Co.* 53 Minn. 163.

The term "public policy," or "policy of the law," is sometimes to be invoked as authority for a decision when a more definite reason cannot readily be assigned.

Rogers v. Kennebec S. B. Co. 86 Me. 261, 25 L. R. A. 491.

Greenhood on Public Policy, page 1, says that any contract made by a competent party, upon valuable consideration, when made freely and intelligently, is valid, unless it is within the rule that if such contract bind the maker to do something opposed to the public policy of the state or nation, or conflicts with the wants, interest, or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however solemnly the same may be made.

Public policy is a variable quantity.

Davies v. Davies, L. R. 38 Ch. Div. 359; *Griswold v. Illinois C. R. Co.* 90 Iowa, 265, 24 L. R. A. 647, 651; *Pope Mfg. Co. v. Gormully*, 144 U. S. 233, 86 L. ed. 418; *Nashville & C. R. Co. v. Jackson*, 6 Heisk. 271 (1871); *Alabama G. S. R. Co. v. Little*, 71 Ala. 611 (1832).

The only public policy which as such could have a right to declare this contract void is that of the state of Kentucky where the contract was made.

But our agreed case concedes that this "bill of lading was not contrary to the law of Kentucky."

Orndorff v. Adams Exp. Co. 3 Bush, 194, 96 Am. Dec. 207.

The public policy of the state of Minnesota cannot, if it would, affect the validity of a contract made in another state for an interstate shipment across numerous states; and we can hardly think that the public policy of Minnesota would do so, if it could.

Hull v. Chicago, St. P. M. & O. R. Co. 41 Minn. 510, 5 L. R. A. 587 (1889).

As between the different states of this Union, the public policy which shall determine the validity of a contract must be the public policy of the state in which the contract was made.

Doyle v. Continental Ins. Co. 94 U. S. 535, 24 L. ed. 148; *Bank of Augusta v. Earle*, 39 U. S. 18 Pet. 519, 10 L. ed. 274; *Vidal v. Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 205; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 29 L. ed. 717; *Primrose v. Western U. Tele. Co.* 154 U. S. 1, 38 L. ed. 833 (1894); *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 857, 21 L. ed. 627; *Camp v. Western U. Tele. Co.* 1 Met. (Ky.) 164, 71 Am. Dec. 461.

The destructive force of supposed public

policy should be applied with clear knowledge and extreme caution.

Printing & N. R. Co. v. Sampson, L. R. 19 Eq. 465 (1875); *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U. S. 6 How. 382, 12 L. ed. 482.

This contract does not assume to relieve against any common-law liability; it only defines the measure of that liability.

Graves v. Lake Shore & M. S. R. Co. 187 Mass. 85, 50 Am. Rep. 282.

A carrier is entitled to honest treatment from his customers.

Orange County Bank v. Brown, 9 Wend. 85, 117, 24 Am. Dec. 129; *Warner v. Western Transp. Co.* 5 Robt. 490; *Magnin v. Dinmore*, 62 N. Y. 85, 20 Am. Rep. 442; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587; *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 160.

A contract for definite liability in consideration of reduced rates was sustained in *Squire v. New York C. R. Co.* 98 Mass. 239, 246, 249, 98 Am. Dec. 157.

Agreed valuation as a valid limitation of liability was sustained in *Graves v. Lake Shore & M. S. R. Co.* 187 Mass. 85, 50 Am. Rep. 282. See also *Hill v. Boston, H. T. & W. R. Co.* 144 Mass. 284; *Louisville & N. R. Co. v. Wynn*, 88 Tenn. 320; *Hart v. Pennsylvania R. Co.* 112 U. S. 831, 28 L. ed. 717; *Harvey v. Terre Haute & I. R. Co.* 74 Mo. 589; *Brehme v. Adams Exp. Co.* 28 Md. 329; *Louisville & N. R. Co. v. Sherrod*, 84 Ala. 178.

Mitchell, J., delivered the opinion of the court:

The matter in dispute between these parties was submitted to the district court, without action, upon an agreed state of facts. Gen. Stat. 1894, § 6083. The only facts material on this appeal are the following: The Ohio & Mississippi Railway Company is a common carrier operating a line of railway from Louisville, Ky., to East St. Louis, Ill., where it makes connection with another like carrier operating a line of railway from East St. Louis to Chicago, where it makes a like connection with a third like carrier operating a line of railway from Chicago to St. Paul, where it makes a like connection with the transfer tracks of the defendant, the Minnesota Transfer Railway Company, a like carrier, which connects with the railways of both the Northern Pacific Railway Company and the Great Northern Railway Company, like carriers, each of which operates a line of railway from St. Paul to Butte, Mont.; the transfer of freight from railroads running into St. Paul from the south and east to the railroads running from St. Paul to the west and north being made by the defendant, over its system of transfer tracks. In October, 1892, at Louisville, Ky., the plaintiff delivered to the first-named railway company (the Ohio & Mississippi) five barrels of whiskey, weighing 1,930 pounds, now admitted to have been of the actual value of \$443.89. The property was so delivered to be transported by the Ohio & Mississippi Railway Company and its connecting lines from Louisville to Butte, being consigned to one Cohen, at the latter place.

The delivery of the property to the Ohio & Mississippi Railway Company was accom-

panied by the following paper, prepared, executed, and presented by the plaintiff itself:

Received of J. J. Douglass Co. the following described packages (contents unknown), in store at his risk, to be forwarded by the Ohio & Mississippi Railway Company, subject to all the conditions (as printed on the back of this sheet) of a bill of lading which will be issued by said company after the same shall have been loaded into the cars of said company.

Articles.

Weight (subject to correction)

Alex. Cohen, Butte, Mont.

Via Great Northern R. R.

Five bls. whiskey O. R. L. 20 Val.

Among the conditions referred to as printed on the back of this paper was the following:

"The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the time and place of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

The Ohio & Mississippi Railway then executed and delivered to the plaintiff a bill of lading in accordance with the terms and conditions proposed by the plaintiff, in which the railway company agreed to carry the property to its destination if on its own road; otherwise, to deliver it to another carrier on the route to such destination. It further provided that the rate of freight from Louisville to Butte should be \$2.73 per 100 pounds, the goods being classed as second class freight. It also showed that the goods were consigned *via* the Great Northern Railway, and stated the value of the goods at \$20 per barrel, the same given by the plaintiff in the paper already referred to. The bill of lading contained the following provisions: "It is mutually agreed, in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions herein contained, and which are hereby agreed to by the shipper, and by him accepted for himself and assigns as just and reasonable." Also: "In consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at the agreed valuation of \$20 per barrel." The same conditions were printed on the back of this bill of lading as upon the paper previously referred to, as prepared, executed, and presented by the plaintiff upon delivery of property. "This bill of lading was not contrary to the law of Kentucky." "If said bill of lading had not contained the provision, 'In consideration of rates inserted, it is agreed that, in case of loss or damage, the same shall be adjusted at agreed valuation of \$20 a barrel,' and if said whiskey had been shipped without any valuation, the same would have been rated as first class, and the freight thereon from Louisville aforesaid to Butte aforesaid would have been

\$3.45 per hundred pounds." "Said J. J. Douglass Company then was and long had been a frequent and heavy shipper of such goods over said lines of railway, well knew and intended to avail itself of such valuation and agreement as to valuation, in order to obtain, and so obtained, the shipment thereof at such lower rate of freight, at \$2.72 per one hundred pounds."

The property, accompanied by a waybill setting forth that the shipment from St. Paul to Butte should be over the Great Northern Railway Company, and that the same was of the value of \$20 per barrel, was transported by the Ohio & Mississippi Railway Company and its connecting carriers from Louisville to St. Paul, and there delivered to the defendant, which in due time shipped the same for Butte over the Northern Pacific Railway Company instead of the Great Northern Railway Company, as directed. While the goods were still in transit over the Northern Pacific Railroad, the plaintiff, having discovered the insolvency of the consignee, and having a right for that reason to stop the goods in transit, but being ignorant of the misshipment over the Northern Pacific Railroad, directed the Ohio & Mississippi Railway Company to stop delivery thereof, and to hold the same subject to their order. The Ohio & Mississippi Railway Company, being also ignorant of the misshipment, immediately communicated these orders to its next succeeding carrier, who being likewise ignorant of the error in shipment, transmitted the orders to the agent of the Great Northern Railway Company at Butte. If the goods had been shipped, as plaintiff directed, over the Great Northern Railway, the order would have been seasonable to prevent their delivery to the consignee; but the Northern Pacific Railway Company, being ignorant of any such order, delivered the goods to the consignee, who appropriated the same, and he never paid for them, and, as he was wholly insolvent, the plaintiff has wholly lost the property.

The questions submitted to the court upon this state of facts, so far as here material, were: (1) For such shipment over the Northern Pacific Railroad instead of the Great Northern Railway, is the defendant liable in any sum? (2) If liable, is it liable for the whole actual value of the property, or only to the extent of \$20 per barrel? The court below held that the defendant was liable to the extent of \$20 per barrel, and no more. As the defendant did not appeal, the first question is not before us for consideration, except so far as it may be involved in the determination of the second.

We have so recently considered this subject at considerable length in *Alair v. Northern P. R. Co.* 53 Minn. 160, that it does not require any extended discussion at this time. That case and the present cannot, in our judgment, be distinguished on principle. The value stipulated was one named by the shippers themselves for the very purpose of securing a lower rate of freight; and in consideration of securing that reduced rate, and without any sort of coercion or any unfair advantage being exercised over them by the carrier, they expressly agreed that, in case of loss or damage, the same should be adjusted at the agreed valuation of \$20 per barrel; in other words, that such

valuation should be that whereon the rate of compensation to the carriers for their services as well as their risks connected with the property should be based. That being the case, the contract ought to be upheld as a just and reasonable mode of securing a due proportion between the amount for which the carriers might be responsible and the freight which they were to receive. If this purpose was a reasonable and fair one, the mere fact that the contract might incidentally have the effect of reducing the amount of the carrier's liability in case of loss caused by negligence will not render it invalid. If the plaintiff desired to obtain the carrier's unlimited common-law liability, all it had to do was to ship the goods as first class, and pay or agree to pay the higher rate of freight. It would be manifestly unjust, after a shipper has secured a reduced rate of freight by stipulating to a valuation of the property as the basis of fixing the carrier's compensation and responsibility, to allow him to repudiate his contract. It would require some very weighty considerations of public policy to justify permitting him to do so. The only difference that is suggested between the *Alair Case* and the present one is that in the former it did not appear that the carrier had any reason to suppose that the stipulated value of the property was not its actual value, while in this case it is claimed the carrier must have known that the goods were worth more than \$20 per barrel. The agreed facts do not state that the carrier knew that the value of the goods was greater than that fixed on them by the shipper. But it is fair to presume that, if the carrier thought of the matter at all, it had good reason to suppose that, if the property was what it purported to be, it was worth more than \$20 per barrel. But we do not think that this, if true, would be at all material, inasmuch as the valuation was one voluntarily fixed and agreed to by the shipper as the basis upon which the carrier's compensation as well as responsibility should be determined and adjusted. In some respects the facts in this case are even stronger in favor of the defendant than in the *Alair Case*, although, perhaps, not affecting the rule of law applicable. In the present case it affirmatively appears that the valuation was one placed on the property by the shipper himself, for the purpose of securing cheaper freight; that he did thereby secure a lower rate, and in consideration of that fact expressly contracted that, in case of loss or damage, the same should be adjusted on the basis of that valuation. There is no suggestion of any coercion or unfair dealing on the part of the carrier which received the freight; neither is there any suggestion of fraud or wilful wrong on the part of this defendant in shipping the goods over the Northern Pacific Railroad. So far as appears, it was simply a mistake.

There is no force in the suggestion that the terms of the contract would be applicable only where the loss or damage occurred while the goods were in transit over the route designated by the shipper, and not to loss or damage caused by a violation of the contract in forwarding them over some other route.

As the authorities were quite fully cited and discussed by us in the *Alair Case*, it is unneces-

easy to again refer to them. We will simply suggest that *Hart v. Pennsylvania R. Co.* 113 U. S. 881, 28 L. ed. 717, was decided over eleven years ago. It has never been overruled or modified, but, on the contrary, has been recently cited approvingly and its doctrine applied in *Primrose v. Western U. Teleg. Co.* 154 U. S. 1, 38 L. ed. 888. It may therefore be considered as the settled doctrine of the Federal courts. The desirableness of being in harmony, if possible, with those courts, on a question of this kind, must be apparent. But aside from any such consideration, we see no reason why the doctrine of the *Alair Case* should not be adhered to.

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We have not considered the effect of the agreed fact that the terms of the bill of lading were not contrary to the law of Kentucky, where the contract was made, as we preferred to decide the case on broader grounds.

Order affirmed.

Canty, J.:

I concur in the foregoing opinion but am of the opinion that the rule of law laid down in this and the *Alair Case* should be watched closely, as in practice it is liable to lead to evasion and abuse on the part of the common carrier.

END OF CASES IN BOOK 30.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Second Quarter of the Judicial Year Beginning with October 1, 1895, Classified as Follows:

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARIES.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS.
- VIII. CIVIL REMEDIES; RULES AND PRINCIPLES; DAMAGES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

Constitutional equality.

A statute allowing attorneys' fees to a designated class of persons, such as employees, in an action for wages, is held not to constitute special legislation. (Ill.) 491.

A statute requiring a license fee of \$25 from every male laundryman who employs one or more others in his business, unless he has a steam laundry, while the proprietor of a steam laundry pays \$15 only, is sustained against the claim that it amounts to a tax which violates the constitutional rule of uniformity, or that it is prohibitory of hand laundries, or discriminates against the Chinese because the hand laundries are in fact operated by Chinamen. (Mont.) 415.

A statute making it unlawful to solicit insurance within the state for any nonresident without procuring a certificate of authority is held not to make any unconstitutional discrimination against citizens of other states. (Mich.) 464.

Due process.

The constitutionality of the Minnesota log lien law is sustained against the contention that it does not provide due process of law. (Minn.) 84.

Tax.

The direct inheritance tax provided by the Ohio statute is held void for lack of uniformity, because it exempted estates less than \$20,000 in value, and did not tax the larger and smaller estates at the same ratio. (Ohio) 318.

The fact that the benefactions of a charitable organization are confined to its members and their families is held not to prevent it from being regarded as a charitable institution, within a statutory provision as to exemption of its property from taxation. (Or.) 167.

Interstate commerce.

License fees charged on itinerant vendors of drugs, professing to treat diseases, are held not to constitute an interference with interstate commerce, although the medicines sold were in original packages brought from another state. (Iowa) 429.

The doctrine that a package put up for inter-

state trade to be sold at retail without breaking bulk is not an original package, within the meaning of the law relating to interstate commerce, is reiterated by the supreme court of Pennsylvania in case of a ten-pound package of oleomargarine. (Pa.) 396.

Shipments between points in the same state are held to constitute interstate commerce, where a continuous voyage to a foreign state is contemplated, with only a change of carriers at the terminal point mentioned in the bill of lading. (Tex.) 718.

Legislative committee.

A legislative committee appointed to make an examination of facts and report is denied power to incur expense for an attorney. (N. C.) 262.

It is also held that such committee cannot draw *per diem* or mileage after adjournment of the legislature, unless an express provision is made therefor. (N. C.) 261.

Parliamentary law.

A quorum of a legislative body is held to be a majority, in the absence of an express provision fixing a different number. (N. C.) 532.

Municipal corporations.

A peculiar question of constitutional law, interpreting the late New York Constitution, is decided by holding that the annexation of a part of Westchester county to the city and county of New York is valid for municipal purposes, but leaves the annexed territory still in Westchester county for the purpose of constituting a part of the Senate and assembly districts of that county. (N. Y.) 74.

The Federal circuit court of appeals refuses to follow the decision of the supreme court of Indiana to the effect that the discretion of a board of county commissioners respecting annexation of land to a city can be reviewed by the courts, but the Federal court holds that the matter is legislative rather than judicial. (C. C. App. 7th C.) 576.

Likewise the power of the legislature over municipal corporations is asserted to the extent of changing the burden of municipal indebted-

ness by a subsequent statute after the division of a city under an act which made an adjustment of such burdens on the parts divided, since this power is held to be political and governmental. (Cal.) 178.

The power of the legislature over municipalities and counties is held to extend to requiring a city to incur a debt without its consent for the acquisition of public bridges and ferries, and the transfer of the management of them to a county court. (Or.) 171.

An ordinance requiring a roofed passageway to be built over a sidewalk when a building is erected abutting thereon is held to be within the power of the common council of a city. (Wis.) 504.

The expense of building viaducts over railroad tracks in a city is held to be properly shared by the city under a contract with a railroad company to that effect, even if the city could have compelled the railroad company to make the improvement at its own expense. (Kan.) 255.

The purchase by sinking-fund commissioners, for their fund, of bonds offered for sale by their city, is held invalid, notwithstanding the absence of any express statutory prohibition. (Minn.) 281.

The power of a municipal corporation to manufacture electric lights for private residences and business places within the city, as well as to light streets and other public places, is sustained in a Florida case against the contention that supplying lights to private persons is outside municipal purposes. (Fla.) 540.

Municipal waterworks.

The right of a municipality to transfer to a private corporation a system of waterworks which the municipality had been in general terms authorized to provide for itself is denied on the ground that the waterworks are held in trust for the public, and the restoration of the money received on such invalid sale is held not necessary as a condition precedent to an action to recover the property, at least where the city has not made any use of the money. (S. D.) 848.

The maintenance of waterworks by a city is held to be within its governmental power and not an enterprise of a private character, and therefore the city is held not to be liable for damages by fire resulting from its negligence in respect to the waterworks. (N. Y.) 660.

Public improvements.

The front of corner lots for the purposes of street improvements is discussed in respect to a number of instances in a case holding that the shorter side is presumed to be the front of such a lot unless the improvements thereon clearly show the contrary. (Ohio) 598.

The unreasonableness of an ordinance for which it will be declared void is illustrated in the case of a sidewalk improvement, which holds that the owner of a vacant lot cannot be compelled to put down a cement sidewalk in place of a plank walk which is in good condition for public use, which he had built as required by an ordinance less than six months before. (Ill.) 225.

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Officers.

The disability of a member of the legislature to hold other office during the time for which he is elected, is held to be unaffected by the fact that he resigns before the expiration of his term. (Minn.) 680.

The liability of a mayor in a civil action on account of an erroneous and malicious order of imprisonment for contempt is denied, where he had power to make the order. (N. C.) 696.

Official newspapers.

In the selection of an official county newspaper having the largest number of bona fide subscribers, it is held that a person to whom a paper is sent without his consent, express or implied, though it is done under a contract with a third person, is not a subscriber. (Iowa) 584.

Schools.

A contract giving the teacher of a common school the right to charge extra compensation from pupils taking special studies is held valid. (Ky.) 697.

Voters and elections.

Failure of inspectors of election to take the number strips from ballots, as required by statute, is held insufficient to prevent counting the ballots. (Nev.) 854.

Another decision on recent ballot laws is made in an Illinois case deciding that the provision as to marking a ballot with a cross is not mandatory, but at the same time makes an honest attempt on the part of the voter to follow the direction of the statute without making any distinguishing mark on the ballot essential to the validity of the ballot. (Ill.) 227.

An injunction against registration under a statute alleged to be unconstitutional because of its unreasonable and burdensome requirements is denied on the ground that the matter is governmental and political, and that property rights or civil rights are not infringed thereby. (C. C. App. 4th C.) 90.

Courts.

A state statute giving a right of action for death caused by negligence is held to be enforceable in a Federal court of admiralty in that state, where the death occurred in the waters of Lake Michigan more than 3 miles from the shore of the state. (C. C. App. 7th C.) 336.

Jurisdiction on service by publication in a suit by a foreign corporation against a nonresident is declined, although the foreign corporation has a place of business in the state, where the defendant has no property there except an interest in a firm whose books and accounts were chiefly in another state at its principal place of business. (Mass.) 628.

Naturalization.

Power of Congress to require state courts to entertain proceedings for the naturalization of aliens is held to be subject to the consent of the state, and the state legislature is held to have power to limit the times when and during which such proceedings may be had. (N. Y.) 761.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The invalidity of a lobby contract is illustrated in a case which denies recovery on a contract for procuring legislation to forfeit a grant of public lands, whereby settlers acquired them at a small part of their value. (Minn.) 787.

Compensation which a state agrees to pay to an agent for prosecuting a claim against the United States is held recoverable notwithstanding the payment of the claim to the state on condition that no part of it should be used to pay for collecting it. (Mass.) 748.

The invalidity of a contract to pay extra compensation to an officer for performing services within the range of his official duties is reiterated in a case in which a city attorney had such a contract; and it is also held that for services after his term of office expired he could not recover under the contract, although he might have compensation under an implied agreement. (Cal.) 409.

A stipulation against liability for negligence of a railroad company setting fire to buildings erected on its right of way is held properly included in a lease, and not to violate public policy. (C. C. App. 8th C.) 198.

The rule that a contract for violation of the law will not sustain an action is applied in a case in which beer was sold with the intent to have it resold by the purchaser under the license of the seller. (Neb.) 644.

The effect of loaning money to a treasurer from funds in his custody, in respect to the liability of his sureties, is discussed in a case which holds that he holds such money as debtor merely, and that his sureties are not liable, but that interest which, as debtor, he pays to himself as treasurer, is held by him as an officer, and is within the protection of his bond. (Pa.) 898.

The enforcement of a mortgage to secure the support of persons for life is decreed in a case in which the mortgagor claimed the right to furnish the support at his own home, but it was held that the mortgagees had the right to claim support at any reasonable place. (Ohio) 214.

Breach and rescission of contract.

The right to rescind a contract to purchase goods for a delivery in instalments on account of the failure to deliver the first instalment is denied in a New Jersey case. (N. J.) 61.

But, reversing on rehearing a prior conclusion, the Illinois supreme court in an elaborate opinion holds that repudiation of a contract may constitute in legal effect such a prevention of performance as will justify the other party in regarding it as abandoned and sue for damages. (Ill.) 83.

The refusal to accept an article which a person has expressly agreed in consideration of its delivery to an express company to pay for in instalments is held not to relieve him from liability to pay the whole price so as to restrict the seller to his remedy for damages. (Mass.) 587.

Carrier's contracts.

See also *supra*, I., as to interstate commerce.

A case in which a railroad company makes a contract to haul a circus train as a private
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carrier holds that such a contract is lawful, although it requires the owner of the circus to assume all the risk of accidents. (C. C. App. 7th C.) 161.

A stipulation that the loss of property shipped should be adjusted at a certain agreed valuation is sustained, although the goods were lost by the carrier's negligence, where it was made to obtain a lower rate of freight. (Minn.) 860.

The expulsion of a passenger because the return coupon of a round-trip ticket, on which he attempted to ride, was not properly stamped, is held to make the carrier liable, where the passenger had done all on his part, and received the ticket from the agent under circumstances justifying the belief that it had been stamped. (C. C. App. 9th C.) 730.

Telegraph cases.

One who voluntarily carries out a contract made by his agent in accordance with a telegram which is wrongly transmitted is denied the right to recover against the telegraph company, if he knew of the mistake before performing the contract and it was not binding on him. (Miss.) 444.

The right of a telegraph company to refuse to transmit a message unless the sender will consent to a stipulation requiring any claim for damages or penalties to be made within sixty days is sustained in a case which upon rehearing reverses a former holding. (S. D.) 612.

Bank matters.

The right of a bank which had guaranteed the checks of another bank in order to clear them through a clearing-house, to recover against the drawers of a certified check which it had paid according to the guaranty after the insolvency of the drawee, is sustained on the ground that the guarantor became an assignee of the check and paid it as agent of the other bank. (Ill.) 155.

The right of a bank to stop payment of its draft mailed in payment of a creditor's draft on a customer of the bank is denied, although the bank extended credit to the customer in ignorance of the fact of his insolvency. This seems to be an exception to the general rule permitting a drawer to stop payment. (Wis.) 845.

A bank which cashed a check for an accommodation indorser is denied the right to hold him liable where it sent the check to a correspondent, which accepted another check in lieu of money as payment thereof, and negligently failed to present the new check in time to obtain the money upon it, although after its dishonor the original check was reclaimed and protested. (Ga.) 800.

Promissory notes.

A statute making all joint obligations joint and several is held applicable to the indorsement of a promissory note, so that notice to any one of several indorsers is sufficient to bind him. (Tenn.) 495.

A state statute providing that all persons becoming parties to a negotiable note by signature on the back thereof shall be entitled to the same notice of nonpayment as indorsers

is held to govern the rights of the parties in a Federal court. (C. C. App. 7th C.) 513.

What is regarded by the court as a novel question in the law of commercial paper is the question of the effect of an assignment without recourse to destroy the negotiable character of an instrument so as to prevent a subsequent indorser from being held liable as an indorser of negotiable paper. The decision is that such liability as indorser is not prevented by the preceding assignment. (C. C. App. 8d C.) 189.

The rule that an administrator may be held liable personally in a note which does not bind the estate is held not to apply to a note made in the name of the estate for an alleged debt of the deceased which was not enforceable. (Minn.) 296.

Leases.

An oral lease for one year with the privilege of three, at an annual rent, is held to be within the statute of frauds and the court says that it has been unable to find a case involving such a contract. (Mich.) 379.

A covenant to keep premises in repair is held to bind the lessor of a hotel to put them in good repair if defective at the time of the lease, so far as to make them habitable. (R. I.) 682.

The abatement of part of the rent on a plantation on destruction of a building thereon is made under statutory provision that a tenant shall not be bound to pay rent for buildings destroyed without his fault. (Miss.) 716.

A lease for 999 years of a railroad is held not to be a sale within the meaning of a provision that the grantor of the right of way shall have the purchase price in case of sale. (Minn.) 546.

Insurance.

An employer's liability policy is construed to be an agreement to assume and pay any liability of the employer for accidents to employees, and not merely a contract of indemnity so that the employer need not pay a judgment against him before maintaining an action on the policy. (Minn.) 689.

Some novel questions in guaranty insurance are presented in a case which decides the liability of an employee to the insurance company which has been compelled to pay for his fraud and dishonesty. (Minn.) 586.

The express language of the printed clauses in an insurance policy against keeping inflammable substances on the premises is held to be limited where such substances are necessary for use in the business on the stock in which the insurance was issued. (Wis.) 788; (Ga.) 835.

Leaving gasoline in a building for use in burning off old paint is held not to constitute such a keeping, using, or allowing of it upon the premises as will avoid an insurance policy, while the use of it to burn off paint from the building is held to make a question for the jury

in respect to the increase of risk. (Mich.) 368.

Where a fire insurance contract is made by using a marine policy blank covering the vessel while on a voyage, this is held not to be waived by a rider waiving provisions in conflict with the fire blank, although the rider describes the property as located at a particular place. (Mich.) 636.

The clerk or employee of an insurance agent is held to represent the company in the same way that the agent does so far as he acts in the matter of the agency by the agent's direction. (Va.) 843.

Representing that the property is owned by husband and wife jointly is held not to be untrue when the property insured consists of a homestead the title to which was entirely in the wife, and personal property thereon which was owned by the husband alone. (Ohio) 719.

Many cases as to what constitutes an accident are collected in an opinion which decides that death by shooting while trying forcibly to eject another, who is not known to be armed, from a hotel, is by accident. (Mo.) 209.

Hanging by a mob is held to be an accidental death within the meaning of an insurance policy. (Miss.) 208.

The question what constitutes nonoccupancy of a dwelling house is answered by holding that a fixed abode is necessary to constitute occupancy, and that keeping provisions therein which are daily taken from it, and the occasional lodging of employees there, are not sufficient. (Md.) 638.

The defense that suicide was contemplated by the insured, which by statute is the only case in which suicide is allowed as a defense to a policy of life insurance, is held to be made out only when it is shown that he had intended or had resolved to commit suicide when he applied for the policy. (C. C. App. 8th C.) 87.

The interest of the "heirs" to whom life insurance is payable is held to be derived from the contract, and not from the statute, and that creditors of the person whose life is insured have no claim to the proceeds. (Ga.) 593.

Construing a statute according to its intent, it is held that life insurance taken by a man before marriage is "effected by a husband," within statutory provisions entitling his widow, children, and next of kin to the proceeds free from the claims of creditors. (Tenn.) 609.

The requirement of immediate notice of loss insured against is considered in a case which seems to be a novel one, and which decides that sixty days' delay as matter of law is a breach of the condition, and, further, that local agents, although having full authority to issue policies, are not authorized to receive or to waive such notice of loss, and that failure to give the notice is not waived by retaining proofs of loss sent after the policy was dead. (Minn.) 346.

III. CORPORATIONS AND ASSOCIATIONS.

Public corporation.

Trustees of Berkeley Springs, belonging to the state of West Virginia, are held to constitute a public corporation; and a lease of the springs to a private person for ninety-nine years is held *ultra vires*. (W. Va.) 747.

Private corporations.

Joint action by two states to create a corporation as a single entity, which for jurisdictional purposes shall be a citizen of each state, is held ineffectual, but the result is the creation of two corporations of the same name. (C. C. App. 8th C.) 250.

The dissolution of a corporation on account of the vacancy of all its offices and the lack of a sufficient number of stockholders to satisfy the law is held not to take place *ipso facto*, and a receiver on the application of one stockholder is permitted against a claim that as the property of the company is in the hands of an administrator of the only other stockholder it is held by joint ownership. (La. Ann.) 648.

The supreme lodge of a benefit society is denied the right to delegate to a board of control the power to enact general laws. (Tenn.) 888.

All the money paid by borrowing members in a building and loan association which has become insolvent, whether payments were called fines, penalties, weekly dues, or any other name, are held to be credits on the amounts borrowed, and the rate of interest charged to them and allowed to nonborrowing members is held in North Carolina to be 6 per cent. (N. C.) 693.

Compelling a private water company to furnish water to a patron without discrimination when it has a franchise for supplying a city, is held to be within the power of the court, where an invalid rule to charge a delinquent \$1 extra for turning on and off the water before renewing his service was insisted on by the company. (Neb.) 447.

A woman who has the custody of minor children under a decree of divorce is denied the right to recover payment for their board out of the estate of her former husband. (R. I.) 690.

The liability of a husband for his wife's slander is sustained in Minnesota notwithstanding the modern statutes respecting married women. (Minn.) 521.

See also *infra*, VII., as to property rights of spouses.

IV. DOMESTIC RELATIONS.

Churches.

The right of an unincorporated church society to hold land is held unaffected by a statute restricting the quantity of land to be held by incorporated church societies. (Ill.) 232.

The liability of a church corporation for services performed by an attorney under procurement of individual trustees is denied, although the trustees had voted a sum to pay another person with an individual understanding that he should apply a part of it to the former claim. (N. Y.) 574.

Lloyds.

Unincorporated associations called "Lloyds" are held unaffected by the Alabama statute restricting business of insurance companies. (Ala.) 851.

Partnership.

Some questions of difficulty respecting the rights of creditors of a partnership and of its individual members are decided in a case in which the firm had been changed by admitting a new member, with the assumption of the old debts by the new firm. (Wis.) 549.

Money received from one partner by his creditor can be retained to satisfy a just debt of the individual partner, although the money belonged to the firm, if this was not known to the creditor. (N. J.) 604.

Adoption.

The adoption without legitimation of an illegitimate child, by the father, is held to give the father's next of kin no inheritable blood with respect to the child, and on the latter's death the property descended to him from his father, like his other property, is held to descend to his mother as against the father's next of kin. (Tenn.) 263.

V. FIDUCIARIES.

As to receivers, see *infra*, VII., under heading *Liens*.

For note of administrator, see *supra*, II.

VI. TORTS; NEGLIGENCE; INJURIES.

Violation of a statute designed to protect a certain class of persons, whereby such persons are injured, is regarded as negligence *per se*, for which a civil action will lie, but subject to the defense of contributory negligence. (Tenn.) 82.

Liability of an owner of animals is denied in case of the escape of a jack which killed a filly, where the escape was without the owner's knowledge or negligence, although the statute declared that the owner should be liable for all damages sustained by the running at large of such an animal. (Ark.) 607.

Injury by gas.

Injury to shade trees caused by the escape of natural gas from a street main through carelessness of the gas company is held to render the company liable to the owner of the trees. (N. Y.) 651

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A gas company is held chargeable with the duty of turning on the gas to a building supplied therewith, when proper connections and a meter have been provided, and liable for negligence in so doing, but not liable for the act of a stranger in turning on the gas. (N. Y.) 653.

Injury by cars.

The liability of a railroad company for running over a person lying asleep on a track if the engineer could have seen him with reasonable care, is affirmed under the North Carolina rule that it is the duty of the engineer to keep a lookout. (N. C.) 257.

The negligence of a person riding with another when injured by a train at a crossing is held to be a question for the jury, although it appeared that he might have discovered the train by looking and listening, and it did not

appear that he knew that the driver was incompetent or negligent. (Minn.) 684.

The Ohio statute requiring every street railway company before a street car crosses a railroad track at grade to stop the car and send an employee ahead to see if the track is clear and signal to that effect is construed to apply in case of a crossing at which there are gates and a watchman as well as to other crossings; and it is held that, at least in the absence of extraordinary circumstances, failure to comply with these requirements is negligence, and renders the street-car company liable for any damages resulting therefrom. (Ohio) 509.

An attempt to mount a flat car used in front of a road engine for switching purposes is held not to constitute contributory negligence as matter of law where it was in accordance with the usage of brakemen in similar circumstances, and was the only way in which the employee could do the work required of him. (Mont.) 814.

Carrier's liability.

See also *Contracts, supra*, II.

For an assault on a railroad passenger after alighting at a station and starting out on his business as a peddler, the carrier is held not liable, but is held liable for an assault, without provocation, in a ticket office in the presence of the ticket agent where he made no effort to prevent it. (Utah) 297.

The words "any railroad," in the New York general railroad law respecting passengers riding on platforms, are held inapplicable to street railways. (N. Y.) 626.

Physician's negligence.

A physician who sends another physician in his stead to attend a patient is held not to be liable for the negligence or unskillfulness of the latter. (N. J.) 345.

VII. PROPERTY RIGHTS; WILLS.

Easement of railway.

A public warehouse or elevator on a railroad right of way, maintained by the railroad company, its lessee or licensee, is held not to be a misuse of the easement. (Minn.) 584.

Railroad fence.

An adjoining landowner is held entitled to connect his fences with the railroad fence, whether that is built on the line of the right of way as it should be, or further back on such right of way. (Minn.) 590.

Entireties.

An estate by entireties is held not to exist where property descends to husband and wife as next of kin. (Wis.) 820.

A deed to husband and wife is held to create an estate by entirety although it provides that if the wife survive the husband she shall have the use of the property, and that the remainder at her death shall go to their children. It is also held that the wife's rights in the property cannot be affected by sale under any judgment against the husband, although the purchaser may be entitled to it if the husband outlives the wife. (Tenn.) 315.

In Maine a gift by will of the residue to a daughter and her husband in equal shares, and so to their heirs and assigns forever, is held not to create a tenancy by entireties; and the court goes further and says that such estates are irreconcilable with statutes giving wives separate and independent property rights. (Me.) 881.

Separate mortgages made by husband and wife each for an undivided half interest in land held by the entireties are held to give the mortgagee on the husband's death no lien except upon an undivided half interest under the wife's mortgage. The right of the wife to make such a mortgage is sustained under laws giving the wife control of her property free from her husband's marital rights. (Ark.) 824.

The question as to the right to the rents and profits of an estate by the entirety where statutes have given married women power to control and dispose of their own property is decided on the theory that the common law right

of the husband to the entire usufruct of such an estate was a part of his marital rights and not an incident of this estate, therefore the husband and wife are held entitled to separate moieties in these rents and profits. (N. Y.) 305.

Mines.

A decision of the highest importance in respect to mining rights is that which sustains the right of a locator, when the apex of a vein passes through but one end line and crosses one of the side lines, to follow the strike of the vein on a dip beyond the side line so far as it is included between a vertical plane through such end line extended, and a parallel vertical plane through the intersection of the apex and the side line. (Mont.) 803.

Homestead.

A building in a city, a part of which is rented for business purposes and the rest occupied as a residence, is held to be protected as a homestead. (Okla.) 722.

Water rights.

On the sudden diversion of water from a channel by the act of God, it is held that a riparian appropriator has no right to go upon another's land to restore the water to the old channel. (Cal.) 820.

The claim of a riparian owner to damages for trespass in disturbing his thatch by a person digging clams below high-water mark is held not to be valid on the ground that the public right of fishery is paramount. (R. I.) 497.

The loss by nonuser of rights in an irrigating ditch is held to result by failure to take water therefrom during the statutory period of limitation in irrigating season, except what is distributed to the owners as shareholders in an association which owns an older ditch of which this has been taken as part. (C. C. App. 9th C.) 265.

An important case as to the law of prior appropriation of waters holds it applicable to the diversion of water for a flouring mill, and sustains the right as existing in that portion of the state of Washington east of the Cascade mountains before the act of Congress on the subject. (Wash.) 665.

(CIVIL REMEDIES; RULES AND PRINCIPLES; DAMAGES.)

A change of the place and purpose of use of water by a prior appropriator is held allowable so long as the water is used for proper objects and the change does not injuriously affect the rights of others. (Cal.) 390.

But the right of a prior appropriator of water to enter on land held by a homestead claim to change the point of diversion is denied although the claimant has not obtained or yet become entitled to a patent. (Cal.) 384.

A peculiar case as to the right of prior appropriation in respect to percolating waters sustains the right in favor of one who dug wells on public lands as against a subsequent locator of the land. (Utah) 186.

Liens.

The inception of liens within the meaning of a statute is held to be the time to which they relate in giving them effect as against a mortgage taken upon an incomplete building, and this is held subject to all mechanics' liens accruing before the work is completed. (Tex.) 765.

So a mechanic's lien for machinery in a mill is held superior to a prior mortgage taken on the premises when the mill was unfinished and substantially without machinery. (Wis.) 778.

The right of subrogation of a mortgagee who advances money on the promise of a first lien is enforced in a case in which the first liens were paid off with his money, while an intermediate lien remaining first in order is held not to prevent subrogation. (Miss.) 829.

The priority of a judgment recovered against a consolidated railroad company under the South Carolina statutes over a mortgage is sustained as against a purchaser on foreclosure who had covenanted to discharge all liens prior to the mortgage, although the judgment was for a personal injury in another state. (C. C. App. 4th C.) 823.

The revival of a judgment is held effective as against a grantee of the judgment debtor, in a deed made after the judgment but before the re-

vival of which the judgment creditor had neither actual nor constructive notice. (Pa.) 400.

Authority to borrow money is held beyond the power of a court to confer upon a receiver to carry on the business of a private corporation by issuing certificates which should be a first lien on the corporate property against the objection of the first mortgagee. (C. C. App. 8th C.) 201.

The rule allowing earnings of a receiver to be applied to running expenses in preference to a mortgage on railway property is denied application in case of a street railway to a claim for damages for negligence of the company before the receiver's appointment. (C. C. App. 8th C.) 456.

Insolvency.

Participation in dividends from assets of an insolvent is allowed on secured claims only for the amount unpaid after deducting all that was realized on collaterals up to the time of making the preliminary proofs, but this is not held to apply to a payment made on that day. (Ill.) 380.

Trust.

Property purchased by a trust for bondholders under an arrangement for the reorganization of a railroad is held not to be discharged from the trust as to bondholders who fail to pay their assessments and give a release to the trustee, where he proceeds to acquire the title to the property. (Ill.) 290.

Gift.

A gift by a man to his children of the bulk of his estate, consisting of personal property, is held valid in Kansas against any claim made by his widow. (Kan.) 243.

Wills.

The signature of a witness to a will is held insufficient where by inadvertence he wrote testator's surname instead of his own with his own initials. (Cal.) 460.

The competency of an attesting witness to a will who signed by mark is held not to depend on his ability to identify the mark. (Ga.) 143.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES; DAMAGES.

Diminished capacity to labor is held to be an element of the damages recoverable by a married woman for personal injuries under statutes which entitle her to her own earnings. (Mass.) 658.

Evidence.

The doctrine of oral evidence to show consideration of a conveyance receives careful analysis in a case which denies such evidence as to the consideration of a deed expressly made for the settlement of certain claims. (Miss.) 441.

Attachment.

Constructive fraud in a conveyance as against creditors is held insufficient to sustain an attachment. (Ill.) 463.

Garnishment.

Garnishment of a foreign corporation assuming to do business in a state, authorized in general terms by a state statute, is denied in case all the parties are nonresidents and the debt did not arise on a contract payable within the state. (C. C. App. 6th C.) 364.

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Creditors who proceed to take judgment and by garnishment on execution reach wages which were exempt by the law of the debtor's domicile after an order restraining them from collecting such wages by garnishee proceedings will be compelled to refund the exempt amount reached with interest, although they dismissed the garnishment which was pending when the restraining order was made. (Wia.) 360.

Injunction.

A novel case of a mandatory injunction is that in which the proprietor of a store is ordered to adopt some means of distinguishing it from that of a competitor where he had purposely imitated the building of the other and adopted the same name, without any name or sign to distinguish them. (Cal.) 182.

An injunction against trespass upon land for the purpose of boxing and scraping trees for turpentine is held to be within the jurisdiction of chancery, notwithstanding the constitutional provisions as to right of trial by jury. (Fla.) 754.

The right to an injunction against an execu-

RÉSUMÉ OF DECISIONS.
(CRIMINAL LAW AND PRACTICE.)

tion sale of exempt property is denied unless the property has some special value to the plaintiff, where the statutes provide a remedy at law. (Or.) 98.

An injunction against a judgment at law is sustained, where the judgment is without evidence to support it and an appeal was prevented by the death of the trial judge. (Ark.) 560.

Fraud in the entry of a default judgment is held ground for an injunction against it, although there was a remedy by certiorari. (Cal.) 786.

The rendition by a justice of a judgment for more than is demanded by an affidavit of attachment is held insufficient ground for an injunction. (Ind.) 700.

An injunction against a judgment by confession which is held to be merely irregular and not void is denied, and it is said that lack of jurisdiction only will not be ground for the injunction unless it is also unjust and inequitable. (Wis.) 285.

The failure to appoint a guardian *ad litem* for an infant is held not to be a ground for an injunction against a judgment taken against him. (Ala.) 707.

Time.

The meaning of the term "calendar month" in a provision as to the time for statutes to take effect is defined as denoting a period terminating with the day of the succeeding month numerically corresponding with the day of its beginning less one, unless there is no corresponding day of the succeeding month, when it terminates on the last day. (Neb.) 450.

The rule that Sunday is to be excluded from the computation of time which ends on Sunday is denied application in a case where the act to be performed was the filing of an application for a writ of error which the court held could lawfully be done on that day. (Tex.) 498.

IX. CRIMINAL LAW AND PRACTICE.

A constitutional provision prohibiting exile is held not to preclude a pardon on condition that the convict leave the state and never return. (Ark.) 786.

The constitutionality of a statute imposing a penalty of imprisonment for life for criminal intimacy with a girl under sixteen years of age is sustained in a Massachusetts case against the contention that it imposes a cruel and unusual punishment, and ignorance is held not to be a defense. (Mass.) 734.

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Sales of intoxicating liquors by an incorporated social club to its members are held not to constitute engaging in the business of selling liquors under a statute imposing an occupation tax on such business. (Tex.) 500.

The right to kill another in self-defense is held to extend to one who began the affray where he had afterwards attempted to withdraw from it. (Cal.) 408.

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2. Filing a plea to the merits before filing a plea in abatement to the jurisdiction of the court upon the ground of citizenship is not a waiver of the question of jurisdiction under the act of Congress of March 3, 1875, § 5, making it the duty of the Federal circuit courts to dismiss or remand a suit not involving a dispute properly within the jurisdiction. *Missouri P. R. Co. v. Meah* (C. C. App. 8th C.) 250

3. An appeal from the Illinois county court upon the question of the amount for which a claim against an insolvent estate should be allowed is properly taken to the appellate court. *Lovy v. Chicago Nat. Bank* (Ill.) 380

4. A statute making the judgment of the appellate court conclusive on all questions of fact does not violate the provisions of the Illinois Constitution authorizing appeals and writs of error to the supreme court in all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved, and "in such other case as may be provided by law." *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 83

5. A judgment that one of the parties to an election contest is the duly elected officer, and that he is entitled to the office on performing necessary acts, is not a judgment in which an election has been "annulled and set aside," within Nev. Gen. Stat. § 1569, requiring the appeal in such case to be taken within thirty days. *Buckner v. Lynip* (Nev.) 354

6. The appellate court is confined to such of the interlocutory orders made in the action as are appealed from. *Wiggins v. Williams* (Fla.) 754

7. Attaching a certified copy of a justice's judgment as an exhibit to a complaint to enjoin the execution of a judgment does not make it a part of the record so that it can be considered on appeal. *Gum-Elastic Roofing Co. v. Mexico Publishing Co.* (Ind.) 700

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tent on the question of damages cannot be made for the first time on appeal, where the objections in the court below were merely to the competency of the witnesses and as to the materiality of the evidence at that stage of the case. *Evans v. Keystone Gas Co.* (N. Y.) 651

9. An appellant cannot assign for error matters which affect other defendants who refuse to join in the appeal. *Baum v. Lynn* (Miss.) 441

10. It will be presumed that the rulings of the court below excluding from evidence will offered to show the condition of the testator's mind, and claims filed in the probate court, offered to show his financial condition, were correct, where the will and the claims are not contained in the record. *Atina L. Ins. Co. v. Florida* (C. C. App. 8th C.) 87

11. A motion to direct a verdict for defendant is abandoned by proceeding to introduce evidence to sustain the defense after the motion is overruled, if it is not renewed. *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 33

12. Instructions to receivers, which seem material, if not necessary, to their work, may be given by an appellate court in reviewing instructions given by a lower court. *Straw v. Carolina I. Bldg. & L. Assn.* (N. C.) 693

Grounds of reversal.

13. An improper or insufficient modification of an instruction is not ground for a reversal, if on the facts and evidence in the case it was not misleading. *Prouser v. Montana C. R. Co.* (Mont.) 214

14. For the court to assume in its charge to the jury the existence of undisputed facts is not reversible error. *Forsyth v. Hammond* (Ind.) 576

15. The elimination from a requested instruction for defendant in a criminal trial of the direction to find the defendant not guilty, if the jury find the facts hypothesized in the instruction, is not reversible error, although it is the better practice to add such conclusion to each instruction which warrants it. *People v. Hecker* (Cal.) 403

16. The refusal of instructions as to the rights of a finder in respect to the property found is reversible error in a prosecution against him for murder, in which he pleads self defense and the evidence shows that the homicide occurred while he was attempting to enforce a right to possession as against the owner, when both men used firearms, since such instructions are necessary to enable the jury to determine which was first in the wrong. *Id.*

17. The accidental absence of the attorney of a party when the verdict is received, not due to any order or action of the court or any conduct by the counsel or parties on the other side, is not cause for reversal. *Fitzgerald v. Clark* (Mont.) 803

18. An alleged error in allowing the jury to separate temporarily, without being admonished by the trial court not to converse among themselves or with others upon the subject of the trial, is without prejudice, if, upon undisputed facts, no other verdict could have been

properly rendered. *Kirby v. Western U. Teleg. Co.* (S. D.) 612

19. A judgment against an insolvent estate will not be reversed at the instance of the administratrix, where the reversal would result in no benefit to her or the estate from the fact that the claim has been allowed by the probate court. *Weare Commission Co. v. Druley* (Ill.) 465

20. A new trial solely for the purpose of inquiring as to the damages may be granted on a reversal for errors affecting damages only. *Pickett v. Wilmington & W. R. Co.* (N. C.) 258

Rehearing.

21. A rehearing will be granted for the purpose of considering new matter stated in the petition therefor, which may materially affect the merits of the main controversy, and was not considered at the rendition of the original opinion. *Kirby v. Western U. Teleg. Co.* (S. D.) 612

ATTACHMENT.

A conveyance by a debtor, legally or constructively fraudulent as to creditors, as contradistinguished from fraudulent in fact, is not ground for attachment by them under the Illinois attachment law. *Weare Commission Co. v. Druley* (Ill.) 465

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BALLOT. See VOTERS AND ELECTIONS, 10.

BANKS. See also CHECKS, 1.

1. A bank which guaranteed the payment of the checks of another bank that was not a member of a clearing-house association, in order to clear its checks, and, after the latter bank had made an assignment for creditors, and a check thereon which had been certified for the drawers had been refused at the clearing-house, paid the check in pursuance of the guaranty,—did not do this as agent of the other bank, but became an assignee of the check, with the right to recover thereon against the drawers. *Voltz v. National Bank* (Ill.) 155

2. A bank which at its customer's request mails its own draft to his creditor in payment of the creditor's draft on him cannot defeat the creditor's right to its draft by intercepting it in the mail, although it extended credit for the amount of the draft to its customer in ignorance of the fact that he was insolvent. *Canterbury v. Bank of Sparta* (Wis.) 845

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See also CHECKS.

Banks; acceptance of check as payment on collection. 801

BASTARDY. See DESCENT AND DISTRIBUTION, 1.

BATHS. See CORPORATIONS, 1.

BENEFIT SOCIETIES.

1. The adoption, certification, promulgation, and printing as one full and complete instrument, of a constitution by the proper body of a benefit society, will cause that instrument to annul and supersede all portions of former constitutions which are not embodied in it. *Supreme Lodge K. of P. v. La Malta* (Tenn.) 888

2. The supreme lodge of a benefit society cannot delegate to a board of control its power to enact general laws affecting the whole endowment rank of the order, without express authority in the charter. *Id.*

3. Power given by the supreme lodge of a benefit association to the board of control of the endowment rank, to have "entire charge and full control" of such rank does not authorize the board to enact laws. *Id.*

4. The holder of a benefit certificate who agrees to be bound by all laws of the order "now in force or that may hereafter be enacted" will be subject to a subsequent rule regularly passed, destroying liability on certificates in case of the suicide of their holders. *Id.*

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BILLS AND NOTES. See also CONFLICT OF LAWS; COURTS, 9; EVIDENCE, 11; EXECUTORS AND ADMINISTRATORS, 1, 2.

1. An assignment without recourse by the payee of a negotiable note payable to order will not prevent an indorsement by the assignee from making him liable as indorser of negotiable commercial paper. *De Haas v. Dibert* (C. C. App. 8d C.) 189

2. The negotiability of a note with accompanying interest coupons is not destroyed by clauses declaring that the contract shall be construed by the laws of the state in which it is executed, that it shall draw a specified higher rate of interest after maturity, and that if any coupon is not paid when due the whole debt shall mature at that time without demand, and the first unpaid coupon shall become a part of the principal and bear interest at the higher rate specified. *Id.*

3. Insolvency of the maker of a note is no excuse for failure to give notice of dishonor. *Hudson Furniture Co. v. Harding* (C. C. App. 7th C.) 513

4. The fact that persons who become joint makers of a corporation note are directors of the company and constituted a majority of the board does not make it unnecessary to give them notice of dishonor of the note, when by the law of the state joint makers are entitled to the same notice as indorsers. *Id.*

5. A statute making all joint obligations joint and several applies to the indorsement of a promissory note, so that notice of nonpayment given to any one of several joint indorsers is sufficient to bind him. *Jarnagin v. Stratton* (Tenn.) 495

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BONDS. See also TRUSTS.

1. Money is not loaned to a city treasurer who is also a banker, so as to relieve his sureties from liability for it, by his invalid promise, made to induce his election, that he will pay interest on the balances in favor of the city. *Wilkes Barre v. Rockefeller* (Pa.) 893

2. A city treasurer who borrows money in his custody, from sinking fund commissioners who have the power to invest it, holds the money as a debtor rather than as an officer; and the sureties on his bond are not liable for his repayment of the money, but only for his care of the security held by him. *Id.*

3. Interest paid to himself as city treasurer by such officer on money which he had borrowed from a fund in his custody is held by him as treasurer; and his failure to pay it over to his successor is a breach of his official bond. *Id.*

4. Commissioners of the sinking fund of a city have no authority to purchase from the city, for that fund, bonds of the city at the time when they are offered for sale by the city, even when there is no statute expressly forbidding such purposes. *Kelly v. Minneapolis* (Minn.) 281

NOTES AND BRIEFS.

Bonds; official, default of treasurer. 893

BOUNDARIES. See STATE, 1, 2.

BRIDGES. See also COUNTIES, 1; MUNICIPAL CORPORATIONS, 16; STATUTES, 6.

The transfer of the management and control of public bridges and ferries may be made by the legislature to any governmental agency,—such as a county court,—although the bridges and ferries belong to a city. *Simon v. Northup* (Or.) 171

BUILDING AND LOAN ASSOCIATIONS. See also MORTGAGE, 3.

The affairs of an insolvent building and loan association are to be settled in North Carolina by charging borrowing members 6 per cent interest on the amounts they received, with a credit for all they have paid into the concern, whether it was called "fines," "penalties," "weekly dues," or by any other name; while nonborrowing members are entitled to interest at the same rate upon the amounts due them. *Strauss v. Carolina I. Bldg. & L. Assn.* (N. C.) 693

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Building and loan associations; rule of settlement on insolvency of. 693
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CARRIERS. See also COMMERCE, 1; TELEGRAPHS, 1.

1. A common carrier is under a legal duty to accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless such liability is restricted by a valid agreement between such carrier and his employer. *Kirby v. Western U. Teleg. Co.* (S. D.) 613

2. A common carrier has a right to make, and as a condition precedent to insist upon a compliance with, reasonable rules and regulations designed to protect its interests and promote the safe and convenient transaction of business, when the same contravene no consideration of public policy, and in no manner affect its liability under the statutory or common law. *Id.*

3. A railroad company is not a common or public carrier in respect to a special train of cars loaded with wild animals and other property as well as persons, belonging to or connected with a circus, which is loaded and unloaded by the proprietor of the circus and is run on special time to suit his convenience, under a special contract that he shall assume all the risk of accidents, the only duty of the railroad company being to haul the cars. *Chicago, M. & St. P. R. Co. v. Wallace* (C. C. App. 7th C.) 161

4. A railroad company hauling a special train of cars as a private carrier may lawfully contract for entire exemption from the risk of accidents. *Id.*

5. A common carrier cannot legally exact an agreement limiting its liability, as a condition precedent to receiving or carrying the offered freight or message. *Kirby v. Western U. Teleg. Co.* (S. D.) 613

6. A stipulation in a bill of lading, that, in consideration of rates inserted therein less than the regular rates, it is agreed in case of loss or damage to the property transferred that the same shall be adjusted at an agreed valuation, which is less than the actual value of such property,—is binding upon the shipper. *J. J. Douglass Co. v. Minnesota Transfer R. Co.* (Minn.) 860

7. An agreement restricting the carrier's liability except as "to the rate of hire, the time, place, and manner of delivery," can only be manifested, under S. D. Comp. Laws, § 8888, by the signature of the passenger, consignor, consignee, or person employing such carrier. *Kirby v. Western U. Teleg. Co.* (S. D.) 613

8. The failure of a carrier's agent to stamp the return coupon of a round-trip ticket in order to make it valid for use under the carrier's regulations will not justify the expulsion from a train of a passenger who had presented himself to the agent, and signed the ticket in the agent's presence, and delivered it to and received it from the agent under such circumstances as to justify the belief that the ticket had been properly stamped. *Northern P. R. Co. v. Pauson* (C. C. App. 9th C.) 730

9. A passenger riding on the platform of a

street car is not a passenger "on any railroad" who assumes the risk of injury, under the provisions of the New York general railroad law of 1850, § 48, as that was not intended to apply to street railways. *Vail v. Broadway R. Co.* (N. Y.) 626

10. A railroad company owes no duty to a passenger as such after he alights from the train at a station, and proceeds towards a section house connected with the station, for the purpose of engaging in his regular business as a peddler. *Krants v. Rio Grande W. R. Co.* (Utah) 297

11. A railroad company is liable for an injury to a person in one of its station houses in a sparsely settled country, although he was not an intending passenger, caused without any provocation by one of the employees of such company aided by strangers, in the presence of the ticket agent, who represented the company, and who made no effort to prevent the injury. *Id.*

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Protection of passenger against assault. 297

Negligence in riding on platform of street car. 626

Contract limiting amount of liability. 860

CHARITIES. See also PERPETUITIES; TAXES, 1.

A gift to the rector, church wardens, and vestrymen of an unincorporated religious society, in trust to pay the salary of the rectors of the parish forever, or for church purposes only, is for a charitable use. *Alden v. St. Peter's Parish* (Ill.) 232

CHECKS. See also BANKS, 2.

1. Even if a guaranty by one bank to another for clearing-house purposes is *ultra vires*, this fact will not avail the drawers of a certified check who are not parties to the guaranty, when charged with liability to the bank, which in compliance with its guaranty had paid the check and become an assignee thereof after the drawee became insolvent. *Volts v. National Bank* (Ill.) 155

2. A bank which cashes a check, and duly sends it for collection to its correspondent, whose runner duly presents it, with other checks, to the drawee, receiving in payment the latter's check drawn on another bank in the same city, which check is dishonored because not presented for two or more hours, during which time the drawee fails, cannot recover from an accommodation indorser of the original check, even though it is subsequently reclaimed and duly protested. *Comer v. Du-four* (Ga.) 800

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CITIZENS. See CONSTITUTIONAL LAW, 6.
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CITY ATTORNEY. See MUNICIPAL CORPORATIONS, 20.

CLAIMS. See also CONTRACTS, 9, 21, 22.

The trust imposed upon the states by the act of Congress refunding the direct tax levied in 1861, to hold the same for the benefit of the persons from whom it was collected, is not binding upon states which paid the tax out of their treasuries, and did not collect it by a levy upon their inhabitants. *Davis v. Com.* (Mass.) 748

CLEARING HOUSE. See BANKS, 1.

CLERKS. See INSURANCE, 6.

CLUBS. See INTOXICATING LIQUORS

COMMERCE.

1. A provision in a carrier's charter, that it shall be subject in the transportation of freight to the laws applicable to common carriers, does not make it subject to state control when engaged in interstate commerce. *Houston Direct Nav. Co. v. Insurance Co. of N. A.* (Tex.) 718

2. A shipment from one point to another within the same state is interstate commerce, although a bill of lading is given and charges are collected to the latter point only, where the destination of the property is in a foreign state, to which a continuous voyage is contemplated, with only a stop to change carriers at the terminal point mentioned in the bill of lading. *Id.*

3. A 10-pound package of oleomargarine put up by a nonresident manufacturer, and sent into the state for sale at retail to an individual customer, and thus sold by an agent for use as food, is not an original package the sale of which is protected against state laws by the Constitution of the United States. *Com. v. Paul* (Pa.) 896

4. A reasonable license fee charged upon itinerant vendors of drugs or articles intended for the treatment of diseases, who publicly profess to cure or treat diseases, is not an unconstitutional interference with interstate commerce, although the medicines sold were in original packages brought from another state. *State v. Wheelock* (Iowa) 429

5. The provision of the United States Constitution, conferring upon Congress the power to regulate commerce among the several states, does not prohibit the legislature of a state from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of the state, although such acts are committed in dealing with messages to be transmitted to points in other states. *Western U. Tele. Co. v. Howell* (Ga.) 158

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CONFLICT OF LAWS.

The liability of joint makers of a note is controlled by the law of the place where the contract is payable. *Hudson Furniture Co. v. Harding* (C. C. App. 7th C.) 518

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Conflict of laws; law applicable to contracts. 514

CONGRESS. See ALIENA.

CONSTITUTIONAL LAW. See also MUNICIPAL CORPORATIONS, 16.

1. Minn. Gen. Stat. 1894, §§ 2451-2465, authorizing the establishment of a logger's lien without notice to the owner, but not precluding him from denying in a subsequent proceeding plaintiff's right to a lien, and giving him an opportunity to intervene in the original action, is not unconstitutional as taking the property of one person to pay the debt of another without due process of law. *Brown v. Markham* (Minn.) 84

2. A statute to regulate by taxation or otherwise the privilege or right to receive property is not in conflict with the Ohio bill of rights, which recognizes the inalienable right of acquiring or possessing and protecting property. *State, Schwartz, v. Ferris* (Ohio) 218

3. The provision of Ohio Const. art. 2, § 26, that all laws of a general nature shall have a uniform operation throughout the state, does not guarantee the general protection of all the inhabitants of the state, but only that such laws shall be in force in all parts of the state. *Id.*

4. The exemption by the Ohio inheritance tax law of April 20, 1894, of estates of \$20,000 and under from all taxation, while no exemption is allowed estates exceeding such amount, and the taxation of larger estates at a higher rate than smaller ones, renders the act unconstitutional as violating the Ohio bill of rights, § 2, declaring that all political power is inherent in the people, and that government is instituted for their equal protection and benefit. *Id.*

5. The provision of U. S. Const. 14th amend. § 1, that no state shall deny to any person within its jurisdiction the equal protection of the laws, is not broader than the provision of the Ohio bill of rights, § 2, that government is instituted for the equal protection and benefit of the people; and a statute imposing an inheritance tax authorized by the latter provision will not conflict with the former. *Id.*

6. There is no unwarranted discrimination against citizens of other states in Mich. Sess. Laws 1893, act No. 74, declaring it to be unlawful for any person to solicit insurance within the state on property within the state for any nonresident persons without procuring from the commissioner of insurance the certificate of insurance provided for by the statute. *People v. Gay* (Mich.) 464

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7. The fact that Chinamen are engaged in the hand laundry business does not make invalid a statute imposing a license fee of \$25 on a male laundryman employing one or more other persons in such business, while the fee for a steam laundry is \$15, where the law in its terms applies to all male laundrymen of every condition and nationality. *State, Toi, v. French* (Mont.) 415

8. The provision as to cruel and unusual punishment in U. S. Const. 8th amend. has no application to crimes against the laws of a state. *Com. v. Murphy* (Mass.) 734

9. An application to compel the attendance of a witness, which will delay the trial, is properly refused where the attempt would be idle because he is without the jurisdiction of the court and beyond the reach of its process. *Fidelity & C. Co. v. Johnson* (Miss.) 206

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1. The acceptance by the master of a written contract of employment signed by the servant is equivalent to its formal execution by the former. *Vogel v. Pekoc* (Ill.) 491

2. A church does not take the benefit of an attorney's services in prosecuting a preacher, so as to make it liable to pay for them, by a resolution for the removal of the preacher from the parsonage, which recites his suspension from the ministry upon the charges presented against him. *Parshley v. Third M. E. Church* (N. Y.) 574

3. An oral lease of land for one year, with the privilege of three, at an annual rent, is for a longer period than a year within the statute of frauds, notwithstanding the lessee's option, since he could not compel the execution of the lease for a year, because the contract contemplates the exercise of the option after the execution of the lease. *Hand v. Osgood* (Mich.) 379

4. A memorandum of an order for the purchase of goods, signed by the agent of the buyer, with a written acceptance signed by the agent of the seller, may constitute a valid contract within the statute of frauds. *Gerli v. Poidebard Silk Mfg. Co.* (N. J. Err. & App.) 61

5. A construction most beneficial to the promisee will be adopted if other things are equal, when the terms of an instrument and the relation of the parties leave it doubtful whether words are used in an enlarged or a restricted sense. *Webster v. Dwelling House Ins. Co.* (Ohio) 719

Validity; public policy.

6. No action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law. *Sorz v. Finkelstein* (Neb.) 644

7. The purchase price of beer cannot be recovered where it was sold under an arrangement contemplating its resale by the purchaser in violation of law under pretense of an agency

for conducting a bottling department under the license of the seller. *Id.*

8. A contract for services in procuring legislation which forfeits to the government timber lands previously included in a railroad grant, and gives the preference in purchase thereof to those who have already settled thereon, whereby the other party to the contract is enabled to buy very valuable government land for the paltry sum of \$1.25 or \$2.50 per acre, is void as against public policy. *Houlton v. Dunn* (Minn.) 737

9. The legislature may authorize the employment of an agent to prosecute claims on behalf of the state which require the procurement of legislation, for a fee contingent on his success. *Davis v. Com.* (Mass.) 743

10. A contract to pay a city attorney any compensation other than his salary, for conducting litigation on behalf of the city which is within the scope of his official duties, is void by public policy as well as by the provisions of Cal. Const. art. 11, § 9. *Buck v. Eureka* (Cal.) 409

11. For services rendered after the expiration of his term of office under a void contract to pay an officer extra compensation he cannot have any recovery under the contract, though he may be entitled to some compensation upon an implied contract. *Id.*

12. The promise to pay interest on balances in favor of the city, made by a banker to induce his election by the council as city treasurer, is against public policy and is incapable of enforcement. *Wilkes Barre v. Rockefeller* (Pa.) 393

13. A stipulation between an employee and a guaranty insurance company which insures his employer against the employee's fraud or dishonesty, to the effect that a voucher or other evidence of payment by the insurer to the employer shall be conclusive evidence against the employee as to the fact and extent of his liability to the insurer, is void as against public policy so far as it attempts to make such evidence conclusive, although it may be sustained to the extent of making it prima facie evidence. *Fidelity & C. Co. v. Erickhoff* (Minn.) 586

14. A stipulation against liability for negligence of a railroad company setting fire to buildings erected on its right of way under a lease may be included in the lease without violating public policy. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 193

Change; rescission; abandonment.

15. The manner in which compensation shall be paid may be waived or modified without destroying the promise that a certain amount shall be paid, where the latter is the principal part of the contract. *Davis v. Com.* (Mass.) 743

16. Failure to deliver the first instalment of goods on a contract for delivery in instalments does not justify a rescission by the buyer. *Gerli v. Poidebard Silk Mfg. Co.* (N. J. Err. & App.) 61

17. A breach of contract which will justify the party not in default in abandoning performance and suing for damages on account of a breach by the other need not be of such a

character as to render the further execution of the contract by him impossible, but if the other party refuses to treat it as subsisting and binding upon him, or by his act and conduct shows that he has renounced it and no longer considers himself bound by it, there is in legal effect a prevention of performance by the other party. *Lake Shore & M. S. R. Co. v. Richards* (Ill.) 33

18. It can make no difference whether a contract has been partially performed or the time for performance has not yet arrived, in determining the right of one party to regard it as abandoned by the other. *Id.*

19. Upon election to treat the renunciation of the contract by the other party, whether by declaration or by acts and conduct, as a breach of the contract, the rights of the parties are to be then regarded as culminating, and the contractual relation ceases to exist except for the purpose of maintaining an action for the recovery of damages. *Id.*

20. A contract whereby the first party agrees to employ the second party to perform such work as he may assign to him from time to time imposes no obligation on the first party, and a provision therein for the forfeiture of a specified sum by the servant in case he shall leave the employment without a specified notice constitutes no defense to an action by the latter for his wages, as the contract is void for want of mutuality. *Vogel v. Pekoc* (Ill.) 491

Breach; performance.

21. A state cannot resist payment of compensation to its agent who has under his contract with it become entitled thereto, on the ground that it has promised the United States that it would not make the payment. *Davis v. Com.* (Mass.) 743

22. A waiver of claim to compensation, or estoppel from asserting it under a contract to collect the direct tax returned by the general government for a state which had paid the tax out of its treasury, for a percentage of the amount received, is not worked by consenting to its receipt on condition that no part of it shall be used to pay the claimant, since such consent will at most amount to an agreement that he shall be paid in some other way. *Id.*

23. The refusal of a mortgagor to furnish support to the mortgagees at any other place than his own home, although they were entitled to claim it at any reasonable place, and his declaration that he would not pay for any support furnished by others, constitute a breach of the condition of the mortgage, on which an action of foreclosure may be maintained for the reasonable value of support furnished by others, without any request of the mortgagor or demand upon him. *Tuttle v. Burgett* (Ohio) 214

24. Support at such place or places as may be selected by the mortgagees can be claimed by them under a mortgage conditioned that the mortgagor shall furnish them during life comfortable rooms, food, clothing, medicine and medical attendance in sickness, with necessities and comforts suitable for persons of their age and situation in life, without specifying any place where it shall be furnished; and

they are not obliged to receive it at the house of the mortgagor. *Id.*

25. Any reasonable place of performance may be designated by the obligee, as a general rule, when no place of performance is agreed upon by the parties. *Id.*

26. Lien creditors are concluded as to the sufficiency of the completion of a building, in the absence of fraud or mistake, by its acceptance by the architect and the owner. *Oriental Hotel Co. v. Griffiths* (Tex.) 765

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Contracts; for support of person; place of support. 215

To procure legislation. 744

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Validity of contract for services to procure legislation:—In general; condemnation of such contracts generally; contingent fee makes contract void; contract for personal influence or lobby services; application of rules; analogous cases. 787

Right to rescind or abandon contract because of other party's default:—(I.) Introduction; (II.) condition precedent: (a) how far is right to rescind controlled by question of condition precedent; (b) charter-party; (c) party excused by nonperformance of condition precedent; (d) excuse for not performing condition precedent; (III.) right to rescind contract without liability for nonperformance: (a) necessity of mutual consent; (b) contract may be rescinded; (c) duty to place other party *in statu quo*; (d) partial performance; (IV.) party seeking to rescind must not be in default; (V.) right of party rescinding to recover for what he has done; (VI.) right to abandon performance and recover for breach: (a) performance excused; (b) recovery for breach; (c) lost profits as damages; (VII.) what will warrant rescission; (VIII.) application of above rules to various kinds of contracts: (a) vendor and purchaser; (b) constructive contracts; (c) insurance contracts; (d) continuing contracts. 88

CORPORATIONS. See also COURTS, 8, 7; EVIDENCE, 2, 3; EXECUTORS AND ADMINISTRATORS, 8; MORTGAGE, 7; RECEIVERS, 1.

1. A lease by a public corporation holding in trust medicinal baths belonging to the state, by which a private person is for the term of ninety-nine years given exclusive possession and control in place of the trustees, is *ultra vires*. *Smith v. Cornelius* (W. Va.) 747

2. Directors as such cannot sustain a suit to contest a lease made by a public corporation on the ground that it is *ultra vires*. *Id.*

3. Notice of restrictions annexed to the grant of power by a law authorizing action by a corporation is chargeable upon persons dealing with the corporation. *Id.*

4. A public corporation vested with powers by the state to be exercised for the public cannot transfer to another the exercise of such powers, and make a lease of its property necessary to enable it to execute its functions, without legislative consent. *Id.*

5. A consolidated railroad company may be held responsible for the acts and neglects of its constituent members as done by it as a whole. *Southern R. Co. v. Bouknight* (C. C. App. 4th C.) 833

6. Two states cannot by joint action create a corporation which will be regarded as a single corporate entity, and for jurisdictional purposes a citizen of each state which joined in creating it. *Missouri P. R. Co. v. Meri* (C. C. App. 8th C.) 250

7. An interstate corporation having by one board of directors formed by process of consolidation or otherwise acts in each of such states as a domestic, and not as a foreign, corporation. *Id.*

8. The result of creation by one state of a corporation of a given name, and the declaration of the legislature of an adjoining state that the same legal entity shall be or become a corporation of that state, and be entitled to exercise within its borders all of its corporate functions by the same board of directors, is not to create a single corporation, but two corporations of the same name having a different paternity. *Id.*

9. Neither the want of officers of a corporation by reason of failure to elect, or by death, nor the burning of the mill which it was the object of the corporation to carry on, will of itself work a dissolution. *Re Belton* (La.) 648

10. An existing corporation is not dissolved by the fact that its shares are held by a less number of persons than the law requires as a condition precedent to its organization. *Id.*

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Corporations; consolidation of. 825

Power to transfer franchise. 820

Power to make by-law. 830

Injunction against execution sale of property of. 103

Injunction against judgment confessed by. 240

Action by shareholders. 749

COTENANCY. See also HUSBAND AND WIFE.

NOTES AND BRIEFS.

Husband and wife as joint tenants, tenants in common, or tenants by entireties, see HUSBAND AND WIFE.

COUNTERFEIT. See INJUNCTION, 3.

COUNTIES. See also ELECTION DISTRICTS, 1.

1. The requirement that a county shall pay the debt of a city within it, made by Or. act 1886, providing for a county tax to pay the interest and principal on the bridge bonds of the city of Portland, is unconstitutional. *Simon v. Northrup* (Or.) 171

2. The power to divide counties or towns and erect new counties and towns, or to change their boundaries, is conferred by the general grant of legislative power, the time and mode

of exercising which is in the discretion of the legislature, unless restrained by other provisions or arrangements of the Constitution. *People, Henderson, v. Westchester County Supers.* (N. Y.) 74

8. The provision in N. Y. Const. art. 8, § 5, that nothing in that section shall prevent the division at any time of counties and towns by the legislature, although that section relates to the apportionment of members of assembly and the manner of constituting assembly districts, gives the legislature power to change such boundaries in its discretion, although the county boundaries which are changed may be the boundaries of a senate district. *Id.*

NOTES AND BRIEFS.

Counties; division of, for election districts. 75

Legislative power to impose liabilities upon. 172

COURTS. See also ADMIRALTY; CORPORATIONS, 6, 7; MUNICIPAL CORPORATIONS, 8.

1. A statute abolishing a judicial district before the expiration of the term of office of the judge of that district, and transferring all the counties comprising it into another district, is within the constitutional power of the legislature. *Aikman v. Edwards* (Kan.) 149

2. The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions, not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 198

3. The legislative character of the function of annexation of territory to a city does not preclude judicial examination and decision on questions as to the preliminary steps and the truth and sufficiency of the petition for annexation. *Foreyth v. Hammond* (Ind.) 576

4. Questions of the necessity and expediency of viaducts over railroad tracks, and of the portion of the expense which the city may properly assume, are for the determination of the city authorities, rather than the courts. *Argentine v. Atchison, T. & S. P. R. Co.* (Kan.) 255

5. An ordinance which is unreasonable, unjust, and oppressive, will be held by the courts to be void. *Haues v. Chicago* (Ill.) 225

6. Courts of equity are not open to a foreign corporation as a matter of strict right, but as matter of comity. *National Teleph. Mfg. Co. v. Dubois* (Mass.) 628

7. Jurisdiction will not be taken on service by publication, of an action by a foreign corporation having a place of business in the state to recover a debt contracted in another state and not reduced to judgment, from a nonresident whose only property in the state consists of his interest as partner in a firm whose property, assets, books, vouchers, papers, and accounts, are all, with few exceptions, in another state where the principal business of the firm is carried on and two of the partners live. *Id.*

8. The relation to a note, of a party whose name is signed on the back of it, is a question 30 L. R. A.

of general law on which Federal courts are not bound by state decisions. *Hudson Furniture Co. v. Harding* (C. C. App. 7th C.) 518

9. State legislation with respect to the law merchant must be recognized and enforced by Federal courts, although in the absence of such statutes they are not bound by state decisions on the subject. *Id.*

10. A state statute providing that all persons becoming parties to promissory notes payable on time, by signature on the back thereof, shall be entitled to the same notice of nonpayment as indorsers, must control the decisions of a Federal court as to the rights of parties to a note payable in that state. *Id.*

11. A provision of a state statute giving a cause of action for death by negligence, that the action shall be brought in some court established by the Constitution and laws of the state, is not operative to deprive a Federal court of jurisdiction of such action. *Bigelow v. Nickerson* (C. C. App. 7th C.) 886

12. A Federal court has no jurisdiction of an action by a citizen of the state against a consolidated railway company organized under the statutes of that and adjoining states, for personal injuries inflicted within the state, as such corporation is a domestic corporation for jurisdictional purposes. *Missouri P. R. Co. v. Meeh* (C. C. App. 8th C.) 250

13. Decisions by state courts as to the validity of a contract against liability for negligence are not conclusive upon the Federal courts. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.* (C. C. App. 8th C.) 198

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Courts; citizenship of consolidated corporation. 250

COVENANT. See LANDLORD AND TENANT, 1.**CRIMINAL LAW.** See also CONSTITUTIONAL LAW, 8.

1. One who intentionally commits a crime is responsible criminally for the consequences of his act, if the offense proves to be different from that which he intended. *Com. v. Murphy* (Mass.) 784

2. The legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe, for prohibited acts. *Id.*

3. The punishment of imprisonment for life under Mass. Stat. 1898, chap. 466, for criminal intimacy with a female child under the age of sixteen years, is not in violation of the constitutional provision against cruel or unusual punishments. *Id.*

4. Lack of knowledge or of good reason to believe that a girl is under sixteen years of age is no defense under Mass. Stat. 1898, chap. 466, providing the penalty of imprisonment for life in case of criminal intimacy with such a person. *Id.*

5. Procuring reversal of a judgment of conviction on account of error by the trial court waives the right to object to further prosecu-

tion on the ground of former jeopardy. *McGinn v. State* (Neb.) 450

6. The power of the court to correct a judgment sentencing a person to death and to solitary confinement until execution is not lost by the fact of imprisonment after sentence, on the ground that this is the suffering of a part of the sentence. *Id.*

7. The power of the court to order confinement of a person sentenced to death, during the time before execution, does not rest upon any positive provision of statute, as such confinement is not a part of the penalty although it is a necessary incident thereof. *Id.*

NOTES AND BRIEFS.

Criminal law; cruel and unusual punishment. 784

CRUEL AND UNUSUAL PUNISHMENT. See CONSTITUTIONAL LAW, 8; CRIMINAL LAW, 8.

CUSTODY OF LAW.

NOTES AND BRIEFS.

Injunction against execution sale of property in. 108

CUSTOM. See also EVIDENCE, 25.

NOTES AND BRIEFS.

As to prior appropriation. 665

DAMAGES. See also SALE, 1.

1. Physical impossibility for the seller to tender goods at the proper time will prevent his obtaining more than nominal damages for breach of the contract by prior notice that the purchaser will not accept the goods. *Gerli v. Poitebard Silk Mfg. Co.* (N. J. Err. & App.) 61

2. No right of action for the death of a child exists in New Jersey merely because the shock of its death caused the sickness of its mother, with the consequent deprivation of her services and society from her husband and the increase of his expenses, as the only right of action for death is to recover, under N. J. Rev. p. 294, for the pecuniary loss resulting therefrom. *Myers v. Holborn* (N. J. Err. & App.) 845

3. One injured by the negligence of another can recover only for such future pain as the evidence shows she is reasonably certain to endure, and not for such as there is a reasonable probability that she will endure. *Smith v. Milwaukee Builders' & T. Eech.* (Wis.) 504

4. The impairment of the capacity of a married woman to perform labor can be considered as an element of the damages recoverable in an action by her for a personal injury, where the statutes entitle her to make contracts on her own account and give her the right to her own earnings. *Harmon v. Old Colony R. Co.* (Mass.) 658

5. A verdict for \$4,500 for serious and permanent injuries to a young man, leaving him badly maimed and deformed for life and practically a physical wreck, is not so excessive as to be set aside. *Hove v. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.) 634

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6. Damages of a land owner for the failure of a railroad company to build railroad fences include the loss of his privilege to connect his fences with such fences for the purpose of making an inclosure. *Gould v. Great Northern R. Co.* (Minn.) 590

7. Damages to shade trees are measured by the difference between the value of the land before and after the injury. *Evans v. Key-stone Gas Co.* (N. Y.) 651

NOTES AND BRIEFS.

Damages; for libel or slander by wife. 529

Recoverable by wife for personal injury; impaired capacity to labor as an element. 658

DEATH. See ADMIRALTY; DAMAGES, 2.

DEDICATION. See also EVIDENCE, 6, 8.

NOTES AND BRIEFS.

Dedication; to state. 748

DEFINITIONS. See also INSURANCE, 38, 39; NEWSPAPERS, 1; TIME, 2.

The word "direct," in a policy insuring against direct loss or damage by fire, means "immediate" or "proximate," as distinguished from "remote." *Ermentrout v. Girard F. & M. Ins. Co.* (Minn.) 346

NOTES AND BRIEFS.

Definition; month. 451

DEPOSITIONS.

1. A deposition taken before certain persons made parties to a suit cannot be used as against them. *Smith v. Milwaukee Builders' & T. Eech.* (Wis.) 504

2. Refusal to answer a cross-interrogatory which does not appear to have been material will not prevent the admission of a deposition in evidence. *White v. Solomon* (Mass.) 537

DESCENT AND DISTRIBUTION. See also HUSBAND AND WIFE, 4.

1. The next of kin of the father of an illegitimate child that has been adopted with capacity to inherit, but not legitimated, have no inheritable blood as to such child. *Murphy v. Portrum* (Tenn.) 263

2. Property descended from the father to an illegitimate child who has been adopted, but not legitimated, will, like other property of the child, descend on his death intestate to his mother in preference to the father's next of kin, under the general provisions of Mill. & V. (Tenn.) Code, § 3273, as to inheritance from an illegitimate child by the mother. *Id.*

DISEASE. See INSURANCE, NOTES AND BRIEFS.

DOWER.

A widow who is not and never has been a resident of the state is not entitled in Kansas to any interest in real property of her husband in that state. *Small v. Small* (Kan.) 243

DURESS.**NOTES AND BRIEFS.**

As ground of injunction against judgment. 786

EJECTMENT.**NOTES AND BRIEFS.**

Injunction against dispossession in. 129

ELECTION. See **VOTERS AND ELECTIONS.****ELECTION DISTRICTS.** See also **COUNTIES, 8.**

1. The constitutional declaration that a senate district shall consist of certain specified counties, when construed with other provisions making population the basis of apportionment and prohibiting the division of a county between senate districts, establishes an organic relation between the boundaries of the counties as they existed at that time and the senate districts thereby established, so that no change of county boundaries can be effectual to change the boundaries of the senate district. *People, Henderson, v. Westchester County Supers.* (N. Y.) 74

2. The annexation of a portion of Westchester county to the city and county of New York by N. Y. Laws 1895, chap. 934, which is valid so far as it affects municipal burdens and municipal rights, leaves the annexed territory still a part of the 22d senate district, which by the Constitution consisted of Westchester county, and within the jurisdiction of the board of supervisors of that county for the purpose of including it within one of the three assembly districts allotted to that county by the Constitution. *Id.*

NOTES AND BRIEFS.

Election districts; constitutionality of change of. 75

ELECTRIC LIGHTS. See **MUNICIPAL CORPORATIONS, 10.****ELEVATORS.** See **EMINENT DOMAIN.****EMBLEMENTS.****NOTES AND BRIEFS.**

Right to, in case of estate by entireties. 308

EMINENT DOMAIN.

The erection and operation of a public grain elevator or warehouse upon a railroad right of way acquired in condemnation proceedings, whether done by the company or its licensee or lessee, are neither misuse nor abandonment of the easement in the land occupied by such structure, so as to give the owner of the fee a right to resume possession. *Gurney v. Minneapolis Union Elevator Co.* (Minn.) 584

NOTES AND BRIEFS.

Eminent domain; public purposes for exercise of. 849

Purposes for which railroad right of way may be used. 584

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EMPLOYERS' LIABILITY POLICY. See **INSURANCE, 16.****ENTIRETIES.** See **HUSBAND AND WIFE, NOTES AND BRIEFS.****ESTOPPEL.**

1. The state is not estopped from levying a tax for the reason that no attempt has been made to assess the property for many years, during which the owner has borrowed money by a mortgage on the property for the erection of a building upon it, and agreed to pay the taxes on such mortgage. *Portland Hibernian Benev. Soc. v. Kelly* (Or.) 167

2. One who has accepted the appointment to an office having at least a potential existence, and has received the emoluments of it, is estopped from endeavoring to show to his own advantage that the office has never been lawfully created because it was not done in the proper mode,—as, by ordinance. *Buck v. Eureka* (Cal.) 409

3. A riparian owner is not estopped to use the water for irrigating purposes by failing to object to the diversion of water by a lower appropriator. *Hargrave v. Cook* (Cal.) 890

4. One who fraudulently obtains money on a mortgage by representing that his property is unencumbered is estopped to contest the mortgagee's right of subrogation to earlier liens, on the ground that they are barred by the statute of limitations. *Union Mortg. Bkg. & T. Co. v. Peters* (Miss.) 829

5. The representative of a deceased person, who stands in his shoes, is bound by an estoppel raised by the fraud of the decedent. *Id.*

EVIDENCE. See also **DEPOSITIONS; TRIAL, 14.****Judicial notice.**

1. Judicial notice will be taken by the supreme court of Washington that at least that portion of the state east of the Cascade Mountains was included within the territory where the customary law of miners was in force. *Isaacs v. Barber* (Wash.) 685

2. The fact that many unincorporated church societies have been in existence is a matter of common knowledge. *Alden v. St. Peter's Parish* (Ill.) 283

Presumptions and burden of proof.

3. Incorporation of a church society cannot be presumed merely because the statute prescribes a mode by which such societies may be incorporated. *Id.*

4. A quorum shown to have been present will be presumed to continue present at proceedings taken the same day, until the contrary is shown. *State, Stanford, v. Ellington* (N. C.) 583

5. The fact that less than a quorum of a legislative body are reported by the tellers as voting when the roll is called overcomes any presumption that a quorum present earlier in the day still continued present. *Id.*

6. Long and uninterrupted possession of land by the state, with a claim of ownership for public use, and user by the public, will raise a presumption of a dedication by the property owner

for such public use. *Smith v. Cornelius* (W. Va.) 747

7. A grant will be presumed from long and uninterrupted possession of land, with claim of ownership. *Id.*

8. A presumption of a grant or dedication by Lord Fairfax as lord of the fee, for public use, of the grounds at Bath or Berkeley Springs, West Virginia, arises from the possession and claim of ownership by that state and Virginia for 119 years, although Va. act 1776 seizing this land recites no consent on the part of Lord Fairfax and makes no provision for obtaining his consent or giving him compensation. *Id.*

9. The presumption is that a corner lot fronts on the street on which its shorter side abuts, if there is a material difference in the length of its sides. *Toledo v. Sheill* (Ohio) 598

10. The front of a corner lot while vacant is presumed to continue to be the front after the lot is improved, unless the contrary appears by the style and character of the improvement. *Id.*

11. A negotiable promissory note made by an administrator in his official capacity imports sufficient consideration to bind him personally. *Germania Bank v. Michaud* (Minn.) 286

12. The duty and burden of showing that an act of legislation within the ordinary scope of legislative power is unconstitutional rests upon those who assert its unconstitutionality. *People, Henderson, v. Westchester County Supers.* (N. Y.) 74

13. The burden of proof as to contributory negligence is on the defense. *Prosser v. Montana U. R. Co.* (Mont.) 814

14. A vessel bound to keep out of the way of another has the burden of proving that a collision between them was due to the failure of the latter. *Bigelow v. Nickerson* (C. C. App. 7th C.) 886

15. A telegraph company receiving a prepaid telegram in Georgia for transmission to a point in another state, which was never delivered to the addressee, has the burden of showing that it was transmitted from the Georgia office with due diligence, and that nondelivery was due to default or some other cause arising beyond the limits of the state, in order to escape liability for the statutory penalty for negligence in transmission. *Western U. Teleg. Co. v. Howell* (Ga.) 158

16. A party excepting to a claim filed in insolvency proceedings has the burden of showing what payments have been made thereon. *Levy v. Chicago Nat. Bank* (Ill.) 880

Documentary.

17. Transcript showing entries by a treasurer upon his books are not conclusive, but only prima facie, evidence against his sureties that he is liable for the sums with which he has charged himself. *Wilkes Barre v. Rockafellow* (Pa.) 898

18. The record of a judgment against a railroad company for personal injuries is admissible as against a purchaser on foreclosure sale, who agreed as part of the price to satisfy all claims held prior in lien, not simply to establish

the fact of its rendition, but as proof of when the action was brought, for what, and the amount, for the purpose of showing that such judgment is prior to the mortgage under the South Carolina statute giving judgments for personal injuries precedence over railroad mortgages. *Southern R. Co. v. Bouknight* (C. C. App. 4th C.) 823

Oral as to writings.

19. Oral proof of a separate agreement, to show that the consideration of a conveyance which recited that it was in settlement and release of the claims of a guardian and ward against the grantor, included also a release of the ward's claim against the guardian, is inadmissible. *Baum v. Lynn* (Miss.) 441

20. Oral evidence as to the consideration recited in a written agreement is inadmissible when the stipulation as to the consideration is contractual—as, in a case where a conveyance expressly recites that it is made for the settlement and release of specified claims. *Id.*

21. Oral declarations of a party to a written instrument made before or at the time of its execution, of an intention or purpose not therein expressed, or different than that to be derived from its terms, are not within the rule which permits extrinsic evidence of the situation of the parties and of the surrounding circumstances, and are inadmissible in an action on the instrument where its reformation is not sought. *Tuttle v. Burgett* (Ohio) 214

22. Parol evidence is admissible to show the meaning of the words "watchmaker's materials," in a policy of insurance on such stock, where there is nothing in the policy itself to indicate with exactness what articles were intended by such term. *Marril v. Connecticut F. Ins. Co.* (Ga.) 835

Opinions.

23. Testimony that flat cars were placed before a locomotive for the purpose of allowing brakemen and switchmen to mount upon the brake beam of a car by grasping the brake staff is not incompetent as an opinion of the witness or as a statement of fact, when made by a witness who is cognizant and observant of the conduct of the business. *Prosser v. Montana O. R. Co.* (Mont.) 814

24. A diver who has examined a vessel sunk while burning is not incapacitated to give his opinion that the vessel is a total loss, by the fact that he regarded himself as not competent to estimate the cost of repairs necessary to replace it. *Jackson v. British America Assur. Co.* (Mich.) 636

Relevancy; sufficiency.

25. Evidence of the usual and customary way of mounting flat cars in front of a road engine when used in switching offered to disprove contributory negligence is not inadmissible on the ground that it is an attempt to excuse negligence by usage or custom, where it does not appear that the act in question was positively negligent. *Prosser v. Montana C. R. Co.* (Mont.) 814

26. The existence of a fault in one mineral vein cannot be proved by showing a fault in another vein which is claimed to be a continuity of the vein in question, in the absence

of a showing of a continuity in the latter fault. *Fitzgerald v. Clark* (Mont.) 803

27. Testimony as to the value of shade trees is not admissible on the question of damages for their destruction, as the damages are measured by the depreciation of the value of the land. *Evans v. Keystone Gas Co.* (N. Y.) 651

28. Evidence of occurrences the day of, but some hours before, a fatal affray, is admissible in a prosecution for murder, on the question of self-defense, where they were a part of the occurrences that culminated in the killing, and tend to enlighten the jury as to the mental attitude of the men toward each other at the time of the affray. *People v. Hecker* (Cal.) 408

29. An offer to prove that a city treasurer borrowed money in his custody from the officers who had power to invest it, and that he paid interest upon it, and that the city council approved reports showing the receipt of such interest, should not be rejected in an action against his sureties because it does not undertake to set forth what action was taken before loaning the money. *Wilkes Barre v. Roata-fellow* (Pa.) 893

30. The coincidence of the decay and death of vegetation with the existence of the leakage of a large amount of gas after the laying of a new main and until its recalking, and the fact of the healthy growth after the recalking, will sustain a conclusion by the jury that the escape of the gas was the cause of the injury. *Evans v. Keystone Gas Co.* (N. Y.) 651

31. There is evidence of a signature to a contract where the party testifies that it resembles his, but that he wishes to have the contract identified before answering further, if there is no later denial of the signature. *White v. Solomon* (Mass.) 537

NOTES AND BRIEFS.

Evidence; presumption as to jurisdiction of tribunal. 578

EXECUTION. See INJUNCTION, 5, NOTES AND BRIEFS.

EXECUTORS AND ADMINISTRATORS.

1. An administrator is not personally liable to the payee on a promissory note given in the name of the estate for a debt of the deceased without any new consideration, and when the time to file claims has expired, and when the probate court has never allowed the claim or ordered it paid. *Germania Bank v. Michaud* (Minn.) 286

2. A promissory note made by an executor or administrator cannot bind the estate, although it may bind the maker personally. *Id.*

3. The property of a corporation in possession or custody of an officer at his death does not pass, as part of his estate, into the possession and control of his administrator. *Re Belton* (La.) 648

NOTES AND BRIEFS.

Executors and administrators; injunction in favor of or against, to prevent execution sales. 120

Validity of promissory note of. 286

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EXEMPTIONS. See INJUNCTION, NOTES AND BRIEFS.

EXILE. See PARDON.

EXPLOSIONS.

NOTES AND BRIEFS.

Of gas. 655

FENCE. See RAILROADS, 3, 4.

FERRIES. See BRIDGES; MUNICIPAL CORPORATIONS, 16; STATUTES, 6.

FILING.

An application for a writ of error is sufficiently filed on Sunday when the clerk received it on that day, but, being doubtful as to his power to file it, merely noted the fact and date of its receipt, and upon the next day marked it "Filed." *Hanover F. Ins. Co. v. Shrader* (Tex.) 498

FIRE. See MUNICIPAL CORPORATIONS, 12.

FISHERIES.

1. Any inhabitant may take shell-fish anywhere in the waters of the state and on the shores below high-water mark as it exists from time to time, in the absence of any express restriction on such right. *Allen v. Allen* (R. I.) 497

2. Disturbing the thatch of a riparian owner by digging clams below high-water mark is not a trespass, as the public right of fishery is paramount to the private right to cut grass or sedge. *Id.*

FOOD.

NOTES AND BRIEFS.

Interstate trade in oleomargarine. 897

FORCIBLE ENTRY AND DETAINER.

NOTES AND BRIEFS.

Injunction against dispossession in case of. 129

FORFEITURE.

1. Rules followed in courts of equity, respecting forfeitures, may be available in a suit at law, where the facts make their application necessary to the ends of justice. *Webster v. Dwelling House Ins. Co.* (Ohio) 719

2. Provisions for forfeiture are to receive, where the intent is doubtful, a strict construction against those for whose benefit they are introduced. *Id.*

FORMER JEOPARDY. See CRIMINAL LAW, 5.

FRAUD. See also ATTACHMENT; INJUNCTION, 3.

NOTES AND BRIEFS.

Fraud; as ground of injunction against judgment. 786

As ground of injunction against judgment by confession. 288

As ground of injunction against judgment when arising subsequent to its rendition. 560

Intent to defraud which will sustain attachment. 465

GARNISHMENT. See also INJUNCTION, 10.

1. An employee who has a judgment against his employer for injuries may garnish an insurance company to reach the employer's right of action against it upon an employer's liability policy, where the employer has made an assignment in insolvency before action is begun by the employee. *Anoka Lumber Co. v. Fidelity & O. Co.* (Minn.) 689

2. A nonresident creditor cannot have his property in a debt seized in a state to which the debtor may resort merely for the purpose of doing business through agents, when the claim arose on a contract not to be performed within the state and the debtor does not reside therein. *Reimers v. Sealco Mfg. Co.* (C. C. App. 8th C.) 364

3. A debt has no situs for the purpose of garnishment in a state of which the plaintiff, defendant, and garnishee are all nonresidents, although the garnishee is a foreign corporation, which by general provisions of a state statute is subject to garnishment in the state because it assumes to do business there. *Id.*

NOTES AND BRIEFS.

' Garnishment; protection of nonresident against. 365

Injunctions against judgments in. 360

GAS. See also TRIAL, 6, 7.

1. The injury to shade trees by the escape of natural gas carelessly suffered to escape from a gas main in an adjoining street renders the gas company liable to the owner for the damage. *Evans v. Keystone Gas Co.* (N. Y.) 651

2. The duty imposed on a gas company, of supplying gas to applicants, includes the duty, when the proper connections have been made and a meter furnished, of turning on the gas when applied to for that purpose. *Schmeer v. Gaslight Co.* (N. Y.) 658

3. A gas company before turning on, or permitting to be turned on, gas for the benefit of tenants in an apartment house who have applied for it, must use reasonable precautions to ascertain that the pipes in the building are in such condition that the gas will not flow out into the apartments of tenants who have not applied for it, to their injury. *Id.*

4. A gas company cannot be held liable for the act of a stranger in turning gas into the pipes of a building without its knowledge or request. *Id.*

5. Notice of intention to turn on the gas, and request to inspect as to the condition of the pipes, in an apartment house, cannot be insisted upon by a gas company as a prerequisite to its duty to make such inspection, if it has adopted the custom of permitting any one

to turn the gas into a building after plans of the piping have been furnished to it and it has provided a meter. *Id.*

6. A gas company cannot deny its liability for injuries resulting from failure to use reasonable precautions before turning gas into an apartment building to see that injury should not result from the escape of gas into the rooms of tenants not applying for it, on the ground that it had no right to enter upon the premises for the purpose of making an inspection. *Id.*

NOTES AND BRIEFS.

Gas; negligence causing explosion of; duty of gas company as to connections. 655

GIFT. See HUSBAND AND WIFE, 1.

GRANT. See EVIDENCE, 7, 8.

GUARANTY. See BANKS, 1; CHECKS, 1.

GUARANTY COMPANY. See CONTRACTS, 13; INSURANCE, 13-15.

HEIRS. See also INSURANCE, 39.

NOTES AND BRIEFS.

Heirs; within meaning of insurance policy. 503

HIGHWAYS.

1. An ordinance requiring "any owner or contractor constructing any building abutting on a sidewalk to build a roofed passageway in front of the building, after the completion of the first story, is a reasonable one; and any owner or contractor who fails to do so is liable to a pedestrian on the sidewalk, not guilty of contributory negligence, who is injured by a brick which falls from the building. *Smith v. Milwaukee Builders' & T. Bch.* (Wia.) 504

2. One who undertakes to construct the iron work in a building, which is an integral and substantial part thereof, consisting of iron girders, beams, and floor joists set in the walls, is a contractor within the meaning of an ordinance requiring any contractor who shall build or cause to be built any building abutting on a public sidewalk to build a roofed passageway in front on the sidewalk, after completion of the first story. *Id.*

NOTES AND BRIEFS.

Highways; legislative power to control. 173

Contributory negligence of traveler. 506

HOMESTEAD. See also WATERS, 11-13.

Renting for business purposes the larger portion of a building resembling ordinary business structures and flush with the sidewalk of a business street, reserving as the only home of the family the smaller part on the second floor, will not deprive it of its homestead character under Okla. Stat. 1893, chap. 34, § 2, providing that an urban homestead shall consist of a lot or lots and the improvements used as a home for the family, and that temporary

renting shall not change its character. *De Ford v. Painter* (Okla.) 723

NOTES AND BRIEFS.

Homestead; injunction against sale of, under execution. 100

Premises used in part for residence. 723

HOMICIDE.

1. The duty to refrain from killing a mere trespasser is not limited to cases where the trespass is committed in a peaceable manner. *People v. Hecker* (Cal.) 408

2. A first felonious assailant may justifiably kill his adversary if, after in good faith withdrawing from and declining further combat, and fairly making known such purpose to his adversary, the latter forces a new combat upon him. *Id.*

3. A first felonious assailant cannot kill the person assaulted, in defending himself against a deadly return assault by the latter, until he has in good faith declined the strife and fairly made known to the latter his willingness to do so; and the imminence of his danger does not relieve him of the necessity of so declining before availing himself of the right of self-defense. *Id.*

4. Retreat is not an essential condition of the right of a person feloniously assaulted without provocation to kill his assailant, if the assault is sudden and the danger great or apparently great; and under such circumstances he may pursue and slay his adversary if apparently necessary for his safety. *Id.*

5. That an attempt to kill or inflict great bodily harm is made in resisting a forcible trespass against personal property does not deprive the person assaulted of the right to kill his assailant without retreating and declining, or making known to his adversary his willingness to decline, the strife, where the assault is so sudden and perilous as to render retreat and declination impossible; but as he is the first wrongdoer, although his wrong does not justify the attack upon him, he must retreat and decline the combat, if possible, before resorting to killing his adversary. *Id.*

NOTES AND BRIEFS.

Homicide; right of self-defense. 404

HUSBAND AND WIFE. See also DAMAGES, 4; MORTGAGE, 10.

1. Gifts by a man to his children, of personal property constituting the bulk of his estate, are valid as against a post mortem claim by his widow. *Small v. Small* (Kan.) 243

2. The common-law liability of a husband for slanderous words uttered by his wife, although he is not present, and in which he has not participated in any manner, has not been abrogated in Minnesota by the statutes relating to married women. *Morgan v. Kennedy* (Minn.) 521

3. A woman who has been given the custody of minor children on obtaining a divorce cannot maintain an action at law against the estate of her deceased husband for their board. *Brown v. Smith* (R. I.) 630

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Entireties.

4. Husband and wife taking by descent as next of kin take by moieties, and not by entireties, and without any rights of survivorship. *Brown v. Baraboo* (Wis.) 820

5. A joint conveyance to husband and wife vests in them an estate in entirety. *Branch v. Polk* (Ark.) 824

6. A wife may execute a mortgage on her interest in lands held by the entirety, where the state Constitution and statutes have excluded the marital rights of the husband in such property during the wife's life, and given her control of her property. *Id.*

7. Separate mortgages made without jointer by husband and wife on land held by the entireties, purporting to convey an undivided half interest in land, although made to the same person and for the same purpose, will give to the mortgagee on the death of the husband no lien beyond an undivided half interest. *Id.*

8. A tenancy by the entirety is not created by a will giving the residuary estate to a daughter and her husband "equal shares and proportions, and so to their respective heirs and assigns forever," where the statutes give married women separate and independent property rights. *Re Robinson's Appeal* (Me.) 831

9. The character of an estate as one by entirety is not changed by the fact that the deed contains a proviso that in the event the wife should survive the husband "she shall have the use and enjoyment of said land," and "at her death the estate in remainder is to go to her children by the said husband." *Cole Mfg. Co. v. Collier* (Tenn.) 815

10. A statute providing that the husband and wife shall not be ejected from the wife's real estate by virtue of any judgment against him will apply to estates by entirety, although the rule has been adopted that the husband's rights may be seized and sold in such a way that in case he should outlive his wife the purchaser will come into possession of the whole estate. *Id.*

11. The rule of the common law creating estates by entirety is irreconcilable with both the letter and the spirit of statutes giving married women separate and independent property rights. *Re Robinson's Appeal* (Me.) 831

12. The rents and profits of an estate by entirety during the joint lives of husband and wife do not follow the nature of the estate in respect to their disposal, but belong to them in separate moieties, the wife's share of which is within the general statutory provisions giving married women power to control and dispose of their own property. *Hiles v. Fisher* (N. Y.) 805

13. The common-law right of the husband to the entire usufruct of an estate by the entirety during the joint lives of his wife and himself is not an incident of that estate, but was a part of his common-law marital rights. *Id.*

NOTES AND BRIEFS.

Husband and wife; injunction against execution sale of wife's property. 113, 118

Gift by husband to defraud wife. 245
 Liability of, for wife's libel and slander. 531

Tenancy by entireties:—(I.) Definition; (II.) who can hold this estate; (III.) nature of the interest of each spouse; (a) the interest of the husband during the joint lifetime at common law; (b) the interests of the spouses during the joint lifetime, since the married women's property acts; (c) right of the spouses and their representatives to emblements at common law; (d) husband's right to compensation for improvements; (e) husband's right to commit waste; (f) husband's right to estovers; (g) right of either spouse to sue for wrongs to the entirety property; (IV.) survivorship of one of the spouses after the death, actual or civil, of the other; (V.) operation of technical rules on the entirety estate: (a) rule in *Shelley's Case*; (b) merger; (c) equity to a settlement; (d) vendor's lien; (e) notice; (f) homestead exemption; (g) construction of statutes; (VI.) where and to what extent entirety estates exist: (a) list of states, etc.; (b) construction of statutes affecting this question; (VII.) in what subjects, estates, and interests entirety may exist: (a) in what subjects; (b) in what tenures; (c) in what titles; (d) in what species of estate, legal or equitable; (e) in what estates; (f) in what shares; (VIII.) creation of entirety estates: (a) by act of law; (b) by act of the party: (1) limitation to husband and wife without specifying how they are to take; (2) limitations expressly by entireties in a state where entirety does not exist; (3) limitation to husband and wife as joint tenants; (4) limitation to husband and wife as tenants in common; (5) limitation to husband and wife for their lives; (6) limitations in peculiar forms; (c) conveyance by entireties to spouses one of whom already has an estate in the land or other subject-matter; (d) invalidity on other grounds of a limitation; (IX.) the share taken by husband and wife under limitation to them and another or others; (X.) disposition or encumbrance of entirety property: (a) by both spouses concurring; (b) by one of the spouses alone: (1) neither can derogate from the survivorship right of the other; (2) each can in most states pass his or her own survivorship right; (3) whether a conveyance by the husband made before the wife's death was void for the period of the joint lifetime; (XI.) the effect of divorce on the entirety property: (a) generally; (b) nullification; (c) dissolution; (d) separation without dissolution of marriage; (XII.) partition between tenants by entireties; (XIII.) adverse possession and the statute of limitations. 805

ILLEGITIMACY. See DESCENT AND DISTRIBUTION, 1.

INDEPENDENT CONTRACTOR. See MASTER AND SERVANT, 8.

INFANTS. See also INJUNCTION, 7; NEGLIGENCE, 4; PARENT AND CHILD; WRIT AND PROCESS, 1.

Failure of a court to appoint a guardian *ad litem* for an infant defendant does not make the judgment, if recovered against him, so in-
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valid as to be subject to collateral attack. *Levystein v. O'Brien* (Ala.) 707

INHERITANCE TAX. See CONSTITUTIONAL LAW, 4, 5; TAXES.

INJUNCTION. See ACTION OR SUIT, 7.

1. An injunction to restrain the exercise of governmental powers under an unconstitutional statute cannot be granted on behalf of individuals who assert no threatened infringement of rights of property or of civil rights. *Green v. Mills* (C. C. App. 4th C.) 90

2. An injunction against any registration of voters on the ground that the statute providing for the registration is unconstitutional because its provisions are so unreasonable, unnecessary, and burdensome that complainant has been unable to register after repeated and persistent efforts to do so, cannot be granted, since the action sought to be enjoined is political and governmental, and will not infringe any right of property or civil right of the complainant and others similarly situated. *Id.*

3. A mandatory injunction to compel a person to distinguish his place of business in some mode or form that shall be a sufficient indication that it is a different place of business from that of a competitor should be granted, where he has imitated the building of another dealer in the same business so closely as to deceive customers and with intent to deceive them, and has omitted the use of any name or sign which could designate the true proprietorship of the store; but it would be too strict a rule to compel him to show the proprietorship of his store. *Wienstock, L. & Co. v. Marks* (Cal.) 183

4. An injunction to restrain the collection of a tax will not be granted merely because of an inaccuracy in the name, on the assessment roll, of the owner of the property. *Portland Hawaiian Benev. Soc. v. Kelly* (Or.) 167

5. Injunction will not lie to prevent the sale under execution of exempt property, unless it has some special value to plaintiff, where the statutes provide a remedy at law for the recovery of personal property and damages for its wrongful seizure. *Parsons v. Hartman* (Or.) 93

6. The enforcement of a judgment at law will not be enjoined merely for want of jurisdiction in the court which rendered it, unless such judgment is shown to be unjust or inequitable. *John V. Farwell Co. v. Hilbert* (Wia.) 235

7. Injunction will not lie against a judgment at law against an infant, merely because no guardian *ad litem* was appointed for him and his general guardian was not brought into the action. *Levystein v. O'Brien* (Ala.) 707

8. A justice's rendition of judgment for more than is demanded by the affidavit of attachment does not make the judgment void so as to warrant an injunction against its execution. *Gum-Elastic Roofing Co. v. Mexico Publishing Co.* (Ind.) 700

9. A clause in a judgment restraining creditors from prosecuting garnishment proceedings against their debtor in another state to

reach exempt wages, "so long as plain'tiff remains a resident of this state," if incorrect, is rendered harmless by a subsequent clause limiting the operation of the judgment to earnings which are exempt. *Griggs v. Dozier* (Wis.) 860

10. Creditors who, having instituted garnishment proceedings in a foreign state to reach wages exempt by the law of the debtor's domicile, dismiss that garnishment, but take judgment, issue execution, and reach the wages by garnishment on the execution after the issuance by the courts of such domicile of an order restraining them from collecting any exempt wages by "said garnishee proceedings," may be compelled to refund to the debtor the exempt amount reached, with interest. *Id.*

11. An injunction against enforcing a judgment at law will be granted where the death of the trial judge soon after the trial prevented the perfection of an appeal, and the record shows that the judgment is without evidence to support it. *Little Rock & Ft. S. R. Co. v. Wells* (Ark.) 560

12. A defendant against whom a default judgment has been fraudulently entered is not compelled to resort to certiorari for relief, rather than to apply for an injunction against its execution, where he would not thereby obtain as effective relief as he could by injunction. *Merriman v. Walton* (Cal.) 786

13. The entering of a default judgment pending negotiations for a transfer of the cause to another jurisdiction, which is concealed until the time for appeal has expired, followed by a justice's refusal to vacate the same, will entitle the defendant to have the execution of the judgment enjoined. *Id.*

14. Relief will not be denied to one seeking to enjoin the execution of a judgment because he might have sought it under a different form of action, in a state where the various kinds of relief are administered by the same tribunal, and there is but one form of civil action for the enforcement or protection of civil rights. *Id.*

NOTES AND BRIEFS.

Injunctions against execution sales or other proceedings under final process:—(I.) Exempt personal property; (II.) homestead; (III.) what kind of property first liable; (IV.) public property; (V.) property in the custody of the law; (VI.) railroad and quasi-public corporation property; (VII.) partnership property; (VIII.) property owned by third parties: (a) condition precedent; (b) real estate; (c) wife's real estate; (d) subsequent purchasers; (e) fraudulent purchasers; (f) equitable owners; (g) right of third party to require levy on other property; (h) personal property; (i) slaves; (j) wife's personal property; (IX.) personal property of a peculiar value; (X.) trust property; (XI.) in favor of or against executors and administrators: (a) English decisions: (1) to obtain equal distribution of assets; (2) foreign administrators and executors; (3) costs; (b) American decisions: (1) to obtain equal distribution of assets; (2) to protect heirs and legatees; (3) judgments against administrators or executors personally; (4) judgments in favor of administrators or executors; (5) sale to pay debts; (XII.) in favor of assignee 30 L. R. A.

for creditors; (XIII.) in favor of or against lien creditors: (a) mortgagees of chattels; (b) mortgagees of real property; (c) attachment creditors; (d) judgment creditors; (e) mechanics' lien; (f) landlord's lien; (XIV.) in favor of general creditors: (XV.) ejectment cases; (XVI.) summary proceedings in forcible entry and detainer; (XVII.) jurisdiction of courts: (a) to protect third party; (b) exempt property; (c) other cases; (d) Federal and state courts; (XVIII.) remedy at law: (a) personal property; (b) real property; (XIX.) irregularities: (a) execution: (1) condition precedent; (2) form; (3) time; (4) party; (5) excessive; (b) levy: (1) excessive; (2) mode, manner, and description; (3) notice; (c) sale: (1) notice and advertisement; (2) appraisal; (3) costs; (4) time, place, and manner; (5) officer; (XX.) effect of injunction on executions, sales, and final process: (a) release of errors; (b) release of liens; (c) officer; (d) limitation; (XXI.) effect of time upon injunctions, executions, and judgments: (a) injunctions and executions; (b) dormant judgments. 98

Against judgments entered on confession:—(I.) In favor of creditors; (II.) for irregularities; (III.) for fraud; (IV.) judgments against public policy: (a) usury; (b) compounding crimes; (c) gambling consideration; (V.) judgments against sureties; (VI.) judgments against corporations; (VII.) judgments against partners; (VIII.) judgments against executors and administrators; (IX.) statute of limitations; (X.) consideration not due; (XI.) valid defense must be shown; (XII.) negligence; (XIII.) remedy at law; (XIV.) other matters. 235

Against judgments in garnishment proceedings:—(I.) Necessity of making defense at law; (II.) injunction for errors and irregularities; (III.) void judgments; (IV.) fraud and mistake; (V.) payment; (VI.) set-off; (VII.) injunctions in behalf of creditors. 860

Against judgments for matters arising subsequent to their rendition:—(I.) Lack of remedy by appeal or new trial: (a) by mistake; (b) by act of court or officer; (c) other cases of defective record; (d) by negligence; (II.) lost or destroyed record; (III.) for fraud; (IV.) for alteration of record; (V.) judgments set aside, reversed, or superseded; (VI.) for payment or satisfaction; (VII.) in behalf of surety; (VIII.) for set-off; (IX.) for newly discovered evidence. 560

Against judgments for errors and irregularities:—(I.) For erroneous rulings and decisions: (a) generally; (b) in refusing a continuance; (c) in rulings on pleadings or motions; (d) in rulings on evidence; (e) as to incompetency of evidence; (f) as to insufficiency of evidence; (g) as to excessive judgments; (h) as to parties; (II.) for irregularities: (a) generally; (b) as to infants; (c) in trial; (d) in matters of form; (e) in pleadings and papers; (f) in records and dockets; (g) in regard to time of rendering judgment. 700

Against judgments obtained by fraud, accident, mistake, surprise, and duress:—(I.) Equity jurisdiction; (II.) fraud in obtaining judgments: (a) by agreement: (1) generally; (2) to dismiss; (3) to give notice; (4) to abide by other matters; (5) to allow a defense; (6) to continue or delay; (7) to compromise; (8) where complainant participated in fraud; (b) by concealment; (c) in matters of record; (d) in matters

of party; (e) in acts committed at the trial; (f) by collusion; (g) other matters; (III.) on account of accident: (a) sickness: (1) of party; (2) of family; (8) of witness; (4) of attorney; (b) death of attorney; (c) other causes; (IV.) on account of mistake: (a) of law; (b) of fact; (V.) on account of surprise: (a) generally; (b) in matters of witnesses; (c) in regard to perjury; (VI.) on account of duress. 786

INSOLVENCY.

1. A claim upon an employer's liability policy does not pass to an assignee in insolvency proceedings under an assignment by the employer, before any action has been commenced against him by the employee who was injured. *Anoka Lumber Co. v. Fidelity & C. Co.* (Minn.) 689

2. A payment upon collaterals held to secure a claim against an insolvent estate, shown merely to have been made upon the same day that the claim was proved, should not be deducted from the amount of such claim as made before the proving, as acts done upon the same day will generally be regarded in law as done at the same time. *Levy v. Chicago Nat. Bank* (Ill.) 880

8. A secured creditor of one who becomes insolvent is entitled to prove his claim and to participate in dividends only for the amount remaining after deducting sums realized upon collaterals up to the date of filing his claim and making the preliminary proofs, and not upon the claim as it exists at the date of the assignment,—especially in view of the provisions of the Illinois assignment act, that creditors must assent to the assignment by proving their claims within a certain time, and for continuance of the proceeding by assent of a majority of creditors, as a creditor acquires no vested interest in the assigned estate until his assent is so signified. *Id.*

NOTES AND BRIEFS.

Insolvency; Injunction in favor of assignee for creditors to prevent execution sale. 124

INSURANCE. See also BENEVOLENT SOCIETIES, 4; CONTRACTS, 18; DEFINITIONS; INSOLVENCY, 1.

Right to do business.

1. A state has power to regulate the business of fire insurance within its boundaries. *Hoadeley v. Purifoy* (Ala.) 851

2. Only chartered insurance companies are included within Ala. Acts 1886-87, p. 85, requiring all insurance companies doing business in the state, "whether chartered by the state or admitted from other states," to have an actual capital of not less than \$100,000. *Id.*

3. Only foreign incorporated insurance companies are included within Ala. Acts 1886-87, p. 105, requiring every insurance company "not organized under the laws of this state" to pay a uniform license tax for the privilege of carrying on business within the state. *Id.*

4. The citizens of any state are entitled to carry on insurance business in Alabama as individuals, associations, partnerships, or companies, in the absence of any statute prohibiting the citizens of such state from doing so. *Id.*

Agents.

5. A person authorized to accept risks, to agree upon and settle the terms of insurance, and to carry them into effect by issuing and renewing policies, must be regarded as the general agent of the insurance company. *Goodie v. Georgia Home Ins. Co.* (Va.) 942

6. The acts of clerks or employees of insurance agents, to whom they delegate authority to discharge their functions, within the scope of their agency, bind the insurer to the same extent as the acts of the agents. *Id.*

Construction of policy.

7. A written special description of the subject-matter must control the printed clauses of an insurance policy, whenever they are inconsistent. *Faust v. American F. Ins. Co.* (Wis.) 738

8. The construction to be given to an insurance policy will not be controlled by the fact that in correspondence relating to the loss the insured apparently sought to bring it within the policy as interpreted by the insurer. *Jackson v. British America Assur. Co.* (Mich.) 698

9. A provision in a marine policy blank upon which a fire insurance contract is written, for navigation by the vessel insured, does not so far conflict with a clause in a fire policy blank providing for insurance while the property is "located and contained as described herein" as to be waived by a rider attached to the marine blank waiving all provisions which conflict with the fire blank, although the description in the rider locates the property at a particular place. *Id.*

10. Riders attached to a policy of insurance on a vessel, describing it as "laid up" in a harbor, and giving permission "to make repairs" and "fit out in the spring" and "more from dock to dock" to load and unload, do not prevent the policy from covering the vessel while on a voyage which is permitted by the body of the policy. *Id.*

11. The cost of repairs to a vessel insured against fire at the time it sunk while burning need not be minutely proved to justify a recovery on a policy making the insurer liable only for the actual cash value of the property destroyed or the cost of replacing it. *Id.*

12. Life insurance taken by a man before marriage is to be deemed "effected by a husband" within the provisions of Mill. & V. (Tenn.) Code, §§ 8135, 8335, giving the benefit of such insurance to the widow, children, and next of kin free from claims of creditors. *Rose v. Wortham* (Tenn.) 109

Guaranty of employer or employee.

13. A contract guaranteeing the honesty of employees is not void as against public policy. *Fidelity & C. Co. v. Eickhoff* (Minn.) 886

14. The obligation of an employee to indemnify a guaranty insurance company for payments to his employer in satisfaction of a guaranty policy executed at his request insuring against his fraud or dishonesty is coextensive with the insurer's obligation to indemnify the employer. *Id.*

15. Provisions as to proof of liability on a guaranty policy insuring against fraud or dishonesty of an employee are as binding on the

employee at whose request the policy was executed, when reimbursement is claimed by the insurer, as they were upon the insurer in favor of the employer. *Id.*

16. An action upon an employer's liability policy may be maintained by the employer after judgment against him on account of an accident to an employee, without first paying the judgment, under a policy insuring against liability for injuries to employees, providing that the insurer shall settle any loss and have control of any legal proceedings against the assured for such injuries, and that the assured shall not settle such claims without the consent of the insurer, and also that no action shall be brought on the policy after the period in which one might be brought by the employee against the employer, unless a suit was pending against the employer when that time expired, since such a policy is not merely one of indemnity, but an agreement to assume and pay the liability. *Anoka Lumber Co. v. Fidelity & C. Co. (Minn.)* 689

Forfeiture; conditions; misrepresentations.

17. The forfeiture of an insurance policy as to the risk upon a dwelling house, by virtue of a provision that the entire policy shall be void for vacancy or nonoccupancy, avoids it also as to personal property in the house. *Agri-cultural Ins. Co. v. Hamilton (Md.)* 688

18. A dwelling house is vacant or unoccupied in the sense in which those terms are employed in a policy of insurance, when it is not used as a fixed abode, although employees occasionally sleep there and some provisions are kept in the house, which is visited to obtain them. *Id.*

19. Failure to mention encumbrances and other insurance in an application for insurance cannot be set up by the insurer, when the omission was made by advice of the solicitor, who issued the policy in the name of the agent, and had full knowledge of the facts. *Goode v. Georgia Home Ins. Co. (Va.)* 842

20. The examination of insured property, required by Ohio Rev. Stat. § 8643, for the purpose of fixing the value, which shall control in the absence of any change increasing the risk, does not include any examination of the matter of encumbrances, so as to prevent a forfeiture by reason of a new encumbrance on the property, whether it increases the risk or not. *Webster v. Dwelling House Ins. Co. (Ohio)* 719

21. A representation and warranty that the insured property was owned by husband and wife jointly will not be held to be untrue within a condition in an insurance policy, merely because the title to the real estate is wholly in the wife and the title to the personalty wholly in the husband, where the property consists of a family homestead and the personalty thereon. *Id.*

Risks covered or prohibited.

22. The insured can be held to have "contemplated suicide" so as to defeat a policy of life insurance under Mo. Rev. Stat. 1889, § 5855, only when he intended or had resolved to commit suicide at the time he made his application for the policy. *Atna L. Ins. Co. v. Florida (C. C. App. 8th C.)* 87

23. Death by hanging at the hands of a mob is an accident within the meaning of a policy against injuries through "external, violent, and accidental means." *Fidelity & C. Co. v. Johnson (Miss.)* 206

24. The death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident, and not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed. *Lovelace v. Travelers' Protective Assn. (Mo.)* 209

25. The fall of a building is "the result of fire" and "a direct loss or damage by fire," although no part of it ignites or is consumed by fire, when it is partly carried down, together with a partition wall, by an adjacent building which falls as the direct result of a fire therein. *Ermentrout v. Girard F. & M. Ins. Co. (Minn.)* 849

26. Painters employed in repainting a building are not "mechanics" within the provision of an insurance policy respecting the employment of mechanics on the building. *Smith v. German Ins. Co. (Mich.)* 868

27. Gasoline is not "kept, used, or allowed" on the premises insured, within the meaning of a provision for avoiding the policy, by leaving a 5-gallon can containing gasoline in the building for a number of days for use in burning off old paint preparatory to repainting the building. *Id.*

28. The increase of hazard by using gasoline to burn old paint from a brick and stone building is a question for the jury, where there is some testimony to show that this was the custom of painters. *Id.*

29. Keeping a small quantity of benzine necessary for use in a furniture repair shop does not forfeit a policy of insurance thereon, although the printed portion of it declares that it shall be void if benzine is kept on the premises, where the written portion of the policy insures the building as a "furniture store and repair shop." *Faust v. American F. Ins. Co. (Wis.)* 788

30. The use of inflammable substances, which is a necessary, usual, and customary incident to a business, must have been in the contemplation of the parties at the time of taking a policy of insurance upon a stock of materials used in that business; and therefore the policy is not avoided, notwithstanding the express language to that effect in printed clauses, by keeping such substances in such quantities only and using them in such manner only as must have been contemplated. *Maril v. Connecticut F. Ins. Co. (Ga.)* 835

31. Inflammable substances constituting component parts of a stock of materials used in a business are covered by a policy of insurance on the stock of materials used in such business, even if there is a printed condition in the policy against the keeping of such inflammable substances. *Id.*

Notice; proofs; waiver.

32. A condition of immediate notice of loss insured against is broken, as matter of law, by failure for nearly sixty days to give such notice. *Ermentrout v. Girard F. & M. Ins. Co. (Minn.)* 846

83. Notice of an accident before any claim thereon is made is not necessary under an employer's liability policy requiring immediate notice by the assured "upon the occurrence of an accident and upon the notice of any claim on account of the accident." *Anoka Lumber Co. v. Fidelity & O. Co.* (Minn.) 689

84. An adjuster's visit to insured premises soon after a fire, and his taking away a list of the property destroyed, which is not returned, with a denial of liability for the loss on the ground that the policy had been avoided, is a waiver of provisions of the policy requiring proofs of loss. *Faust v. American F. Ins. Co.* (Wis.) 768

85. Local agents have no implied authority to accept or waive notice of loss insured against, although they have authority to accept applications, fix rates, fill up, countersign, and issue policies, and collect premiums. *Ermentrout v. Girard F. & M. Ins. Co.* (Minn.) 846

86. Failure to give notice of loss, which defeats a right of action for insurance, is not waived by retaining proofs of loss sent after the policy is dead, where the insurer gives notice of a denial of any liability on the policy. *Id.*

87. An insurer waives a cause of forfeiture of a policy by failing to mention it when it undertakes to state definitely its reasons for denying liability thereon. *Smith v. German Ins. Co.* (Mich.) 868

Rights in proceeds.

88. The term "legal representatives," in a policy of life insurance, as a description of the beneficiaries, does not give the executor or administrator any beneficial interest in the recovery so as to defeat the right of widow, children, and next of kin under Mill. & V. (Tenn.) Code, §§ 8185, 8885, to take the proceeds free from claims of creditors. *Ross v. Wortham* (Tenn.) 609

89. The word "heirs," in a policy of life insurance payable to the "heirs or assigns" of the assured, who has no wife or child, is to be construed to mean his next of kin according to the statute of distributions. *Hubbard v. Turner* (Ga.) 598

40. The interest of the "heirs" to whom a policy of life insurance is made payable, being derived from the contract, and not from the statute which determines who are within the description, cannot be made subject to the claims of the creditors of the person whose life is insured. *Id.*

41. The fact that the loss is by indorsement made payable to mortgagees as their interest may appear does not prevent a breach of condition of the policy from making it void as to the mortgagees, as well as to other parties. *Agricultural Ins. Co. v. Hamilton* (Md.) 688

NOTES AND BRIEFS.

Insurance; powers of agent; of agent's clerk. 842

Notice to agent. 846

Construction of guaranty policy. 586

Employer's liability policy. 690

Right to rescind contract of, for default of other party. 69

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Waiver of objection to notice of loss. 847

Statute as to increase of risk. 719

Keeping prohibited articles on premises. 868, 754

Who are "heirs" within the meaning of life insurance policies:—(I.) In general; (II.) other words combined with the word "heirs;" (III.) widow as an heir; (IV.) insured as heir or beneficiary. 543

Who are "legal representatives" within the meaning of life insurance policies:—(I.) In general; (II.) other words combined with the words "legal representatives." 609

Effect of riders or slips attached to insurance policies. 636

What constitutes an accident within the meaning of an accident insurance policy:—(I.) Definitions; general rules; (II.) intentional injuries: (a) self-inflicted; (b) inflicted by others; (c) proviso against liability for intentional injuries; (III.) accident and disease: (a) distinguished; (b) accident caused by disease; (c) disease caused by accident; (d) disease aggravated by accident; (IV.) other instances. 206

INTEREST. See BONDS, 8; CRIMINAL LAW, 4.

INTOXICATING LIQUORS.

An incorporated social club is not engaged in the business of selling intoxicating liquors within the meaning of Sayles's (Tex.) Civ. Stat. art. 8226a, imposing an occupation tax on such business, where the club does not sell liquors for profit, and sells them only to its members. *State v. Austin Club* (Tex.) 500

NOTES AND BRIEFS.

Intoxicating liquors; sale of, by club. 500

JUDGMENT. See also APPEAL AND ERROR, 5; COURTS, 7; INFANTS; INJUNCTION, 1; MORTGAGE, 4-9.

1. A judgment by confession is irregular only, and not void, where it is founded on a valid debt and there is a sufficient warrant of attorney and release of errors, although the answer of confession, required under Wis. Rev. Stat. § 2896, to be signed by defendant or some attorney in his behalf, is signed by plaintiff's attorney in the name of another attorney, at his special instance and request, as attorney for defendant. *John V. Farwell Co. v. Hilbert* (Wis.) 225

2. A money judgment is properly rendered against a railroad company purchasing from a trustee for bondholders a railroad bought in by him under a reorganization scheme, with notice of the trust, by which the bondholders were entitled to new bonds secured by mortgage, where it refuses to comply with an interlocutory decree directing it to issue such bonds, although stock in a construction company was given in consideration of such purchase, which was at one time of great value, but has greatly depreciated. *Indiana, I. & I. R. Co. v. Swannell* (Ill.) 290

3. A judgment for the lienor in an action against a contractor under the Minnesota log

lien law (Minn. Gen. Stat. 1894, §§ 2451-2465) does not preclude the owner of the logs from denying in a subsequent action plaintiff's right to a lien; but such judgment, if regular on its face, will be held valid unless the contrary affirmatively appears. *Brown v. Markham* (Minn.) 84

4. The description of the property in a decree foreclosing a lien, which properly describes the lot and building, is not made insufficient by adding "save and except the land and the basement and foundation" of the building. *Oriental Hotel Co. v. Griffiths* (Tex.) 765

5. The revival of a judgment against the judgment debtor by a writ of scire facias regularly issued, or by an amicable scire facias, is effective as against the grantee in a deed made after the judgment but before its revival, of which the judgment creditor had neither actual nor constructive notice prior to the revival. *Lyon v. Cleveland* (Pa.) 400

6. The revival by amicable scire facias of a judgment is not abandoned by subsequent erroneous proceedings upon discovering that a transferee claimed an interest in the property covered by the judgment lien, which are instituted for the purpose of making the judgment effective against him. *Lyon v. Cleveland* (Pa.) 400

7. Proceedings to revive a judgment as against a terre-tenant, after receiving notice that he held a secret deed to the property at the time the judgment was regularly revived against the judgment debtor, are erroneous, since he is bound by the proceedings against the debtor. *Id.*

NOTES AND BRIEFS.

See also INJUNCTION.

Jurisdiction of and service by publication. 628

Confession of, as fraud to sustain attachment. 486

Injunction against for matters arising subsequent to rendition. 560

Injunction in favor of judgment creditor against execution sales; dormancy of, as ground for injunction against execution. 142

Collateral attack on decision of inferior tribunal. 578

Revival by scire facias. 400

JUDICIAL SALE. See also INJUNCTION, 10.

NOTES AND BRIEFS.

Judicial sale; bona fide purchaser at. 293

JURY. See TRIAL, 1-4.

LANDLORD AND TENANT. See also CONTRACTS, 8.

1. A covenant by the lessor of a hotel, "that he will keep . . . in good repair" the outside of the premises, binds him to repair the roof so as to make the building habitable, if it was out of repair at the time of the lease, and is not satisfied in such case by maintaining the premises in the same condition as when leased. *Miller v. McCordell* (R. I.) 682

2. An abatement of so much of the rent as

was paid "for the building" must be allowed under Miss. Code 1892, § 2498, in case of the destruction of buildings which constituted a material part of the consideration of the lease. *Taylor v. Hart* (Miss.) 716

3. A lessee of rural as well as urban property is within the provision of Miss. Code 1892, § 2498, exempting him from liability to pay rent for buildings destroyed without his fault. *Id.*

NOTES AND BRIEFS.

Landlord and tenant; injunction in favor of landlord against execution sale. 129

Covenant as to repairs. 682

LAUNDRY. See LICENSE, 2.

LEASE. See RAILROADS, 1, 2.

LEGAL REPRESENTATIVES. See INSURANCE, NOTES AND BRIEFS.

LEGISLATURE. See also COUNTIES, 1, 2; MUNICIPAL CORPORATIONS, 14, 16; OFFICERS, 1.

1. A committee appointed by the legislature to make an examination and find the facts from the evidence and report the facts and set out the evidence in full, is not entitled to an attorney as a "necessary expense." *Purnell v. Worth* (N. C.) 262

2. A committee appointed by the general assembly to make an examination and find the facts from the evidence, with authority to make the report after adjournment of the assembly, cannot draw *per diem* or mileage after such adjournment, unless the resolution appointing them provides therefor. *Commercial & F. Bank v. Worth* (N. C.) 261

3. A resolution by the general assembly providing that a committee created thereby shall find the facts from the evidence in an examination to be made by it, report such facts and set out the evidence in full and report to the general assembly "if it is possible to do so before its adjournment, and if not then said report shall be made to the supreme court," confers on such committee no power to act after adjournment of the general assembly except to make the report. *Id.*

LEVY AND SEIZURE. See also HUSBAND AND WIFE, 10.

NOTES AND BRIEFS.

Levy and seizure; irregularities in, as ground of injunction. 136

LIBEL AND SLANDER. See also HUSBAND AND WIFE, 2.

Saying that a man has been drunk throughout Thanksgiving week, and has not retired any night during that week other than in a state of drunkenness, and that he has drunken people in his room, and gets people there and makes them drunk, is slanderous *per se*, as the words involve moral turpitude and charge an indictable offense. *Morgan v. Kennedy* (Minn.) 521

NOTES AND BRIEFS.

Libel; liability of husband and wife for the wife's libel and slander:—(I.) The common-law doctrine; (II.) effect of state legislation; (III.) the question of the husband's presence and coercion; (IV.) joinder of parties and actions; (V.) necessity of services upon wife; (VI.) effect of death pending action; (VII.) husband and wife as witnesses; (VIII.) damages and evidence in mitigation; (IX.) effect of judgment in such cases; (X.) action on bail bond in such cases. 521

LICENSE. See also **COMMERCE**, 4; **CONSTITUTIONAL LAW**, 7.

1. The uniformity clause of Mont. Const. art. 12, § 1, relating to taxation, does not apply to licenses imposed on occupations. *State, Toi, v. French* (Mont.) 415

2. Imposing on laundrymen the payment of a license fee of \$15 for a steam laundry, \$10 for every male person in the business other than that of a steam laundry, and \$25 for a male laundryman employing one or more other persons, does not grant a monopoly or have a prohibitory effect. *Id.*

8. A license fee of \$100 per annum charged an itinerant vendor of drugs professing to cure or treat all diseases is not unreasonable. *State v. Wheelock* (Iowa) 429

NOTES AND BRIEFS.

License; limit of amount of license fees:—(I.) Power to fix license fees generally; (II.) constitutional restrictions as to amount: (a) provisions against discrimination; (b) provisions against violation of contract obligations; (c) provisions requiring equality and uniformity; (d) direct restrictions as to amount of levy; (e) miscellaneous provisions; (III.) graduation of license fees; (IV.) limitations peculiar to municipal corporations: (a) statutory and charter restrictions; (b) must not be discriminating; (c) under a general power to regulate: (1) what may be included in the fee; (2) must not be for revenue; (3) distinction between measures for revenue and regulation; (4) must not be unreasonable or in restraint of trade; (5) reasonableness, by whom determined; (6) presumption of reasonableness; (7) what impositions are reasonable; (d) under a power to restrain or prohibit; (e) under a power to tax or license; (f) when discretion is expressly conferred. 415

LIENS. See also **CONSTITUTIONAL LAW**, 1; **JUDGMENT**, 3, 4; **PLEADING**, 5.

1. Holders of liens cannot be divested of them and their liens transferred to the proceeds of a sale on foreclosure of another lien, to which they are not made parties. *Oriental Hotel Co. v. Griffiths* (Tex.) 765

2. The time of the inception of mechanics' liens is the time to which they relate in giving them effect, under Sayles's (Tex.) Civ. Stat. art. 3171, as amended in 1889, saving mortgages and other encumbrances on the land at the time of the inception of other liens, and art. 3179, placing all liens upon an equal footing, so that a mortgage upon an incomplete building is subject to all mechanics' liens which accrue 80 L. R. A.

before its completion, as they relate back to the beginning of the work. *Id.*

8. A mechanic's lien for machinery placed in a mill is superior to a prior mortgage taken on the premises when the mill was unfinished and substantially without machinery, under Wis. Rev. Stat. § 3314, making such liens "prior to any other lien which originates subsequent to the commencement of the construction . . . or work" for which the lien is claimed. *Vilas v. McDonough Mfg. Co.* (Wis.) 778

NOTES AND BRIEFS.

Liens; on logs, validity of. 84

Mechanics'; priority of. 766, 779

Injunction in favor of or against lien creditors to prevent execution sales. 125

LIMITATION OF ACTIONS.

NOTES AND BRIEFS.

Suspension of, by injunction. 142

Injunction against judgment confessed on debt barred by. 241

LOBBY. See **CONTRACTS**, **NOTES AND BRIEFS**.

MANDAMUS.

Mandamus may issue to a private corporation furnishing a municipality with water under a franchise, to compel water to be furnished to a patron without discrimination, where the company has refused to furnish it without an unjust charge. *American Waterworks Co. v. State, Walker* (Neb.) 447

MANDATORY INJUNCTION. See **INJUNCTION**, 3.

MARINE INSURANCE. See **INSURANCE**, 9.

MARK. See **WILLS**, 2.

MASTER AND SERVANT. See also **NEGLIGENCE**, 2.

1. Allowing a brake-staff to remain loose in its socket, and to be bent at an angle of 30 degrees from the perpendicular, when it is used by brakemen and switchmen for the purpose of mounting a flat car used in front of a road engine for switching purposes, is negligence on the part of a railroad. *Prosser v. Montana C. R. Co.* (Mont.) 814

2. A switchman and brakeman who grasps a brake-staff on the front of a flat car as it approaches him, for the purpose of mounting the car as his duties require him to do and in the manner that he is expected to mount, although the staff is loose in its socket and is bent, but appears to him to be straight as the bend is directly away from him, is not as matter of law guilty of contributory negligence. *Id.*

3. The reservation by an employer under an independent contract for the construction of a building, of the right of inspection of the work, does not change the character of the contract so as to render him liable for the negligence of

some of the workmen employed by the contractors. *Smith v. Milwaukee Builders' & T. Exch.* (Wis.) 504

NOTES AND BRIEFS.

Master and servant; contributory negligence of servant. 815

MAXIMS.

1. Aqua cedit solo. *Wholey v. Caldwell* (Cal.) 820

2. Aqua currit et debet currere ut currere solebat ex jure naturæ. *Id.*

3. Cessat ratio, cessat lex. *Isaacs v. Barber* (Wash.) 665

4. Delegatus non potest delegari. *Goode v. Georgia Home Ins. Co.* (Va.) 842

5. Expressio unius est exclusio alterius. *Kelly v. Minneapolis* (Minn.) 281

6. Omnia rite acta præsumuntur. *Fidelity & C. Co. v. Eickhoff* (Minn.) 586

7. Sic utere tuo ut alienum non lædas. *Briscoe v. Alfrey* (Ark.) 607

MAYOR. See OFFICERS, 2.

MERGER.

NOTES AND BRIEFS.

In case of estate by entreties. 813

MINES. See also EVIDENCE, 26; NEGLIGENCE, 2.

1. The existence between two veins of such material or indications as a practical miner would follow with the expectation of finding ore does not establish such connection between them as entitles the owner of the vein first located to the ore in the portion of the other vein lying within his location, but which, in the absence of a connection between the two veins, belongs to the owner of the other vein by virtue of U. S. Rev. Stat. § 2322; but the connection, to accomplish such result, must be through a continuous streak or body of ore or through vein matter. *Fitzgerald v. Clark* (Mont.) 803

2. The construction of U. S. Rev. Stat. § 2322, defining the rights of a mining locator in a vein of which the apex is within his location, should be such as to give him a length on the strike equal to the length of the apex within the boundary lines of his location, regardless of the direction of the dip or the depth to which it is followed. *Id.*

3. The owner of a mining claim located on the apex of a vein which enters on an end line and passes out of a side line is entitled, under U. S. Rev. Stat. § 2322, to so much of the strike of the vein on the dip extending beyond such side line as is included between a vertical plane let fall into the earth through such end line extended, and a parallel vertical plane let fall through the point of intersection of the apex and the side line. *Id.*

NOTES AND BRIEFS.

Mines; right to follow vein. 804

MISTAKE.

NOTES AND BRIEFS.

As ground of injunction against judgment. 786

MORTGAGE. See also ACTION OR SUIT, 2, 8; CONTRACTS, 23; HUSBAND AND WIFE, 6, 7; INSURANCE, 41; LIENS, 2, 3; RECEIVERS, 8; SUBROGATION, 8; TRUSTS, 1.

1. A resolution of directors included in a deed of trust, to the effect that this shall constitute a prior and first lien, is inoperative to change the relation of that lien to others as fixed by law. *Oriental Hotel Co. v. Griffiths* (Tex.) 765

2. A mortgage for the support of persons during life may be foreclosed after their death, to obtain payment of claims allowed in administration for support furnished them after the mortgagor's breach of his contract. *Tuttle v. Burgett* (Ohio) 214

3. A receiver of a building and loan association cannot foreclose under the power of sale contained in mortgages held by the association. *Strauss v. Carolina I. Bldg. & L. Asso.* (N. C.) 693

4. A judgment for personal injuries is not deprived of its priority over a railroad mortgage, under S. C. Gen. Stat. 1882, § 1528, by the fact that the mortgage was executed by a consolidated company formed from companies organized in South Carolina and other states, and the entire property was sold as a unit, as against a purchaser who agreed as part of the price to satisfy all claims adjudged prior in lien to the mortgage. *Southern R. Co. v. Bouknight* (C. C. App. 4th C.) 823

5. A mortgagee of a railroad by accepting the mortgage subsequent to the passage of a statute giving judgments against the railroad company for personal injuries, recovered in actions commenced within twelve months from the injury, precedence over any mortgage or security for bonds, assents to such priority. *Id.*

6. A railroad mortgage is not entitled to priority over a judgment for personal injuries subsequently recovered, under S. C. Gen. Stat. 1882, § 1528, providing that such judgments shall take precedence over any mortgage, because of the further provision that they shall relate back to the date when the cause of action arose, and the fact that the injury was subsequent to the mortgage. *Id.*

7. The priority of a judgment recovered against a consolidated railroad company over a mortgage made by such company, under S. C. Gen. Stat. 1882, § 1528, cannot be defeated on the theory that the mortgagor was in fact three corporations of different states, and that the injury was inflicted in the exercise of the franchises of a separate domestic corporation of another state. *Id.*

8. A personal injury in another state for which judgment is recovered in South Carolina is within S. C. Gen. Stat. 1882, § 1528, giving priority to a judgment recovered on a cause of action against a railroad company for personal injuries over any railroad mortgage. *Id.*

9. A purchaser on foreclosure of a mortgage on the property of a railroad company, who has covenanted to discharge all liens held prior to the mortgage, is not entitled to assert an equity for the revival of prior mortgages executed before the passage of S. C. Gen. Stat. 1882, § 1528,

giving judgments for personal injuries priority over railroad mortgages, so as to destroy the precedence of such a judgment over the mortgage upon which the sale was made, or to claim a proportionate reduction by reason thereof. *Southern R. Co. v. Bouknight* (C. C. App. 4th C.) 828

10. A purchaser on foreclosure sale under a mortgage given by the husband alone on land held by the entirety, where the wife is alive at the time of the sale, obtains the husband's interest, which is subject to her right of survivorship, with the right to use an undivided half of the land during the joint lives of the husband and wife. *Hiles v. Fisher* (N.Y.) 805

NOTES AND BRIEFS.

Mortgage; injunction in favor of mortgagee against execution sale. 125

MUNICIPAL CORPORATIONS. See also ACTION OR SUIT, 1; BONDS, 4; BRIDGES; COUNTIES, 1; COURTS, 3, 5; HIGHWAYS, 1; PUBLIC IMPROVEMENTS, 1; TRIAL, 18; WATERS, 21.

Annexation.

1. A statute giving a city council jurisdiction to annex adjacent lands on the written consent of the owners gives the council no jurisdiction to annex lands on the petition of owners whose lands are not adjacent. *Forryth v. Hammond* (Ind.) 576

2. Lands subdivided into lots and blocks, if not contiguous to the limits of a city, are not "platted" within the meaning of the statutes relating to the annexation of territory to municipalities. *Id.*

3. The annexation by a city council of territory to the city by proceedings in which it acquires no jurisdiction may, except in case of estoppel, be collaterally attacked. *Id.*

4. The jurisdiction of the county board to order annexation of territory to a city is not defeated under Ind. Rev. Stat. 1894, § 3659, by the fact that a part of the lands are platted, if the platted section is not contiguous to the city. *Id.*

5. Failure of the owner to consent need not be alleged in a proceeding for the annexation of unplatted land to a city, since the very existence of the controversy implies, not only a desire for annexation on the part of the city, but also want of consent thereto on the part of the property owner. *Id.*

6. If the parties declining to join in an appeal go voluntarily before the supreme court and file their written declination, all is accomplished that was intended by Ind. Rev. Stat. 1894, § 647, providing for an appeal by some of several coparties upon service of notice upon all, and striking out the names of those refusing to join on motion, so that the appeal cannot be dismissed for failure to make them parties after the time for them to appeal has passed. *Id.*

Powers and liabilities generally.

7. Power to make ordinances on a given subject, conferred by the legislature without prescribing the details, must be reasonably exercised, else the ordinances will be held invalid. *Hawes v. Chicago* (Ill.) 225

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8. The reasonableness or unreasonableness of a municipal ordinance is a question for the decision of the court in the light of all existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption. *Id.*

9. The common council of a city has power to pass an ordinance requiring any owner or contractor building or causing to be built any building abutting on a public sidewalk, to build a roofed passageway in front on the sidewalk after completion of the first story, under a charter giving it power to control and regulate the construction of buildings, to control and regulate streets, and to regulate the manner of using the streets and pavements. *Smith v. Milwaukee Builders' & T. Exch.* (Wis.) 504

10. The erection of an electric-light plant to supply the inhabitants of a city with light for use in private residences and business houses, as well as to light the streets and public places of the city, is for a municipal purpose within the meaning of a statute authorizing the issue of bonds for municipal purposes. *Jacksonville Electric Light Co. v. Jacksonville* (Fla.) 540

11. The maintenance of municipal waterworks is in no sense a private business, for negligence in which the corporation will be held liable, but is an exercise of governmental power for the public good, appertaining to the corporation in its political character. *Springfield H. & M. Ins. Co. v. Keeseville* (N. Y.) 660

12. A municipal corporation is not liable for damages caused by fire in consequence of its negligent failure to maintain sufficient waterworks. *Id.*

13. A sale by city authorities, without legislative authority, of waterworks which the city has been given power to construct and maintain for public use, is invalid, as the property is clothed with a public trust which cannot be discharged and devolved upon another party. *Huron Waterworks Co. v. Huron* (S. D.) 848

Debts.

14. The power of the legislature to change and readjust the burden of municipal indebtedness, after the division of a city and after having declared in the act of separation in what manner it should be borne by the divisions, still remains; and such future adjustments may be made as the equities may suggest. *Johnson v. San Diego* (Cal.) 178

15. Liability for a *pro rata* share of the debts of the city continued on a part excluded from San Diego, under Cal. Stat. 1889, p. 356, providing that it shall not "relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion." *Id.*

16. The legislature has power to require a city to incur a debt, without its consent, for the acquisition of public bridges and ferries, as is done by Or. act 1895, relating to the city of Portland, in the absence of any constitutional prohibition. *Simon v. Northrup* (Or.) 171

17. Liability for part of the expense of building a viaduct or bridge over railroad tracks within a city, for the safety and con-

venience of the public, may be incurred by the city when it is deemed just, under a contract with the railroad company, even if the city might be able to compel the railroad company to build it at its own expense. *Argentine v. Atchison, T. & S. F. R. Co.* (Kan.) 255

18. The amount of a sinking fund must be deducted from the total apparent debt of a city, to ascertain if its actual debt exceeds the debt limit. *Kelly v. Minneapolis* (Minn.) 281

19. Park board certificates reciting that the city is indebted in the sum named therein, and that the consideration therefor is a conveyance of land which is mortgaged to secure their payment, and that they are payable out of funds arising from assessments for benefits, and also that there is no liability on the part of the city to pay them out of any other fund,—do not constitute a part of the indebtedness of the city within the meaning of a statute fixing a debt limit. *Id.*

City attorney.

20. The duty of a city attorney to attend to "all suits, matters, and things" in which the city may be legally interested, under Cal. Pol. Code, § 4891, is not limited to suits in any particular courts. *Buck v. Eureka* (Cal.) 400

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See also LICENSE.

Municipal corporations; legislative power to impose burdens upon. 172

Power to annex territory. 576

Limitation of indebtedness; use of sinking fund. 281

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MURDER. See HOMICIDE.

NATURALIZATION. See ALIENS, NOTES AND BRIEFS.

NEGLIGENCE. See also ANIMALS; CONTRACTS, 14; GAS; MASTER AND SERVANT; STREET RAILWAYS; TRIAL, 5-8, 10, 11.

1. Liability to persons for whose protection a statute was made, in case of their injury by breach of it, is subject to the defense of contributory negligence. *Queen v. Dayton Coal & I. Co.* (Tenn.) 82

2. Violation of a statute by hiring a boy under twelve years of age to work in a mine constitutes negligence *per se*, which will sustain a civil right of action whenever the boy sustains injuries in consequence of the employment. *Id.*

3. He who has the last clear chance, notwithstanding the negligence of the adverse party, is considered solely responsible for injuries resulting from his failure to exercise reasonable care. *Pickett v. Wilmington & W. R. Co.* (N. C.) 257

4. Contributory negligence on the part of a minor is to be measured by his age and his ability to discern and appreciate circumstances of danger. *Queen v. Dayton Coal & I. Co.* (Tenn.) 82

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Negligence; contract stipulating against liability for. 194

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NEGOTIABLE PAPERS. See BILLS AND NOTES.

NEWSPAPERS.

1. A person to whom a paper is sent without his knowledge or consent, either expressed or implied, although it is done under a valid contract with a third person, is not a "subscriber" within the meaning of Iowa Code, § 807, as amended (McClain's Code, § 428), requiring supervisors to select as the official newspapers of the county the two having the largest number of bona fide yearly subscribers within the county. *Ashton v. Stoy* (Iowa) 584

2. An amendment of the list of subscribers by adding the name of one omitted should be refused by the district court on review of the action of the board of supervisors in the selection of a county newspaper. *Id.*

3. A motion in a district court to require plaintiffs to state more particularly the manner in which they were aggrieved by the action of the board of supervisors in the selection of a county newspaper under Iowa Code, § 807, is properly overruled. *Id.*

NEW TRIAL.

1. A juror's affidavit impeaching the verdict rendered in an equity case, which is merely advisory, is properly disregarded. *Hitzgerald v. Clark* (Mont.) 808

2. A correct verdict will not be set aside because of errors occurring on the trial. *Krantz v. Rio Grande W. R. Co.* (Utah) 297

NOTICE.

A railroad company is chargeable with the knowledge of its president and director that property purchased by it is impressed with a trust in favor of the holders of bonds issued by the former owner of such property. *Indiana, I. & I. R. Co. v. Swannell* (Ill.) 290

OCCUPATION TAX. See LICENSE, 1.

OFFICERS. See also BONDS; CONTRACTS, 10-12; COURTS, 1; ESTOPPEL, 2; MUNICIPAL CORPORATIONS, 20.

1. The disability of a member of the legislature "during the time for which he is elected," under Minn. Const. art. 4, § 9, to hold any office under the authority of the United States or the state, except that of postmaster, continues until the expiration of the full period of time for which he was elected, notwithstanding his resignation as a member of the legislature. *State, Childs, v. Sutton* (Minn.) 630

2. A mayor is not subject to a civil action for damages because of an erroneous order, made through malice, for the imprisonment of a person for contempt, if it was an order made

in court and within his power to make. *Scott v. Fishblate* (N. C.) 696

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Constitutional tenure of. 149
Contract for extra compensation. 410
Personal liability of magistrate. 696

OLEOMARGARINE. See **COMMERCE**, 8.

PARDON.

A constitutional provision forbidding exile does not prevent the granting of pardons to convicts upon condition that they leave the state and never return. *Ex parte Hawkins* (Ark.) 736

PARENT AND CHILD.

A decree for the adoption of an illegitimate child with capacity to inherit, without legitimating the child, may be rendered under a petition which asks for both legitimation and adoption. *Murphy v. Portrum* (Tenn.) 263

NOTES AND BRIEFS.

Parent and child; liability of father to pay for support of child after divorce giving custody to wife. 680

PARLIAMENTARY LAW. See also **EVIDENCE**, 5.

1. A majority of the members of a legislative body constitute a quorum, unless the number is otherwise fixed by the Constitution or the power that creates the body. *State v. Stanford*, v. *Ellington* (N. C.) 582

2. It seems that the presiding officer of a legislative body is powerless to count those who are present and do not vote, for the purpose of making a quorum, in the absence of any rule of the House or other express authority to do so. *Id.*

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Parliamentary law; majority of quorum. 582

PARTITION.

NOTES AND BRIEFS.

Between tenants by entireties. 885

PARTNERSHIP.

1. A chose in action accruing to a partnership from a transaction in the ordinary course of its business may be transferred by a single member of the firm. *Gerli v. Poidebard Silk Mfg. Co.* (N. J. Err. & App.) 61

2. An individual creditor who receives money from one partner in satisfaction of a just debt, without knowledge or notice that it is partnership money, can retain it against the claims of the partnership or of the other partners, although the money was in fact derived from the sale of partnership property; but it would be otherwise as to partnership property trans-

ferred in payment of an individual debt. *Stanish v. Babcock* (N. J. Err. & App.) 604

3. Partnership creditors may prove *pari passu* with separate creditors against the estate of a partner, when there is no living solvent partner and no partnership assets applicable to the partnership debts, either at law or in equity. *Thayer v. Humphrey* (Wis.) 549

4. Creditors of the old and of the new firm may prove their claims *pari passu* and be preferred over individual creditors of the members of the new firm, when the new firm assumed the debts of the old with the intention of all parties to have the business continue and pay the old debts out of the business, but the new firm has made an assignment for the benefit of creditors. *Id.*

5. A sale by a partner of his interest in an insolvent firm, for the purpose of paying the old firm debts and thus winding up the old partnership concern by applying the assets to such debts, does not change the equity of the outgoing partner and of the firm creditors to have the assets applied to such debts. *Id.*

6. On a sale of the interest of a partner, his equity to have the assets of the firm applied to the existing partnership debts ceases, even if the purchaser agrees to pay them as part of the consideration, unless there is an express or implied agreement to apply the assets to such purpose. *Id.*

7. Creditors who have trusted persons as partners and a business as that of the firm may hold the property used to carry on the business of the ostensible partnership subject to their claims in case of insolvency, to the exclusion of any claim of either of the ostensible members of the firm or of their separate creditors. *Id.*

8. Partnership creditors have no lien on the partnership assets independent of the equities of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members. *Id.*

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Injunction against judgments by confession against partners. 240

Rights of individual and of firm creditors. 549

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PAYMENT. See also **EVIDENCE**, 16.

Failure to pay a debt in stock when stock is due and demanded makes the entire demand due in money. *Oriental Hotel Co. v. Griffiths* (Tex.) 765

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Payment; as ground of injunction against judgment. 563

PEDDLERS. See **COMMERCE**, 4.

PERPETUITIES.

Gifts to charitable uses are excluded from the operation of the rule against perpetuities by

the statute of 43 Eliz. chap. 4, which is in force in Illinois. *Alden v. St. Peter's Parish* (Ill.) 232

PHYSICIANS. See also **COMMERCE**, 4.

A practicing physician who sends another physician in his place to attend a patient whom he has promised to attend is not liable for the unskilful or negligent acts of the other physician, when the latter is engaged in a distinct and independent occupation of his own, and is not the servant or agent of the former. *Myers v. Holborn* (N. J. Err. & App.) 345

PLEADING.

1. Conclusions of law are not admitted by a demurrer. *American Waterworks Co. v. State, Walker* (Neb.) 447

2. Allegations that a judgment was rendered without jurisdiction of the subject-matter or person of defendant, that no sufficient ground for publication was shown, and that the affidavit stated no ground for attachment,—are mere legal conclusions, and not sufficient to require the enjoining of the judgment. *Gum-Elastic Roofing Co. v. Mexico Publishing Co.* (Ind.) 700

3. A complaint does not show absence of jurisdiction in a justice which will require an injunction against his judgment, which alleges that the "process under which appellant was before said justice being publication of notice as a nonresident." *Gum-Elastic Roofing Co. v. Mexico Publishing Co.* (Ind.) 700

4. A petition to enforce a mechanic's lien is not insufficient because it fails to set forth plans and specifications which are made part of an alleged contract declared upon. *Oriental Hotel Co. v. Griffiths* (Tex.) 765

PRIOR APPROPRIATORS. See **WATERS**, **NOTES AND BRIEFS**.

PUBLIC IMPROVEMENTS. See also **EVIDENCE**, 9, 10.

1. A ordinance compelling the substitution of a cement sidewalk in the place of a plank walk in front of a vacant 20-acre lot, which had been laid less than six months before in conformity with an ordinance, and which was in good condition and in all respects safe, convenient, and sufficient for public use, is unreasonable, unjust, and oppressive, and therefore void. *Hawes v. Chicago* (Ill.) 325

2. The erection on a corner lot of a dwelling house facing the street on the shorter side of the lot, and also of a business house facing the street on the longer side of the lot, makes the portion of the lot occupied by and clearly appurtenant to the latter front on the longer side of the lot. *Toledo v. Sheill* (Ohio) 598

3. An extensive use of the street on the longer side of a corner lot, permitted by doors and halls thereon, is not sufficient to make that side the front of the lot, when the building constitutes a single business house and the plan of construction and style of architecture accord with the presumption that the shorter side is the front.

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4. Appurtenant structures accessible only from the street on the longer side of a corner lot, together with entrances to a dwelling from that street, which are extensively used, are not sufficient to show that that side is the front of the lot, when the front of the dwelling according to its plan of construction or style of architecture corresponds with that of the lot when it was vacant. *Id.*

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Frontage assessment for; on corner lots. 598

PUBLIC LANDS. See **WATERS**, 5, 7, 8, 10-13.

PUBLIC MONEYS.

Funds raised by the taxation of franchises, rights, and privileges, may be applied to purposes of general revenue, or any other purpose authorized by statute. *State, Schwartz, v. Ferris* (Ohio) 218

PUBLIC POLICY. See **COURTS**, 2.

PUBLIC PROPERTY.

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QUORUM. See **EVIDENCE**, 4, 5; **PARLIAMENTARY LAW**.

RAILROADS. See also **CARRIERS**; **CONTRACTS**, 14; **MASTER AND SERVANT**; **MUNICIPAL CORPORATIONS**, 17; **STREET RAILWAYS**, 2, 3.

1. A railroad company which, under a lease of another road, is conducting it wholly in the interest of the lessor, occupies the position merely of operating agent, and the lessor is liable for injuries for the negligence of the lessee. *Southern R. Co. v. Bouknight* (C. C. App. 4th C.) 828

2. A lease of a railroad for 999 years is not a sale within the meaning of a provision in a deed that in case the grantee should sell the right of way it should pay half of the purchase money to the grantor, where it does not appear from the instrument as a whole that the real intention of the parties was a sale, but the lease was intended to secure better connections and more profitable operation of the railroad, and was terminable at any time after ninety days in case of default of the lessee. *Morrison v. St. Paul & N. P. R. Co.* (Minn.) 546

3. The owner of land adjoining a railroad has the right to join his fences to the railroad fence, whether that is on the border of the right of way or set back inside such line on the right of way. *Gould v. Great Northern R. Co.* (Minn.) 590

4. "Fences on each side of such road," required by Minn. Gen Stat. 1878, chap. 84,

§ 54 (Minn. Gen. Stat. 1894, § 2692), relating to fencing railroads, are to be made on the margin or border of the entire grounds or right of way. *Gould v. Great Northern R. Co.* (Minn.) 590

5. The failure of an engineer to perform his duty to maintain a reasonably vigilant lookout along the track in front of the train renders the railroad company liable for killing a human being lying on the track, apparently helpless from any cause, when the engineer could have seen him by the exercise of ordinary care. *Pickett v. Wilmington & W. R. Co.* (N. C.) 257

6. One riding in a wagon owned and driven by another over whom he has no control, at the owner's invitation, is not as a matter of law negligent in failing to look and listen on approaching a railroad track, where he does not know that the driver is incompetent or that he is not keeping a proper lookout for trains. *Howe v. Minneapolis, St. P. & S. S. M. R. Co.* (Minn.) 684

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RAPE. See CRIMINAL LAW, 4.

RECEIVERS. See also MORTGAGE, 8.

1. The appointment of a receiver on application of a stockholder will not be denied on the ground that the corporation has ceased to exist and the property is held by joint ownership, merely because the shares have passed into the hands of a less number of persons than the law requires for stockholders, and the offices of the company have become vacant, while an administrator of the only other stockholder has taken possession of the corporate property. *Re Belton* (La.) 648

2. Receivers will not be instructed as to the distribution of funds until they have them in court. *Strauss v. Carolina I. Bldg. & L. Assn.* (N. C.) 698

3. Preference over a mortgage debt in respect to the receiver's earnings cannot be given to a claim for damages caused by negligence of a street-railway company before the appointment of the receiver, in a suit to foreclose the mortgage on the street-railway property. *St. Louis Trust Co. v. Riley* (C. C. App. 8th C.) 456

4. A court of chancery cannot, against the objection of the first mortgagee, authorize the receiver of a private corporation appointed at the suit of a second mortgagee to borrow money to carry on the corporate business on certificates to be made a first and paramount lien on the corporate property. *Hanna v. State Trust Co.* (C. C. App. 8th C.) 201

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Loss or alteration of, as ground of injunction against judgments. 562, 563

RELEASE. See TRUSTS, 5.

RELIGIOUS SOCIETIES. See also CONTRACTS, 2; EVIDENCE, 2, 8.

1. An unincorporated church society is not affected by a statute limiting the quantity of real estate which can be held by incorporated church societies. *Alden v. St. Peter's Parish* (Ill.) 232

2. A church corporation does not ratify the employment of an attorney by individual trustees to conduct the prosecution of a preacher before a church tribunal, by passing a resolution to pay a certain sum to another attorney for services in respect to the sale of property, although the trustees acting individually, and not in their corporate character, had an understanding with him that a part of the money should be applied by him to discharge the claim of the other attorney. *Parahley v. Third M. E. Church* (N. Y.) 574

3. No liability is admitted by a resolution by church trustees appointing a committee to "confer with and act under the advice of" the attorney of the board in examining a certain claim and agreeing upon the sum, if any, to be paid, and another resolution authorizing the president and treasurer to pay the sum, if any, found due by such committee, where the board refused to accept the report of the committee, which found in favor of the claim in disregard of the condition as to acting under the advice of counsel. *Id.*

4. The official board of a Methodist Episcopal church, consisting of the trustees, the stewards, the class leaders, the Sunday-school teachers, and the local preachers, does not represent and cannot legally bind the church corporation in respect to the payment of a claim against it. *Id.*

NOTES AND BRIEFS.

Religious societies; power to own lands. 233

Power of trustees to contract for. 574

RESCISSION. See CONTRACTS, NOTES AND BRIEFS.

RESUME.

For resumé of contents of book, see 865

SALE. See also RAILROADS, 2.

1. The refusal to accept an article which a person has expressly agreed, in consideration

of its delivery to an express company, to pay for in instalments, does not relieve him from liability to pay the whole price, or restrict the seller to his remedy for damages. *White v. Solomon* (Mass.) 587

2. A contract to pay the whole value of a chattel before the title passes may be lawfully made. *Id.*

NOTES AND BRIEFS.

Sale; passing of title upon order for goods. 587

SCHOOLS.

The trustees of a common-school district may contract with a teacher that the latter may teach certain higher branches, and as a part of his compensation have the right to charge and receive compensation therefor from all pupils taking such branches, under Ky. Stat. § 4364, entitling all pupils of school age within the district to free tuition in certain studies specified in § 4388, and § 4506, providing that no teacher shall be required to teach any other than the common-school branches unless it is so specified in a written contract with the trustees. *Major v. Cayce* (Ky.) 697

SCIRE FACIAS. See JUDGMENT, 5-7.

SET-OFF.

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As ground for injunction against judgment in garnishment. 868

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SHELLEY'S CASE.

NOTES AND BRIEFS.

As affecting entirety estate. 812

SHIPPING. See also EVIDENCE, 14; INSURANCE, 9-11.

1. Failure of a schooner to exhibit a torch light will not render her responsible for collision with a vessel which sees her lights, where her position and course are distinctly apparent. *Bigelow v. Nickerson* (C. C. App. 7th C.) 836

2. The luffing of a vessel in the presence of imminent danger of collision is not such a fault as will preclude recovery for damages from such collision. *Id.*

SINKING FUND. See BONDS, 4.

SLANDER. See LIBEL AND SLANDER.

SLAVES.

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STATE. See also ESTOPPEL, 1; INSURANCE, 1.

1. The sovereignty of the state of Wisconsin extends to the middle of Lake Michigan, and its laws, so far as they do not conflict with
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those of the United States regulating commerce and navigation, are operative within such limits. *Bigelow v. Nickerson* (C. C. App. 7th C.) 836

2. The territorial limit of sovereignty with respect to the high seas, to the 8-mile zone, should not be applied to a lake which is not the common boundary of nations, or open by nature for the commerce of the world, but is within the exclusive jurisdiction of each nation. *Id.*

3. A state treasurer properly refuses to pay a warrant drawn on him by the auditor for an illegal claim, under N. C. Code, § 8856, sub. 8, requiring him to pay all warrants legally drawn on him by the auditor. *Commercial & F. Bank v. Worth* (N. C.) 261

STATE INSTITUTIONS. See CORPORATIONS, 1, 2, 4.

STATUTES. See also EVIDENCE, 12; TIME, 2.

1. A failure of the presiding officers to sign a bill within two days after its passage does not defeat the act or in any manner impair its validity, if it be thereafter duly authenticated and approved by the governor. *Aikman v. Edwards* (Kan.) 149

2. A two-thirds vote of the members of each House of the legislature is not required on the passage of an act to abolish a judicial district, under Kan. Const. art. 8, § 14, requiring such a vote to increase the number of judicial districts. *Id.*

3. The three months after the adjournment of the legislature on April 8, which must expire before a statute would take effect under Neb. Const. art. 8, § 24, expires so that the act will take effect on July 9. *McGinn v. State* (Neb.) 450

4. A statute providing for the acquisition of bridges and ferries by a city, the issuance of bonds in payment therefor, the transfer of the property to the county, and the collection of taxes by the county to pay the bonds, does not embrace more than one subject in violation of Or. Const. art. 4, § 20. *Simon v. Northrup* (Or.) 171

5. The maintenance of a ferry by the county of Multnomah at Sellwood is not within the subject of Or. act 1895, providing for the acquisition of specified bridges and ferries by the city of Portland. *Id.*

6. The acquisition by a city of certain bridges and ferries which are already public highways, provided for by Or. act 1895, is not included in the laying out, opening, and working of highways, for which special or local laws are forbidden by Or. Const. art. 4, § 23, subd. 7. *Id.*

7. A statute requiring a county tax to be levied and collected like other taxes, for the purpose of maintaining bridges and ferries, being in effect a requirement only that the sums required shall be included in the estimate for county purposes, does not violate Or. Const. art. 4, § 28, subd. 10, prohibiting local or special laws for assessment and collection of taxes. *Id.*

8. But one subject is included in a statute defining the boundaries of several judicial districts, providing for holding terms of court therein, and defining certain duties of the trial court in one of the districts, and also repealing all laws inconsistent therewith. *Aikman v. Edwards* (Kan.) 149

9. The restriction to a designated class of persons of the right to recover attorneys' fees, granted by Ill. Laws 1889, p. 862, in suits for wages, does not render the statute obnoxious to the constitutional prohibition against special legislation, as it applies to all persons in the state similarly engaged. *Vogel v. Pakoc* (Ill.) 491

10. A law of a general nature which is in full force in every part of the state complies with a constitutional requirement that laws of a general nature shall have a uniform operation throughout the state. *State, Schwartz, v. Ferris* (Ohio) 218

STREET RAILWAYS. See also CARRIERS, 9; RECEIVERS, 8.

1. The provision of N. H. Gen. Laws, chap. 269, § 14, that "no person shall ride through any street" in the compact part of any town at a swifter pace than at the rate of 5 miles an hour, applies to a street-railway company whose charter provides that the road may be operated by such power as may be authorized by the mayor and aldermen, who shall have power to make such regulations as to the rate of speed as the public safety and convenience require, where no regulations have been made by them in regard to speed. *Bly v. Nashua Street R. Co.* (N. H.) 808

2. Running a street car across a railroad track at grade without first stopping it, and without some employee going ahead to see if the way is clear and free from danger and giving a signal to that effect as required by Ohio act May 4, 1891 (88 Ohio Laws, 582), is negligence—at least in the absence of extraordinary circumstances—for which the street-railroad company will be liable for any damages directly caused by such negligence. *Cincinnati Street R. Co. v. Murray* (Ohio) 508

3. The existence of gates and a watchman at a railroad crossing does not relieve a street-railroad company from the necessity of complying with the provisions of Ohio act May 4, 1891 (88 Ohio Laws, 582), requiring a street car to be stopped and an employee to go ahead to ascertain if the way is clear and safe and give a signal to that effect before crossing a railroad track at grade. *Id.*

SUBROGATION. See also ACTION OR SUIT, 2.

1. A bank which pays a check in pursuance of a guaranty, even if that was *ultra vires*, is not a mere volunteer so as to be precluded from claiming the rights of the person to whom payment was made, by subrogation. *Voltz v. National Bank* (Ill.) 155

2. One who advances money at the instance of a debtor, to be used by the latter in payment of a prior security, is not a stranger or intermeddler in his affairs within the rule 80 L. R. A.

which denies to such persons a remedy by way of subrogation. *Union Mortg. Bkg. & T. Co. v. Peters* (Miss.) 829

8. The holder of an intermediate mortgage who is not placed in any worse attitude by the subrogation of a subsequent mortgagee to the first lien on the property, which was paid off with money advanced by the last mortgagee on a promise that he should have the first lien, cannot defeat such subrogation, even if he has not waived or become estopped to assert his priority. *Id.*

4. The relief by subrogation to earlier liens which have been paid off with money advanced by a subsequent mortgagee under agreement that he shall have a first lien is not destroyed by the fact that the early liens have been actually paid off and canceled in pursuance of an agreement that this should be done, since equity will consider them alive so long as justice requires. *Id.*

SUMMARY PROCEEDINGS.

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Injunction against dispossession by. 129

SUNDAY. See also TIME, 8.

The right to file papers on Sunday during the progress of a suit is clearly implied by Tex. Rev. Stat. art. 1184, prohibiting the commencement of suits or the issue of process, on that day with certain exceptions. *Hanover F. Ins. Co. v. Shrader* (Tex.) 498

SUPPORT. See CONTRACTS, 24; MORTGAGE, 2.

SURPRISE.

NOTES AND BRIEFS.

As ground of injunction against judgment. 786

TAXES. See also CONSTITUTIONAL LAW, 4, 5; ESTOPPEL, 1; INJUNCTION, 4; PUBLIC MONEY; STATUTES, 7.

1. The restriction of the benefactions of a charitable organization to its own members or their families does not take it out of the exemption of certain property of charitable institutions by Hill's (Or.) Ann. Laws, § 2732. *Portland Hibernian Benev. Soc. v. Kelly* (Or.) 167

2. An exemption from taxation of property used exclusively for charitable or benevolent purposes cannot be extended to property occupied and used for other and different purposes, although the revenue derived from its use is devoted exclusively to charitable or benevolent objects. *Id.*

8. The state may tax the right to receive property by will or inheritance. *State, Schwartz, v. Ferris* (Ohio) 218

4. The Ohio inheritance tax law of April 20, 1894, is not made unconstitutional as a tax on property, by the provision that it shall become a lien upon the property received. *Id.*

5. The Ohio inheritance tax law is not unconstitutional when construed as a tax upon the right of receiving property, as in conflict with Ohio Const. art. 12, § 2, requiring taxation to be by uniform rule on all property according to its true value in money, because the proceeds are to be applied for purposes of general revenue. *Id.*

6. The tax imposed by Ohio act April 20, 1894, declaring that all property passing by will or the intestate laws or by deed of gift intended to take effect after the grantor's death, to an heir, shall be liable to certain taxes, is a tax upon the right or privilege of succession, and not upon the property itself. *Id.*

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Taxes; exemption of charities. 167
On inheritances; constitutionality of. 219

TELEGRAPHS. See also COMMERCE, 5; EVIDENCE, 15; PLEADING, 8; STATUTES, 11.

1. A telegraph company is a common carrier in South Dakota. *Kirby v. Western U. Teleg. Co.* (S. D.) 612

2. As a common carrier, a telegraph company cannot legally refuse to accept and transmit an offered message because the person offering will not sign an agreement that such carrier shall not be liable for damages in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. *Id.*

3. The statute which makes a telegraph company a common carrier of messages is not superseded or repealed by S. D. Const. art. 17, § 11, imposing upon the legislature the duty of providing reasonable regulations, by general law, for giving effect to the right of a corporation organized for such purpose to construct and maintain lines of telegraph within the state. *Id.*

4. The wrongful refusal of a message by a telegraph company, except on certain conditions, is not cured by the fact that the message offered is subsequently sent on the conditions demanded by the telegraph company. *Id.*

5. A telegraph company has the right to decline to accept a message for transmission if the sender will not consent to a stipulation requiring a claim for any damages or statutory penalties to be presented in writing within sixty days after the message is filed for transmission, since this regulation is a reasonable one, and does not limit or modify the statutory obligation and common-law liability of the company to transmit the message safely and promptly. *Id.*

6. A mistake in a telegram directing an agent to sell property, in reliance on which he makes a contract for such sale in his own name and not binding on the principal, will not give the latter a right of action where he voluntarily carries out the contract after notice of the mistake, in order to protect his agent, instead of leaving the latter to his remedy against the
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telegraph company. *Shingleur v. Western U. Teleg. Co.* (Miss.) 444

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Telegraphs; stipulation as to liability for default. 445

Stipulation as to liability for messages; telegraph company as common carrier. 613

TIME. See also INSOLVENCY, 2; STATUTES, 8.

1. The rule as to the exclusion of the first day in computing the time within which an act is to be done, provided by Neb. Code Civ. Proc. § 895, was intended to be uniformly applicable alike to the construction of statutes and to matters of practice. *McGinn v. State* (Neb.) 450

2. The term "calendar month," in Neb. Const. art. 3, § 24, fixing the time for statutes to go into effect, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month it terminates with the last day thereof. *Id.*

3. Sunday cannot be excluded from the computation of the thirty days after motion for rehearing before filing an application for a writ of error, although it is the thirtieth day and the clerk is not bound to file the application on that day, since he may lawfully do so. *Hanover F. Ins. Co. v. Shrader* (Tex.) 498

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Time; computation of months. 451

TOWNS. See COUNTIES, 2.

TRADENAME.

The words "mechanics' store" may be a trade-name, and the user thereof entitled to protection from the use of such words by a competitor in business for the purpose of deceiving the public, and especially the customers of the former. *Weinstock, L. & Co. v. Marks* (Cal.) 182

TREES. See GAS, 1.

TRESPASS. See FISHERIES, 2.

TRIAL.

1. It is not competent under the Florida Bill of Rights, § 8, guaranteeing the right of trial by jury existing at the time of the adoption of the Constitution, for the legislature to confer the power to enjoin in cases where it did not exist before the Constitution, and at the same time draw to it the incidental power to assess damages in a case triable at law by a jury. *Wiggins v. Williams* (Fla.) 754

2. The guaranty of the right of trial existing at the time of the Constitution, in the Florida Bill of Rights, § 8, is infringed by the provision of Fla. Acts 1889, chap. 8884, § 2, that the court of chancery may, in an action thereby authorized to enjoin trespasses on

land by the cutting of trees thereon or removal of turpentine therefrom, cause an account to be taken of the damage to claimant from the trespass, as such trespass would not, before the adoption of the Constitution, have conferred jurisdiction upon chancery to enjoin the same. *Wiggins v. Williams* (Fla.) 754

8. Persons were incompetent as jurors in a suit against a railroad company to recover the penalty for an overcharge for passenger carriage, who only a short time before had brought similar actions against the same defendant for overcharges on the same section of track, so that the two cases involved the same issues. *Little Rock & Ft. S. R. Co. v. Wells* (Ark.) 560

4. The legislature may lawfully provide that interest as a taxpayer of a county shall not disqualify a person from acting as juror in a suit in which the county is a party. *Smith v. German Ins. Co.* (Mich.) 868

5. Whether or not the evidence tends to prove that negligence was the direct cause of an injury is a question of law for the court. *Cincinnati Street R. Co. v. Murray* (Ohio) 508

6. The question is for the jury whether or not a gas company, before permitting gas to be turned on for the benefit of some of the tenants of an apartment house, used reasonable precaution to ascertain that no harm would thereby result to other tenants who had not applied for it, by the gas escaping into their rooms. *Schmeer v. Gaslight Co.* (N. Y.) 658

7. Whether or not it is negligence for a boy eighteen years old to take a lighted candle to search for a leak in gas pipes is a question for the jury, to be considered in the light of all the circumstances of the case. *Id.*

8. The contributory negligence of a brakeman and switchman in mounting a flat car coming toward him, by grasping a brake-staff which was loose and bent when he did not know of its defects, is a question for the jury. *Prosser v. Montana C. R. Co.* (Mont.) 814

9. The qualification of a witness to give an opinion is for the court to decide. *Pickett v. Wilmington & W. R. Co.* (N. C.) 257

10. It is proper to instruct the jury that plaintiff's negligence is immaterial if they find that the defendant's negligence was the proximate cause of the injury. *Id.*

11. An instruction that plaintiff is not chargeable with negligence because she did not use the best means of escaping injury is misleading, where she did not know or understand that she was in any danger, and did not adopt any course of action while facing an imminent danger. *Smith v. Milwaukee Builders' & T. Exch.* (Wis.) 504

12. A requested instruction in a criminal action, which requires the jury to be convinced to "an absolute moral certainty" before conviction, is properly refused. *People v. Hecker* (Cal.) 408

18. An instruction that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible, is erroneous. *Smith v. Milwaukee Builders' & T. Exch.* (Wis.) 504

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14. A charge in substance that negative testimony is confined to that of witnesses who, though present at a transaction, say that they did not see or did not hear, is erroneous, as testimony which is positive in form may amount merely to negative testimony. *Id.*

15. An instruction that the measure of damages for the loss of a human life is the estimated value of the intestate's life to those dependent upon him is not sufficient to cure a refusal to instruct that it would be the present value of accumulations arising from his net income, based upon his expectancy of life. *Pickett v. Wilmington & W. R. Co.* (N. C.) 257

16. An instruction making the basis for estimating the value of ore extracted from a claim the market value of such ore on the dump after deducting the cost of mining and hoisting the same in effect allows a party liable the reasonable expense of reducing the ore. *Hitzgerald v. Clark* (Mont.) 803

17. A requested instruction that the jury may render a general verdict or a special one is properly refused in the absence of a request to submit any special findings upon any branch of the case. *Prosser v. Montana C. R. Co.* (Mont.) 814

18. An instruction that land is contiguous to a certain city is not erroneous because of the fact that the land has been previously annexed to another municipality. *Forsyth v. Hammond* (Ind.) 576

NOTES AND BRIEFS.

Trial; question for jury as to negligence. 509

Sufficiency of special verdict. 505

TRUSTS. See also ACTION OR SUIT, 6; JUDGMENT, 2.

1. A trustee for railroad bondholders to purchase at a foreclosure sale under a reorganization scheme, though entitled to abandon the sale because of the failure of a sufficient number of bondholders to pay assessments made, is bound by all the terms of his trust, where notwithstanding such failure he proceeds to complete the purchase made as such trustee, until he is released therefrom by the bondholders. *Indiana, I. & L. R. Co. v. Swannell* (Ill.) 290

2. Property purchased under a scheme for reorganization of a railroad, by a trustee for bondholders, may be followed by the latter into the hands of a purchaser from such trustee with knowledge of the trust. *Id.*

3. A purchaser with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchases, even though he is a purchaser for a valuable consideration. *Id.*

4. The beneficiary in a trust is not bound to enforce an individual liability against a trustee who has disposed of the trust property in an improper manner, but has the alternative remedy of following the trust property. *Id.*

5. A release by a bondholder of the trustee in a reorganization agreement from all further

luty or liability, and a waiver of all rights attained through or by him, will not preclude such bondholder from following the railroad property purchased by such trustee in his official capacity and transferred by him to another company. *Id.*

6. The return of bonds by a trustee for bondholders under an arrangement for the reorganization of a railroad, to a bondholder upon an order receipting in full for the bonds and discharging the trustee from all liability, does not release the equities that such bondholder has in the property purchased by such trustee under the arrangement and transferred by him to another company. *Id.*

7. Property purchased by a trustee for bondholders under an arrangement for the reorganization of a railroad is not discharged from the trust, where such trustee does not abandon his bid, but procures the confirmation of the sale to himself and the vesting in him of the title to the property, as to bondholders who fail to pay assessments, release the trustee from liability, and accept a return of their bonds or a portion of the assessments paid,—especially where the reorganization plan makes no provision for forfeiting the interests of bondholders, but provides that their shares of the purchase money may be borrowed or otherwise provided, and in default of payment within a specified time the interests of such bondholders may be sold. *Id.*

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Trusts; injunction against execution sale of trust property. 119

USURY.

An agreement to pay interest at 12 per cent after maturity, in a note made in Kansas, expressly made subject to the laws of that state, is not usurious. *De Hass v. Dibert* (C. C. App. 3d C.) 189

NOTES AND BRIEFS.

Usury; as ground of injunction against judgment by confession. 289

VENDOR AND PURCHASER.

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Right of, to rescind or abandon contract because of other party's default. 64

VOLUNTEER. See SUBROGATION, 1.

VOTERS AND ELECTIONS. See also APPEAL AND ERROR, 5; INJUNCTION, 2.

1. Ballots from which the inspectors have unintentionally omitted to take slips containing the numbers, as required by Nev. Stat. 1891, chap. 40, § 24, will not be rejected under the provision of § 26, that any ballot upon which appear "names, words, or marks, written or printed," except as provided in the act, shall not be counted. *Buckner v. Lynip* (Nev.) 854

2. The rule that a voter should not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascer-

tained from his ballot, is not changed by the Illinois ballot law of 1891, which expressly provides in § 26 that his ballot shall not be counted if he "marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled." *Parker v. Orr* (Ill.) 227

8. The use of a mark or character which furnishes the means to designing persons of avoiding the law as to secrecy will require the rejection of a ballot under the Illinois ballot law, though it contains no prohibition of distinguishing marks, even if the mark or character used indicates an intention to vote a particular party ticket or for certain candidates. *Id.*

4. An honest attempt to follow the directions of the law requiring a cross to be made in the appropriate margin or place opposite the name on the ballot must appear in order to permit the ballot to be counted. *Id.*

5. A mark on a ballot, which bears no resemblance to a cross, without any attempt to make a cross of any kind on the ballot, will not permit it to be counted. *Id.*

6. A mark made with ink and somewhat blurred, even if it cannot be said to be a cross strictly speaking, if it shows an attempt to make a cross, may be sufficient to allow the ballot to be counted. *Id.*

7. The fact that a ballot is marked by a cross in a circle at the head of each of two tickets will not prevent counting the vote for a candidate named on one ticket for an office for which no candidate is named on the other, although it prevents counting the ballot for a candidate for any office for which both tickets present a candidate. *Id.*

8. Imperfect success in marking a cross in the proper places to indicate a choice of candidates, where there was a clear intention to conform to the statute, and not to distinguish the ballot, will not require its rejection. *Id.*

9. The requirement that a ballot be marked by a cross "in the appropriate margin or place opposite the name," made by the Illinois ballot law, § 28 (3 Starr & C. chap. 46, p. 570), is directory, and not mandatory, and under it the voter's intention should be given effect if it can be gathered from his ballot without laying down a rule which may lead to a destruction of its secrecy. *Id.*

10. A ballot marked simply by writing the word "Democratic" at the head of the Democratic ticket, or one marked by a single mark across or through the circle or square, or marked with a circle or irregular character within the circle or square, or marked with crosses opposite the names of candidates, but entirely outside of the squares; as well as a ballot signed by the name of the voter,—must be rejected as disregarding the plain directions of the law requiring the ballot to be marked by a cross in the appropriate margin or place opposite the name, and as furnishing the means whereby the secrecy of the ballot could be destroyed. *Id.*

11. The erasure of names of candidates by pencil marks drawn through them does not constitute a distinguishing mark which re-

quires a rejection of the ballot as to other candidates. *Parker v. Orr* (Ill.) 227

12. A word which is read by one party as "get" and by the other as "yes," opposite a proposed constitutional amendment, is not regarded as such a distinguishing mark as to prevent counting the ballot for a candidate named on the same ballot. *Id.*

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WASTE.

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By husband on land held by entireties. 309

WATERS. See also ESTOPPEL, 8; MANDAMUS; MUNICIPAL CORPORATIONS, 11-13; STATE, 1, 2.

1. A riparian proprietor has no right to go upon another's land, and restore to the old channel the water which has been suddenly diverted by the act of God so as to flow elsewhere. *Wholey v. Caldwell* (Cal.) 820

2. A grant by a riparian proprietor of land bordering on the stream below that retained by him, and of the "waters accustomed to flow in the stream," will not entitle the grantee to go upon the grantor's land to return to the stream waters suddenly diverted by an extraordinary freshet. *Id.*

Prior appropriation.

3. The right of prior appropriation of waters existed as part of the laws and customs of that portion of the state of Washington east of the Cascade mountains, prior to the act of Congress on that subject. *Isaacs v. Barber* (Wash.) 665

4. The right of prior appropriation of waters according to the customary law of mining regions was not created, but merely recognized, by the act of Congress of 1866. *Id.*

5. A grant of government lands is subject to a prior appropriation of waters made according to the customary law of the locality, although the act of Congress on the subject had not then been passed. *Id.*

6. The operation of a flouring-mill is one of the purposes for which water can be appropriated under the customary law of mining regions, adopted by the act of Congress of 1866. *Id.*

7. An appropriator of water upon the public domain acquires, under the confirmatory acts of Congress, no rights superior to the riparian rights which have attached to land held at the time of the appropriation in private ownership. *Hargrave v. Cook* (Cal.) 390

8. The discoverer of a flow of percolating waters on the public lands may, by digging wells and improving them and constantly using the water for a beneficial purpose, acquire a right to take water from such wells as against one who by subsequent location acquires title to the land. *Sullivan v. Northern Spy Min. Co.* (Utah) 186

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Change of appropriation.

9. An appropriator of water may change the place and purpose of use as against subsequent appropriators, so long as the water is used for proper objects and the change does not injuriously affect the rights of such other appropriators. *Hargrave v. Cook* (Cal.) 390

10. Although an appropriator of water upon government lands retains his right when the land passes into private ownership, under Stat. at L. 253, 16 Stat. at L. 218, and may change the point of diversion to another place, he cannot make such change arbitrarily, but only when required to enable him to take the amount of water to which he is entitled, and then, under Cal. Civ. Code, § 1412, only when others are not injured by the change. *Id.*

11. The provision in the act of Congress of July 26, 1866, that a party committing injury or damage, in the construction of a ditch or canal, to the possession of any settler on the public domain, shall be liable to the party injured, does not grant any rights to enter on the possession of a homestead claimant for the purpose of materially changing the point of diversion of water already appropriated. *McGuire v. Brown* (Cal.) 354

12. The privilege of changing the point of diversion of water to which a right has been obtained by prior appropriation, under Cal. Civ. Code, § 1412, does not extend to materially changing the point of diversion and making new ditches on land lawfully held under a homestead claim. *Id.*

13. The prior appropriator of water has no right to enter upon the homestead claim of a settler, for the purpose of materially changing the point of diversion and constructing new waterways through the land, although the settler has not made final proof of residence and cultivation, or obtained a patent to the land, but has made an entry and has actual possession. *Id.*

Abandonment.

14. A riparian owner does not lose his right to the use of water for irrigating purposes by mere nonuser, as against a lower appropriator. *Hargrave v. Cook* (Cal.) 390

15. The rights of the locators of a ditch for irrigation, to the use of waste water after supplying prior appropriators, are lost by permitting the exclusive possession, management, and beneficial use of the waste water ditch to be enjoyed during the season of irrigation, for more than the statutory period of limitation, as part of an older system, without any use of water therefrom by such locators except what is distributed to them by virtue of their ownership of shares in the older ditch. *Hewett v. Store* (C. C. App. 9th C.) 265

16. Mere declarations of parties who have acquired rights to the use of water in an irrigating ditch are insufficient to preserve those rights, without any act or deed in vindication or maintenance of them, when for a period prescribed by the statute of limitations they take no water from the ditch except what is distributed to them as shareholders in an older ditch owned by an unincorporated association which has assumed entire control and use of the latter ditch as a part of the older system. *Id.*

7. Rights in a ditch location lost by non-user cannot be reasserted so as to acquire any right therein, except by continued and adverse use for the statutory period of prescription or a new and valid appropriation. *Id.*

Public supply.

8. Rules adopted by a water company with respect to its service must be lawful and just and free from discrimination, in order to be valid and enforceable. *American Waterworks v. State, Walker* (Neb.) 447

9. A private corporation supplying water to a municipality under a franchise is affected with a public use and assumes a public duty, which is to furnish all the inhabitants with water at reasonable rates and without unjust discrimination. *Id.*

20. A rule of a water company to make a charge of \$1 in addition to all back rents for turning the water off and on, made a condition precedent to turning on the water after a person has become in default for water rents, is reasonable, discriminatory, and void, since compensation for turning off and on the water included in the water rents. *Id.*

21. The imposition of water rents by a municipal corporation for the use of water does not show that the waterworks system is operated by the corporation in its private corporate character, but is only a mode of taxation and part of the general scheme of raising revenue to carry on the work of government. *Springfield F. & M. Ins. Co. v. Keeseville* (N. H.) 660

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Waters; appropriation of percolating waters to public lands. 186

Abandonment or loss of rights of prior appropriators of:—In general; effect of nonuser; attempt to change use; abandonment prevented by use; decisions under statutes. 265

Change of use or channel of water appropriated:—In general; rights subsequently vested cannot be infringed; priority not lost by change; right may be sold; right to change ditch location. 884

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WELLS. See WATERS, 8.

WILLS.

1. An inadvertent mistake by a witness to a will, in writing testator's surname with his own initials when attempting to sign his name as a witness, makes his signature insufficient under a statute requiring witnesses to the will. *Re Walker's Estate* (Cal.) 460

2. The right to "attest by his mark provided he can swear to the same," given to a subscribing witness to a will by Ga. Code, § 2415, does not depend on his ability to swear to or identify his mark at the time the will is offered for probate, but such a witness is competent to attest by his mark as one of the competent witnesses required by § 2414, if he is under no legal disability to testify as a witness. *Gillis v. Gillis* (Ga.) 148

3. Any competent witness, although not a subscribing witness to a will, may testify to facts as to the attestation or execution of the will or the testator's capacity, if the subscribing witnesses deny these facts or, from want of memory or other cause, are unable or unwilling to testify thereto. *Id.*

4. A moiety of a residuary estate descends to testator's heirs on the death, during his life, of one of two persons to whom the residue is given in equal shares. *Robinson's Appeal* (Me.) 831

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Wills; mistake in signature to. 460

WITNESSES. See also WILLS, 8.

The trial judge may, in the exercise of his discretion, interrogate witnesses to aid in eliciting material matter suggested by the evidence. *DeFord v. Painter* (Okla.) 722

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Witnesses; husband and wife as, in action for wife's libel or slander. 529

WRIT AND PROCESS.

1. Jurisdiction of an infant defendant may be acquired by the service of summons in the same manner as upon defendants who are *sui juris*. *Levystein v. O'Brien* (Ala.) 707

2. A certification by the sheriff in his return to a writ in an action to establish a logger's lien against the contractor under Minn. Gen. Stat. 1894, §§ 2451-2465, in addition to the statutory requirements, that he has attached all the defendant's right, title, and interest in the logs described, is an irregularity, but will not prevent jurisdiction over the logs for the purpose of establishing a lien. *Brown v. Markham* (Minn.) 84

L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN AP-
PLIED DEVELOPED STRENGTHENED, LIMITED, OR IN ANY
WAY AFFECTED BY LATER DECISIONS THAT HAVE
CITED THESE CASES AS PRECEDENTS WITH
HOLDINGS OF CITING CASES, ALSO
REFERENCES TO LATER AN-
NOTATIONS CITING
CASES OR NOTES

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30 L. R. A. 33, LAKE SHORE M. S. R. CO. v. RICHARDS, 152 Ill. 59, 38 N. E. 773.

Partnership accounting in *Maynard v. Richards*, 166 Ill. 478, 57 Am. St. Rep. 145, 46 N. E. 1138, Affirming 61 Ill. App. 336.

Constitutional right to appeal.

Cited in *Illinois C. R. Co. v. Larson*, 152 Ill. 329, 38 N. E. 784, sustaining statute making judgment of appellate court final as to questions of fact.

Cited in footnotes to *Johnson v. State*, 51 L. R. A. 272, which sustains statute requiring exception to obtain reversal for error in charge; *McClain v. Williams*, 43 L. R. A. 287, which holds right of appeal subject to legislative restriction.

Review of facts by supreme court.

Cited in *Baltimore & O. R. Co. v. Stanley*, 158 Ill. 400, 41 N. E. 1012, and *Lake Shore Laundry Co. v. Rakowski*, 157 Ill. 461, 41 N. E. 1019, holding judgment of appellate court on questions of fact conclusive on supreme court; *Cicero & P. Street R. Co. v. Meixner*, 160 Ill. 322, 31 L. R. A. 332, 43 N. E. 823, and *Siddall v. Jansen*, 168 Ill. 45, 39 L. R. A. 114, 48 N. E. 191, holding that supreme court may review sufficiency of facts supporting plaintiff's case when refusal to direct verdict for defendant is assigned as error.

Waiver of exception to refusal to direct verdict.

Cited in *Kolze v. Jones*, 64 Ill. App. 292, and *Martin Emrich Outfitting Co. v. Brown*, 63 Ill. App. 39, holding exception to refusal to direct verdict for defendant waived by introducing evidence and submitting case without renewing motion.

Taking case from jury.

Cited in *Siddall v. Jansen*, 168 Ill. 46, 39 L. R. A. 114, 48 N. E. 191; *Baltimore & O. R. Co. v. Stanley*, 158 Ill. 398, 41 N. E. 1012; *Pittsburgh, Ft. W. & C. R. Co. v. Callaghan*, 157 Ill. 410, 41 N. E. 909; *Chicago & A. R. Co. v. Logue*, 158 Ill. 626, 42 N. E. 53; *Foster v. Wadsworth-Howland Co.* 168 Ill. 517, 48 N. E. 163; *North Chicago Street R. Co. v. Wiswell*, 168 Ill. 614, 48 N. E. 407; *Illinois Steel Co. v. Ostrowski*, 194 Ill. 382, 62 N. E. 822; *Wetz v. Greffe*, 71 Ill. App. 315; *Boyle v. Illinois C. R. Co.* 88 Ill. App. 257; *Finley v. West Chicago Street R. Co.* 90 Ill. App. 370; *North Chicago Street R. Co. v. Boyd*, 156 Ill. 419, 40 N. E. 955,—holding instruction to find for defendant proper only when evidence wholly insufficient to sustain verdict for plaintiff; *Cooney v. United States Wringer Co.* 101 Ill. App. 473; *Missouri Malleable Iron Co. v. Hoover*, 77 Ill.

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App. 439; *Kean v. West Chicago Street R. Co.* 75 Ill. App. 41; *West Chicago Street R. Co. v. Marzalkiewicz*, 75 Ill. App. 242, — holding that evidence tending to sustain plaintiff's case raises question for jury.

Right to rescind or abandon contract for other party's default.

Cited in *Turney v. Peoria Grape Sugar Co.* 65 Ill. App. 657, holding that refusal to receive coal authorizes termination of contract to supply; *Ballance v. Vanuxem*, 191 Ill. 324, 61 N. E. 85, holding that default rendering further performance something different than contracted for justifies termination of contract; *Tomson v. Heidenheimer*, 16 Tex. Civ. App. 118, 40 S. W. 425, holding that repudiation gives other party right to treat contract as abandoned, and referring particularly to annotation in 30 L. R. A. 33; *Curtis v. Brannon*, 85 Tenn. 162, 38 S. W. 1073, holding that vendee seeking to rescind sale for breach of covenant of seisin must restore possession, and referring particularly to annotation in 30 L. R. A. 33; *Peurrung v. Carter-Crume Co.* 110 Fed. 109, holding (*obiter*) repudiation of contract equivalent to prevention of performance; *Kimbark v. Illinois Car & Equipment Co.* 103 Ill. App. 645, raising, without deciding, question whether refusal to deliver, repudiation of contract to furnish iron; *Kaukauna Electric Light Co. v. Kaukauna*, 114 Wis. 341, 89 N. W. 542, raising, without deciding, question whether breach of agreement to furnish additional lights justifies rescission of lighting contract; *Genet v. Delaware & H. Canal Co.* 170 N. Y. 295, 63 N. E. 350, by Bartlett, J., dissenting, who holds contract terminable only when acts of other party amount to complete repudiation.

Cited in footnotes to *Johnson Forge Co. v. Leonard*, 57 L. R. A. 225, which sustains seller's right to rescind upon purchaser's demand for additional deliveries before remitting for articles delivered; *Vandegrift v. Cowles Engineering Co.* 48 L. R. A. 685, which holds general assignment for creditors by contractor not abrogation or breach of existing contracts; *Kauffman v. Raeder*, 54 L. R. A. 247, which denies right of one receiving and retaining benefit of part performance by other party to rescind for breach of complete performance; *Ball v. Safe Deposit & T. Co.* 52 L. R. A. 403, which sustains right of purchaser to rescind for want of jurisdiction in court authorizing sale.

Limited in *Stanford v. McGill*, 6 N. D. 564, 38 L. R. A. 770, footnote p. 760, 72 N. W. 938, holding repudiation of contract before time of performance not breach.

Annotation in 30 L. R. A. 33, referred to particularly in *West v. Bechtel*, 125 Mich. 163, 51 L. R. A. 799, footnote p. 791, 84 N. W. 69, holding contract not abandoned by purchaser's breach of agreement to pay for each shipment as received; *Worthington v. Gwin*, 119 Ala. 54, 43 L. R. A. 384, footnote p. 382, 24 So. 739, denying right to abandon entire contract because small quantity of ore not free from foreign substances as required.

Bringing action on repudiated contract before time to perform.

Cited in *Marks v. Van Eeghen*, 30 C. C. A. 210, 57 U. S. App. 149, 85 Fed. 855, and *Roehm v. Horst*, 178 U. S. 16, 44 L. ed. 959, 20 Sup. Ct. Rep. 780, holding action on breach of executory contract after repudiation not premature; *Zatlin v. Davenport*, 71 Ill. App. 294, holding declaration of intention not to abide by contract to marry justifies bringing action before time set.

Effect of repudiation of contract.

Cited in *Chemical Nat. Bank v. World's Columbian Exposition*, 170 Ill. 92, 48 N. E. 331, Affirming 67 Ill. App. 178, holding insolvency of bank breach of

contract to establish branch on exposition grounds; Meyer v. Manhattan L. Ins. Co. 144 Ind. 451, 43 N. E. 448, holding allowing insurance to lapse terminates insured's right to paid-up policy; Southern Cotton-Oil Co. v. Heflin, 39 C. C. A. 550, 99 Fed. 344, holding notice that vendee will not receive goods does not take away vendor's rights under contract.

Remedies of injured party to repudiated contract.

Cited in Lockport v. Shields, 87 Ill. App. 154, holding repudiation of contract for services gives right to sue for damages; Vickers v. Electrozone Commercial Co. 67 N. J. L. 671, 52 Atl. 467, and James H. Rice Co. v. Penn Plate Glass Co. 88 Ill. App. 414, holding repudiation of contract gives right to sue for profits which would have been realized; Dyer v. Middle Kittitas Irrig. Dist. 25 Wash. 90, 64 Pac. 1009, sustaining right of contractor to recover without completing contract, where instalments not paid when due; Waggeman v. Janssen, 74 Ill. App. 41, sustaining recovery on *quantum meruit* for work under partly performed repudiated contract; Ornstein v. Yahr & L. Drug Co. 119 Wis. 435, 96 N. W. 826, holding recovery, upon breach of contract of employment, of one month's *pro rata* salary, bar to any subsequent recovery thereon.

Distinguished in effect in Rogers-Ruger Co. v. McCord, 115 Wis. 263, 91 N. W. 685, holding establishment of conditions precedent to defendant's obligation, necessary, before recovery may be had upon contract.

Measure of damages for breach of contract.

Cited in Delaware & H. Canal Co. v. Mitchell, 92 Ill. App. 581, holding measure of damages for vendor's refusal to deliver, difference between contract and market prices at time and place of delivery fixed.

Cited in footnote to Bethel v. Salem Improv. Co. 33 L. R. A. 602, which holds loss of profits not recoverable for breach of contract.

Cited in note (53 L. R. A. 36, 47) on loss of profits as element of damages for breach of contract.

30 L. R. A. 61, GERLI v. POIDEBARD SILK MFG. CO. 57 N. J. L. 432, 51 Am. St. Rep. 612, 31 Atl. 401.

Assignment of chose in action.

Cited in Tufts v. People's Bank & T. Co. 59 N. J. L. 382, 35 Atl. 792, holding accepting payment of third person's note amounts to assignment of debt; Sullivan v. Visconti, 68 N. J. L. 545, 53 Atl. 598, recognizing validity of assignment by single partner of chose in action belonging to firm.

What constitutes breach of contract.

Cited in Middlesex Water Co. v. Knappmann Whiting Co. 64 N. J. L. 246, 49 L. R. A. 575, 81 Am. St. Rep. 467, 45 Atl. 692, holding water company liable for failure to furnish fire protection, due to break in pipes.

Cited in footnote to West v. Bechtel, 51 L. R. A. 791, which holds contract not abandoned by purchaser's breach of agreement to pay for each shipment as received.

30 L. R. A. 74, PEOPLE *ex rel* HENDERSON v. WESTCHESTER COUNTY, 147 N. Y. 1, 41 N. E. 563.

Followed without discussion in Westchester v. Haffen, 147 N. Y. 685, 42 N. E. 726.

Burden of showing act unconstitutional.

Cited in *Re Brenner*, 35 Misc. 215, 70 N. Y. Supp. 744, holding burden of proof on party asserting unconstitutionality of statute; *Board of Education v. Board of Education*, 76 App. Div. 357, 78 N. Y. Supp. 522, recognizing presumption of validity of legislation changing boundaries of school district; *People ex rel. Tyroler v. City Prison*, 157 N. Y. 149, 43 L. R. A. 277, 68 Am. St. Rep. 763, 51 N. E. 1006, by Martin, J., dissenting, who holds burden of showing unconstitutionality of statute on party asserting it.

When statute unconstitutional.

Cited in *Dillon v. Erie R. Co.* 19 Misc. 123, 43 N. Y. Supp. 320; *Re Brenner*, 35 Misc. 215, 70 N. Y. Supp. 744; *Parfitt v. Ferguson*, 3 App. Div. 196, 38 N. Y. Supp. 466; *Irwin v. Metropolitan Street R. Co.* 38 App. Div. 260, 57 N. Y. Supp. 21; *People ex rel. Holmes v. Lane*, 53 App. Div. 539, 65 N. Y. Supp. 1004; *Worthington v. London Guarantee & Acci. Co.* 164 N. Y. 84, 58 N. E. 102, — holding statute invalid only where clearly irreconcilable with Constitution.

Constitutional interpretation.

Cited in *Goedel v. Palmer*, 15 App. Div. 89, 44 N. Y. Supp. 301, holding that journal of Constitutional Convention may be consulted in interpreting Constitution.

Division of county without changing assembly district.

Cited in *State ex rel. Hicks v. Stevens*, 112 Wis. 177, 88 N. W. 48, sustaining statute creating new county providing it shall remain part of original assembly district.

Change in senatorial districts.

Cited in footnote to *Denny v. State*, 31 L. R. A. 726, which denies right to create double districts so as to give counties having less than population for one senator or representative a voice in electing more than one.

Distinguished in *Baker County v. Benson*, 40 Or. 223, 66 Pac. 815, sustaining act changing senatorial districts.

Effect of annexation act.

Cited in *Irwin v. Metropolitan Street R. Co.* 38 App. Div. 260, 57 N. Y. Supp. 21, sustaining act extending jurisdiction of municipal court of New York over more than one county; *Bell v. New York*, 46 App. Div. 197, 61 N. Y. Supp. 709, holding contract of school librarian with town annexed to New York city binding on city; *Duckworth v. Cunningham*, 26 Misc. 404, 56 N. Y. Supp. 191, and *McTurek v. Foussadier*, 51 App. Div. 219, 64 N. Y. Supp. 962, holding change of county boundaries does not change judicial departments; *Re McKeon*, 26 Misc. 470, 58 N. Y. Supp. 589, holding jurisdiction of Westchester surrogate unaffected by act of annexation; *Zeimer v. Rafferty*, 18 App. Div. 398, 46 N. Y. Supp. 345, holding persons living in annexed portion deemed residents of Westchester county for purpose of determining venue of action.

Limited in *Hawkins v. Pelham Electric Light & P. Co.* 158 N. Y. 419, 53 N. E. 162, holding territory annexed by act of legislature part of New York county for purpose of determining place of trial of action.

30 L. R. A. 82, *QUEEN v. DAYTON COAL & I. CO.* 95 Tenn. 458, 49 Am. St. Rep. 935, 32 S. W. 460.

Breach of statutory duty as creating liability.

Cited in *Wise v. Morgan*, 101 Tenn. 278, 44 L. R. A. 551, 48 S. W. 971, holding druggist's failure to label poison negligence *per se*; *Iron & Wire Co. v. Green*, 108 Tenn. 164, 65 S. W. 399, holding employment of infant in factory in violation of statute, negligence *per se*; *Perry v. Tozer*, 90 Minn. 437, 101 Am. St. Rep. 416, 97 N. W. 137, holding that employment of child in sawmill in violation of statute, makes employer prima facie liable for injury; *Riden v. Grimm Bros.* 97 Tenn. 223, 35 L. R. A. 588, 36 S. W. 1097, holding seller of liquor after notice forbidding sale, in violation of statute, liable to wife for husband's death; *Rhea County v. Sneed*, 105 Tenn. 586, 58 S. W. 1063, holding commissioners, failing to comply with statute requiring taking bond from contractor for benefit of laborers, liable for wages; *Weeks v. McNulty*, 101 Tenn. 502, 43 L. R. A. 187, 70 Am. St. Rep. 693, 48 S. W. 809, and *Schmalzried v. White*, 97 Tenn. 45, 32 L. R. A. 784, 36 S. W. 393, raising, without deciding, question whether failure to comply with ordinance requiring fire escapes creates liability to person injured.

Contributory negligence as defense.

Cited in *Island Coal Co. v. Sherwood*, 153 Ind. 700, 53 N. E. 1135, holding contributory negligence of miner defense to action for injury from fall of coal; *Bodell v. Brazil Block Coal Co.* 25 Ind. App. 660, 58 N. E. 856, holding, that freedom from contributory negligence must be shown in action based on breach of statutory duty to cover mine cages.

Contributory negligence of children.

Cited in footnote to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground.

30 L. R. A. 84, *BROWN v. MARKHAM*, 60 Minn. 233, 62 N. W. 123.

Validity of log-lien law.

Cited in *Foley v. Markham*, 60 Minn. 218, 62 N. W. 125, holding log-lien law constitutional.

Log-lien judgment as evidence of lien.

Cited in *Scott & H. Lumber Co. v. Sharvy*, 62 Minn. 529, 64 N. W. 1132, holding log-lien judgments prima facie evidence of existence of liens, in action against owner.

30 L. R. A. 87, *ÆTNA L. INS. CO. v. FLORIDA*, 16 C. C. A. 618, 32 U. S. App. 753, 69 Fed. 932.

Petition for certiorari to circuit court of appeals denied in 163 U. S. 675, 41 L. ed. 311, 16 Sup. Ct. Rep. 1198.

Suicide of insured as bar to recovery.

Cited in *Christian v. Connecticut Mut. L. Ins. Co.* 143 Mo. 467, 45 S. W. 268, construing statute making "contemplated suicide" defense in action for life insurance, as meaning intended suicide; *Supreme Lodge, K. of P. v. Stein*, 75 Miss. 120, 37 L. R. A. 778, 65 Am. St. Rep. 589, 21 So. 559, holding anti-suicide clause

in application not binding when not adopted by competent authority of fraternal organization.

Cited in footnote to *Campbell v. Supreme Conclave I. O. H.* 54 L. R. A. 576, which holds recovery not prevented by suicide of insured.

Cited in note (42 L. R. A. 260) on contestability of life insurance under provisions of policy or of statute.

30 L. R. A. 90, *GREEN v. MILLS*, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852.

Appeal dismissed in 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132.

Appeals to circuit court of appeals.

Cited in *Indianapolis v. Central Trust Co.* 27 C. C. A. 582, 53 U. S. App. 659, 83 Fed. 531, holding that appeal lies from interlocutory injunction where violation of Federal Constitution not primarily involved; *Watkins v. King*, 55 C. C. A. 297, 118 Fed. 531, sustaining jurisdiction of court where question as to Federal Constitution arises incidentally upon objection to evidence of state statute; *American Sugar Ref. Co. v. New Orleans*, 43 C. C. A. 395, 104 Fed. 5 (dissenting opinion), majority holding that court should decline jurisdiction where controlling question involves Federal Constitution; *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 42 C. C. A. 266, 102 Fed. 209 (dissenting opinion), majority holding injunction order in case involving contract clause of Federal Constitution, as well as other questions, not appealable.

Distinguished in *Beck & P. Lithographing Co. v. Wacker & B. Brewing & Malting Co.* 22 C. C. A. 14, 46 U. S. App. 486, 76 Fed. 13, holding order dismissing action as to defendants not served, appealable.

Power of appellate court to pass on merits on appeal from interlocutory order.

Cited in *Smith v. Vulcan Iron Works*, 165 U. S. 522, 41 L. ed. 811, 17 Sup. Ct. Rep. 407, holding that on appeal from interlocutory injunction after hearing on pleadings and proofs, bill may be dismissed; *Mast, F. & Co. v. Stover Mfg. Co.* 177 U. S. 495, 20 Sup. Ct. Rep. 708, holding that bill may be dismissed on appeal from injunction order granted upon bill and affidavits; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* 19 C. C. A. 38, 43 U. S. App. 47, 72 Fed. 558, holding that on appeal from interlocutory decree for perpetual injunction court may pass on whole merits of case; *Allegheny Oil Co. v. Snyder*, 45 C. C. A. 611, 106 Fed. 764; *Knoxville v. Africa*, 23 C. C. A. 257, 47 U. S. App. 85, 77 Fed. 506, holding that on appeal from preliminary injunction order, presenting questions fully, court of appeals will dispose of case on merits; *Lake Street Elev. R. Co. v. Farmers' Loan & T. Co.* 23 C. C. A. 452, 46 U. S. App. 630, 77 Fed. 772, holding that on appeal from order dissolving injunction court of appeals may, on finding want of jurisdiction, remand cause to state court; *Dewey Hotel Co. v. United States Electric Lighting Co.* 17 App. D. C. 368, holding that on appeal from interlocutory injunction appellate court of District of Columbia may dismiss bill on merits.

Distinguished in *Standard Elevator Co. v. Crane Elevator Co.* 22 C. C. A. 557, 46 U. S. App. 411, 76 Fed. 775, holding affirmance by court of appeals does not confer finality on decree of circuit court; *Lockwood v. Wickes*, 21 C. C. A. 263, 40 U. S. App. 136, 75 Fed. 123, refusing to pass on merits of case on appeal from interlocutory order where injunction dissolved by expiration.

Injunction to restrain governmental or political action.

Cited in *Gowdy v. Green*, 69 Fed. 865, denying injunction to restrain officers from acting under state registration law abridging right to vote; *McNiece v. Sohmer*, 29 Misc. 239, 61 N. Y. Supp. 193, holding that equity cannot enjoin filling of vacancy in public office nor compel reinstatement of person removed; *State ex rel. Taylor v. Lord*, 28 Or. 520, 31 L. R. A. 483, footnote p. 473, 43 Pac. 471, denying power of court to interfere with location by governor of site for public institution; *State ex rel. McCaffery v. Aloe*, 152 Mo. 481, 47 L. R. A. 398, footnote p. 393, 54 S. W. 494, denying right to injunction to protect purely political right of citizen as voter; *Landes v. Walls*, 160 Ind. 219, 66 N. E. 619, denying injunction to restrain appointees from acting as members of common council, until determination of their right so to do; *Anthony v. Burrow*, 129 Fed. 790, denying injunction preventing state officers acting under state statute, from certifying name of candidate for office of representative in Congress; *Segars v. Parrott*, 54 S. C. 72, 31 S. E. 677, by Buchanan, J., dissenting, holding that injunction cannot be issued in effect invalidating election of members of legislature under unconstitutional statute.

Power of courts in political matters.

Cited in *Giles v. Harris*, 189 U. S. 486, 47 L. ed. 911, 23 Sup. Ct. Rep. 639, denying equitable jurisdiction of United States circuit court to compel enrolment of names upon county voting list.

Cited in footnotes to *Phelps v. Piper*, 33 L. R. A. 53, which holds question as to which faction of political party is true representative, political rather than judicial; *Davis v. Hambrick*, 51 L. R. A. 671, which holds decision of state central committee between bodies claiming to be executive committee of county conclusive on courts; *Covington v. Buffett*, 47 L. R. A. 622, which denies court's jurisdiction to determine existence of vacancy in office of senator; *Weaver v. Toney*, 50 L. R. A. 105, which denies right to enforce in equity right to have inspector of certain party at polls; *Fesler v. Brayton*, 32 L. R. A. 578, which denies right to injunction against holding election under alleged unconstitutional statute; *State ex rel. Cranmer v. Thorson*, 33 L. R. A. 582, which denies right to enjoin certifying of proposed constitutional amendment.

Effect of acquired remedy at law to oust equitable jurisdiction.

Cited in *Mutual L. Ins. Co. v. Blair*, 130 Fed. 974, holding equitable jurisdiction of Federal court obtained in proceeding to cancel insurance policy, not ousted by death of insured and commencement of action at law on policy.

30 L. R. A. 98, *PARSONS v. HARTMAN*, 25 Or. 547, 42 Am. St. Rep. 803, 37 Pac. 61.

Exemption of property in custody of law.

Cited in *Reger v. Manhattan Brass Co.* 6 Pa. Super. Ct. 379, 41 W. N. C. 422, holding property in custody of claimant giving bond to sheriff, exempt from process.

Injunction against judgments.

Cited in notes (31 L. R. A. 775) on injunction against judgments for defenses existing prior to their rendition; (32 L. R. A. 329) on general equitable jurisdiction in regard to injunctions against judgments.

30 L. R. A. 143, GILLIS v. GILLIS, 96 Ga. 1, 51 Am. St. Rep. 121, 23 S. E. 107.

Competency of attesting witness.

Cited in Smith v. Crotty, 112 Ga. 909, 38 S. E. 110, holding competency of attesting witness tested by competency to testify to attestation in court.

Proof of execution where attesting witnesses fail.

Cited in Kelly v. William Sharp Saddlery Co. 99 Ga. 398, 27 S. E. 741, holding maker of deed competent to testify to execution, where subscribing witnesses cannot recollect transaction; Buchanan v. Simpson Grocery Co. 105 Ga. 305, 31 S. E. 105, holding execution of note provable by other evidence where subscribing witness denies attestation; Underwood v. Thurman, 111 Ga. 334, 36 S. E. 788, raising, without deciding, question whether presumption of due execution of will restricted to cases where subscribing witnesses die or fail to remember.

Evidence in proceeding to establish lost will.

Cited in Scott v. Maddox, 113 Ga. 797, 84 Am. St. Rep. 263, 39 S. E. 500, holding, in proceeding to establish lost will, execution provable by subscribing witnesses and facts rebutting presumed revocation by others.

Construction of Code.

Cited in Mitchell v. Georgia & A. R. Co. 111 Ga. 769, 51 L. R. A. 626, 36 S. E. 971, and Lamar v. McLaren, 107 Ga. 599, 34 S. E. 116, holding that, unless contrary manifestly appears, Code construable as declaratory of, not as changing, existing law.

30 L. R. A. 149, AIKMAN v. EDWARDS, 55 Kan. 751, 42 Pac. 366.

Legislative power to abolish existing courts.

Cited in Proulx v. Graves, 143 Cal. 247, 76 Pac. 1025, sustaining supervisors' power to abolish townships including justice's courts in each, and consolidate them into one; McCully v. State, 102 Tenn. 542, 46 L. R. A. 576, footnote p. 567, 53 S. W. 134 (distinguished in dissenting opinion), upholding legislature's power to abolish existing courts and change counties from one circuit to another.

Cited in footnotes to People *ex rel.* Burby v. Howland, 41 L. R. A. 838, which holds void, statute depriving justices of the peace of single town of criminal jurisdiction; Love v. Liddle, 62 L. R. A. 482, which denies power to regulate jurisdiction of justices of the peace by classification of cities in which they reside.

Repeal by implication.

Cited in Lowe v. Bourbon County, 6 Kan. App. 606, 51 Pac. 579, upholding act covering whole subject repealing by implication previous legislation.

30 L. R. A. 155, VOLTZ v. NATIONAL BANK, 158 Ill. 532, 42 N. E. 69.

Ultra vires corporate contracts.

Cited in Tourtelot v. Whithed, 9 N. D. 480, 84 N. W. 8, holding *ultra vires* contract of bank, not forbidden by law, not voidable when preformed.

Effect of payment of debt by stranger.

Cited in footnote to United States use of Fidelity Nat. Bank v. Rundle, 52 L. R. A. 505, which holds money furnished to pay labor claims not within bond

for paying persons supplying principal with labor or materials for prosecuting work.

30 L. R. A. 158, *WESTERN U. TELEG. CO. v. HOWELL*, 95 Ga. 194, 5 Inters. Com. Rep. 516, 51 Am. St. Rep. 68, 22 S. E. 286.

Followed without discussion in *Western U. Teleg. Co. v. Rawlings*, 95 Ga. 526, 23 S. E. 416.

30 L. R. A. 161, *CHICAGO, M. & ST. P. R. CO. v. WALLACE*, 14 C. C. A. 257, 24 U. S. App. 589, 66 Fed. 506.

Right of carrier to limit liability by contract.

Cited in *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 516, 44 L. ed. 569, 20 Sup. Ct. Rep. 385, Reversing 79 Fed. 566; *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 200, 40 L. R. A. 103, 62 Am. St. Rep. 503, 46 N. E. 917; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 26, 38 L. R. A. 94, 58 Am. St. Rep. 348, 44 N. E. 796; *Long v. Lehigh Valley R. Co.* 130 Fed. 873, — sustaining provision exempting railroad from liability to express messenger in contract to carry express matter; *Wilson v. Atlantic Coast Line R. Co.* 129 Fed. 779, sustaining validity of contract limiting carrier's liability for injuries to circus equipment transported under special arrangement.

Cited in footnotes to *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for injuries by wet; *Ullman v. Chicago & N. W. R. Co.* 56 L. R. A. 246, which sustains carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance; *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 558, which holds statutory prohibition against carriers limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state; *Central R. Co. v. Murphey*, 53 L. R. A. 720, which holds negligent carrier liable for true value, notwithstanding arbitrary preadjustment in bill of lading assented to by shipper.

Distinguished in *Richmond v. Southern P. Co.* 41 Or. 57, 57 L. R. A. 618, 93 Am. St. Rep. 694, 67 Pac. 947, holding agreement releasing railroad from liability to passenger on freight trains void as to trains designated to carry passengers.

30 L. R. A. 167, *PORTLAND HIBERNIAN BENEV. SOC. v. KELLY*, 28 Or. 173, 52 Am. St. Rep. 769, 42 Pac. 3.

Masonic lodge as charitable institution.

Cited in *Fitterer v. Crawford*, 157 Mo. 61, 50 L. R. A. 194, 57 S. W. 532, holding Masonic lodge exempt from taxation as institution "for purposes purely charitable."

Distinguished in *Mason v. Perry*, 22 R. I. 484, 48 Atl. 671, holding Masonic lodge not charitable institution which can hold bequest in trust for lodge purposes.

Effect of use of property on exemption from taxation.

Cited in *Willamette University v. Knight*, 35 Or. 36, 56 Pac. 124, holding realty of educational institution leased for profit, not exempt; *People ex rel. Young Men's Asso. v. Sayles*, 32 App. Div. 202, 53 N. Y. Supp. 67, denying exemption

of part of library building rented as public hall; *Parker v. Quinn*, 23 Utah, 341, 64 Pac. 961, denying exemption of portion of property of charitable institution devoted to purposes of revenue; *People ex rel. Delta Kappa Epsilon Soc. v. Lawler*, 74 App. Div. 560, 77 N. Y. Supp. 840, holding college fraternity house used primarily as boarding place for members not exempt; *Fitterer v. Crawford*, 157 Mo. 65, 50 L. R. A. 195, footnote p. 191, 57 S. W. 532, denying exemption of masonic lodge building, first and second stories of which are rented to pay debt and current expenses of lodge.

Cited in footnotes to *Young Men's Christian Asso. v. Douglas County*, 52 L. R. A. 123, which denies exemption to part of Y. M. C. A. building rented for business purposes; *Protestant Episcopal Church v. Prioleau*, 57 L. R. A. 606, which holds exempt, church parsonage rented, the rent being used to procure other residence for parson.

Injunction against collection of taxes.

Cited in *Alliance Trust Co. v. Multnomah County*, 38 Or. 437, 63 Pac. 498, refusing to restrain collection of irregular tax until tender of amount due; *Southern Oregon Co. v. Coos County*, 39 Or. 194, 64 Pac. 646, refusing to enjoin collection of tax on property not grossly overvalued.

Cited in footnote to *Philadelphia Mortg. & Trust Co. v. Omaha*, 57 L. R. A. 150, which denies right to restrain city from enforcing tax against property on which money loaned in reliance on treasurer's mistaken marking of taxes as paid.

30 L. R. A. 171, *SIMON v. NORTHUP*, 27 Or. 487, 40 Pac. 560.

Legislative power to impose burdens on municipalities.

Cited in *State ex rel. Bulkeley v. Williams*, 68 Conn. 148, 48 L. R. A. 490, 35 Atl. 24, holding that legislature may require town specially benefitted to contribute to cost of maintaining bridge or highway outside of limits.

Cited in footnotes to *Byram v. Marion County*, 33 L. R. A. 476, which authorizes taxation of city property for free gravel roads or turnpikes within county; *Johnson v. San Diego*, 30 L. R. A. 178, which upholds legislative power to readjust municipal indebtedness after division of city.

Cited in note (48 L. R. A. 471) on power of legislature to impose burdens upon municipalities and to control their local administration and property.

Distinguished in *Eaton v. Minnaugh*, 43 Or. 475, 73 Pac. 754, holding void legislation creating indebtedness by county beyond constitutional limit for construction of court-house.

Requirement that subject of act be stated in title.

Cited in *State ex rel. Carey v. Cornell*, 50 Neb. 532, 70 N. W. 56, holding provision for stenographer's salary germane to title of act relating to "courts."

Constitutional prohibition of special legislation laying out highways.

Cited in *Ellis v. Frazier*, 38 Or. 469, 53 L. R. A. 457, 63 Pac. 642, raising, without deciding, question whether statute authorizing construction of bicycle paths is a laying out of highway by local law.

State control of highways.

Cited in *Brand v. Multnomah County*, 38 Or. 91, 50 L. R. A. 393, 84 Am. St. Rep. 772, 60 Pac. 390, sustaining legislature's power to fix grade of city street; *Huddleston v. Eugene*, 34 Or. 354, 43 L. R. A. 447, 55 Pac. 868, holding

that legislature may by act of incorporation change county road to city street; *Cicero Lumber Co. v. Cicero*, 176 Ill. 25, 42 L. R. A. 703, 68 Am. St. Rep. 155, 51 N. E. 758, holding that municipality may, under legislative authority, exclude general traffic from public highway.

Cited in note (59 L. R. A. 522, 542) on establishment, regulation, and protection of ferries.

Taxation of county for city's benefit.

Distinguished in *Ladd v. Holmes*, 40 Or. 191, 91 Am. St. Rep. 457, 66 Pac. 714, holding that expenses of city primary elections may be imposed on county.

When statute unconstitutional.

Cited in *Ellis v. Frazier*, 38 Or. 464, 53 L. R. A. 456, 63 Pac. 642, holding that constitutionality of statute will be upheld wherever possible.

Municipal duties as to ferries.

Limited in *Kadderly v. County Court*, 32 Or. 567, 52 Pac. 515, denying right to compel court to provide new ferry boat to replace one in use when ferry was purchased.

30 L. R. A. 178, *JOHNSON v. SAN DIEGO*, 109 Cal. 468, 42 Pac. 249.

Legislative power to impose burdens on localities.

Cited in *Rolph v. Fargo*, 7 N. D. 662, 42 L. R. A. 655, 76 N. W. 242, sustaining front-foot assessments for paving.

Cited in footnote to *Simon v. Northup*, 30 L. R. A. 171, which upholds legislative power to require city to incur debt for bridges and ferries.

Cited in note (48 L. R. A. 475) on power of legislature to impose burdens on municipalities and to control their local administration and property.

Apportionment of municipal indebtedness.

Cited in *Re Fremont & B. H. Counties*, 8 Wyo. 22, 54 Pac. 1073, holding that provision apportioning indebtedness may be made after passage of act dividing county.

30 L. R. A. 182, *WEINSTOCK, L. & CO. v. MARKS*, 109 Cal. 529, 50 Am. St. Rep. 57, 42 Pac. 142.

Unlawful competition.

Cited in *Hainque v. Cyclops Iron Works*, 136 Cal. 352, 68 Pac. 1014, enjoining use of word "Cyclops" applied to machine shop by neighboring business competitor; *Duke v. Cleaver*, 19 Tex. Civ. App. 222, 46 S. W. 1128, enjoining use of words "nickle store" as business sign and trade name.

Cited in footnote to *American Washboard Co. v. Saginaw Mfg. Co.* 50 L. R. A. 609, which holds false description of zinc washboards as "aluminum," not unlawful competition.

Scope of equity jurisdiction.

Cited in *Southern P. Co. v. Robinson*, 132 Cal. 412, 64 Pac. 572, sustaining equity jurisdiction over action for injunction staying multiplicity of suits against railroad refusing stop-over privileges.

30 L. R. A. 186, *SULLIVAN v. NORTHERN SPY MIN. CO.* 11 Utah, 438, 40 Pac. 709.

Appropriation of percolating waters.

Cited in *Brosnan v. Harris*, 39 Or. 151, 54 L. R. A. 629, footnote p. 628, 87 Am. St. Rep. 649, 65 Pac. 867, sustaining right under statute to appropriate water of spring without natural outlet.

Cited in footnotes to *Bruening v. Dorr*, 35 L. R. A. 640, which denies right to use water of spring for irrigation as against prior appropriator of stream into which it percolates; *Willow Creek Irrig. Co. v. Michaelson*, 51 L. R. A. 280, which denies right to appropriate water arising through percolation on land after its segregation from public domain; *Vineland Irrig. District v. Azusa Irrig. Co.* 46 L. R. A. 820, which holds subsurface flow of river through gravelly bed subject to legal appropriation subordinate to rights of prior appropriator of surface flow; *Stillwater Water Co. v. Farmer*, 60 L. R. A. 875, which sustains right to injunction against landowner draining, collecting, and diverting percolating waters solely to waste them; *Huber v. Merkel*, 62 L. R. A. 589, which holds that landowner's right to sink wells and gather percolating water cannot be taken away by legislation unless by exercise of eminent domain or police power.

Limited in *Deadwood C. R. Co. v. Barker*, 14 S. D. 571, 86 N. W. 619, sustaining right of landowner to cut off, by adjoining well, supply of percolating water appropriated on public lands.

Distinguished in *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 456, 76 Am. St. Rep. 810, 54 Pac. 244, holding that appropriator of waters from artificial lake on public land acquires no prescriptive right to percolating waters drained from tunnel.

Acquiring rights in public lands by location.

Cited in *Bear Lake & River Waterworks & Irrig. Co. v. Garland*, 164 U. S. 19, 41 L. ed. 334, 17 Sup. Ct. Rep. 7, holding contractor's lien filed before completion of irrigation canal across public lands superior to antecedent mortgage.

30 L. R. A. 189, *DE HASS v. DIBERT*, 17 C. C. A. 79, 28 U. S. App. 559, 70 Fed. 227.

Negotiability of note.

Cited in *Benny v. Dunn*, 26 Pittsb. L. J. N. S. 383, 2 Lack. Legal News, 138, holding note containing provision for sale of stock collateral in case of depreciation before maturity, nonnegotiable.

Usury in agreement for interest after maturity.

Cited in note (49 L. R. A. 552) on usury in agreement for interest after maturity.

30 L. R. A. 193, *HARTFORD F. INS. CO. v. CHICAGO, M. & ST. P. R. CO.* 17 C. C. A. 62, 36 U. S. App. 152, 70 Fed. 201.

When state decisions binding on Federal courts.

Reversed on this point in 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33, holding state decision as to validity of contract against liability for negligence conclusive on Federal courts.

Cited in *Speer v. Kearney County*, 32 C. C. A. 114, 60 U. S. App. 38, 88 Fed. 762, holding decision of state, not conclusive upon Federal, court as to effect of

invalidity of act creating township on town warrants; *Clapp v. Otoe County*, 45 C. C. A. 582, 104 Fed. 477, holding decision of state, not obligatory on Federal courts as to effect of invalidity of municipal action on bonds issued pursuant thereto; *Independent School Dist. v. Rew*, 55 L. R. A. 372, 49 C. C. A. 207, 111 Fed. 11, holding state decisions as to validity of municipal bonds not controlling in Federal courts; *Manship v. New South Bldg. & L. Asso.* 110 Fed. 859, holding Federal court not bound by decision of state courts as to law governing loan by loan association of another state.

Stipulations against liability for negligence.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 200, 40 L. R. A. 104, footnote p. 191, 62 Am. St. Rep. 503, 46 N. E. 917, holding assumption of risks of employer's negligence by express contract not against public policy; *Louisville, N. A. & C. R. Co. v. Keefer*, 146 Ind. 31, 38 L. R. A. 95, 58 Am. St. Rep. 348, 44 N. E. 796, sustaining provision in contract with express company exempting railroad from liability to messenger; *South Carolina & G. R. Co. v. Carolina, C. G. & C. R. Co.* 93 Fed. 559, upholding stipulation against liability for negligence of employees in contract by one railroad to operate another.

— In railroad leases against liability for fire.

Cited in *Northern P. R. Co. v. McClure*, 9 N. D. 81, 47 L. R. A. 153, 81 N. W. 52, holding that covenant by railroad's lessee to indemnify against damages by fire from engines passes to transferee of railroad; *Ordelheide v. Wabash R. Co.* 80 Mo. App. 367; *American Cent. Ins. Co. v. Chicago & A. R. Co.* 74 Mo. App. 102, sustaining release of damages by fire to buildings on land leased from railroad; *Greenwich Ins. Co. v. Louisville & N. R. Co.* 112 Ky. 604, 56 L. R. A. 479, footnote p. 477, 99 Am. St. Rep. 313, 66 S. W. 411, and *Ordelheide v. Wabash R. Co.* 175 Mo. 346, 75 S. W. 149, sustaining contract releasing company from liability for injury by fire to building permitted to be placed on right of way.

Burden of showing contract against public policy.

Cited in *Pittsburgh, C. C. & St. L. R. Co. v. Mahoney*, 148 Ind. 201, 40 L. R. A. 104, 62 Am. St. Rep. 503, 46 N. E. 917, holding burden of showing contract against public policy on party asserting.

30 L. R. A. 201, *HANNA v. STATE TRUST CO.* 16 C. C. A. 586, 36 U. S. App. 61, 70 Fed. 2.

Power to make debts preferred liens.

Cited in *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 73, holding certificates issued by receiver of private corporation not entitled to priority as against non-consenting lienors; *Baltimore Bldg. & L. Asso. v. Alderson*, 32 C. C. A. 545, 61 U. S. App. 636, 90 Fed. 145, holding receiver's certificates not issuable to complete hotel without consent of creditors whose liens affected; *Ford v. Central Trust Co.* 17 C. C. A. 33, 36 U. S. App. 203, 70 Fed. 145, refusing to authorize receiver to recognize claim for materials and services in extending waterworks as paramount to prior mortgage; *International Trust Co. v. United Coal Co.* 27 Colo. 257, 83 Am. St. Rep. 59, 60 Pac. 621, holding that expenses of receiver operating coal mine cannot be given priority over mortgage; *Belknap Sav. Bank v. Lamar Land & Canal Co.* 28 Colo. 342, 64 Pac. 212, holding certificate of receiver of irrigation company inferior to liens of nonconsenting bondholders; *United States Invest. Corp. v. Portland Hospital*, 40 Or. 533, 56 L. R. A. 629, footnote p. 627, 67 Pac. 194, denying authority of receiver for continuing operation of hospital to contract

debts taking precedence over prior claims; *Grove v. Grove*, 93 Fed. 871, holding (*obiter*) consent of lienholders indispensable to issuance of certificates by receiver of private corporation; *Drennen v. Mercantile Trust & D. Co.* 115 Ala. 630, 39 L. R. A. 634, footnote p. 623, 67 Am. St. Rep. 72, 23 So. 164 (dissenting opinion), majority holding employee of manufacturing or mining company entitled to priority for wages earned within six months before receiver appointed; *Illinois Trust & Sav. Bank v. Doud*, 52 L. R. A. 497, 44 C. C. A. 416, 105 Fed. 150 (dissenting opinion), majority denying priority over mortgage of loan to make addition to plant of electric railway, light, and power company.

Cited in footnotes to *Whitely v. Central Trust Co.* 34 L. R. A. 303, which holds preference to railroad mortgages not gained by paying judgment for damages against company by surety on supersedeas bond; *St. Louis Trust Co. v. Riley*, 30 L. R. A. 456, which denies right to prefer claim for personal injuries over mortgage debt in receiver's earnings.

30 L. R. A. 206, *FIDELITY & C. CO. v. JOHNSON*, 72 Miss. 333, 17 So. 2.

What constitutes accident.

Cited in *American Acci. Co. v. Carson*, 99 Ky. 445, 34 L. R. A. 302, footnote p. 301, 59 Am. St. Rep. 473, 36 S. W. 169, holding intentional killing of insured by third person an accident; *Campbell v. Fidelity & C. Co.* 109 Ky. 670, 60 S. W. 492, holding death caused by being shot by another in self-defense, accidental, within meaning of policy; *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 242, 76 N. W. 562, holding death of insured shot by footpads, accidental; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 540, 43 L. R. A. 694, footnote p. 693, 70 Am. St. Rep. 212, 78 N. W. 252, holding death by rupture of artery while reaching over chair to close shutters, not accidental.

Cited in footnotes to *Atlanta Acci. Asso. v. Alexander*, 42 L. R. A. 188, which holds death from hernia from sudden and accidental strain not within clause exempting insurer from death resulting from hernia; *Fetter v. Fidelity & C. Co.* 61 L. R. A. 459, which holds death from rupture of cancerous kidney covered by accident policy; *Horsfall v. Pacific Mut. L. Ins. Co.* 63 L. R. A. 425, which holds dilation of heart resulting in death within few weeks, caused by heavy lift, covered by accident policy; *Maryland Casualty Co. v. Hudgins*, 64 L. R. A. 349, which holds death by accidentally eating spoiled oysters within clause of policy exempting from injuries from poison or anything accidentally or otherwise taken or absorbed; *Brown v. Sun L. Ins. Co.* 51 L. R. A. 252, which sustains recovery on policy of one whose death caused by taking over dose of morphine; *Delaney v. Modern Accident Club*, 63 L. R. A. 603, which holds death from blood poisoning received through slight wound as result of accidental injury covered by accident policy; *Preferred Acci. Ins. Co. v. Robinson*, 61 L. R. A. 145, which denies right to recover under accident policy for inflammation of eyes from accidental contact with poison ivy; *Railway Officials & E. Acci. Asso. v. Johnson*, 52 L. R. A. 401, which holds death by sunstroke while in line of employment covered by accident policy; *Smith v. Etna L. Ins. Co.* 56 L. R. A. 272, which holds injury by fall from steps of moving train covered by policy; *Fidelity & C. Co. v. Waterman*, 32 L. R. A. 654, which holds death from breathing illuminating gas while asleep covered by policy; *Menneiley v. Employers' Liability Assur. Corp.* 31 L. R. A. 686, which holds death by inhaling illuminating gas while asleep covered by accident policy; *Kasten v. Interstate Casualty Co.* 40 L. R. A. 651, which holds death caused by blood poisoning from germs in cotton used by dentist covered

by accident policy; *Modern Woodmen Acci. Asso. v. Shryock*, 39 L. R. A. 826, which holds question whether accident or disease caused death of insured for jury; *Burt v. Union Cent. L. Ins. Co.* 59 L. R. A. 393, which denies right to recover on policy on life of innocent person executed after conviction of capital offense.

30 L. R. A. 209, *LOVELACE v. TRAVELERS' PROTECTIVE ASSO.* 126 Mo. 104, 47 Am. St. Rep. 638, 28 S. W. 877.

Death by accident.

Cited in *American Acci. Co. v. Carson*, 99 Ky. 445, 34 L. R. A. 302, 59 Am. St. Rep. 473, 36 S. W. 169, holding intentional killing of insured by another, accident within meaning of policy and referring particularly to annotation in 30 L. R. A. 209; *Union Casualty & Surety Co. v. Harroll*, 98 Tenn. 595, 60 Am. St. Rep. 873, 40 S. W. 1080, holding killing of insured while quarreling with person, not knowing him armed, accidental; *Collins v. Fidelity & C. Co.* 63 Mo. App. 257, holding shooting of insured while in controversy with another, accidental injury; *Railway Officials & E. Acci. Asso. v. Drummond*, 56 Neb. 241, 76 N. W. 562, holding death of insured shot by robber, accidental; *Carnes v. Iowa State Traveling Men's Asso.* 106 Iowa, 285, 68 Am. St. Rep. 306, 76 N. W. 683, holding death by mistaken overdose of morphine, accidental; otherwise when effect of dose misjudged; *Hester v. Fidelity & C. Co.* 69 Mo. App. 191, holding it a question for the jury whether injuries sustained from gunshot wound in quarrel were accidental.

Distinguished in *Taliaferro v. Travelers' Protective Asso.* 25 C. C. A. 496, 49 U. S. App. 275, 80 Fed. 370, holding death of insured attacking adversary with pistol not accidental.

Annotation in 30 L. R. A. 209, referred to particularly in *Peele v. Provident Fund Soc.* 147 Ind. 549, 44 N. E. 661, holding involuntary death by drowning, death by accident.

Voluntary exposure to risk.

Cited in *Hester v. Fidelity & C. Co.* 78 Mo. App. 509, denying liability on accident policy for death of insured persisting in quarrel, knowing person armed; *Union Casualty & Surety Co. v. Harroll*, 98 Tenn. 598, 60 Am. St. Rep. 873, 40 S. W. 1080, holding insured's advancing toward apparently unarmed adversary after warning, not voluntary exposure.

30 L. R. A. 214, *TUTTLE v. BURGETT*, 53 Ohio St. 498, 53 Am. St. Rep. 649, 42 N. E. 427.

Rights under deed in consideration of agreement to support.

Cited in footnote to *Glocke v. Glocke*, 57 L. R. A. 458, which holds land conveyed by aged parent to son promising to support him, reverts to former on breach of agreement.

Parol evidence varying written instrument.

Cited in *First Nat. Bank v. Central Chandelier Co.* 17 Ohio C. C. 447, holding prior oral declarations of parties inadmissible to show purpose not expressed in ambiguous instrument; *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 377, 38 S. E. 679, holding parol evidence of contemporaneous agreement contradicting written submission of controversy inadmissible; *Harness v. Eastern Oil Co.* 49 W. Va. 248, 38 S. E. 662, holding parol evidence of contemporaneous agreement not to assign lease inadmissible.

30 L. R. A. 218, *STATE ex rel. SCHWARTZ v. FERRIS*, 53 Ohio St. 314, 41 N. E. 579.

Power of taxation for general revenue.

Cited in *Dyer v. Hagerty*, 12 Ohio C. C. 607, sustaining collateral inheritance tax for general revenue; *Alter v. Cincinnati*, 56 Ohio St. 68, 35 L. R. A. 742, 46 N. E. 69, sustaining statute applying water rents to general revenue; *Southern Gum Co. v. Laylin*, 66 Ohio St. 593, 64 N. E. 564, sustaining corporate franchise tax for general revenue.

Constitutional requirement that general laws operate uniformly.

Cited in *State v. Spellmire*, 67 Ohio St. 82, 65 N. E. 619, holding act creating special school district unconstitutional.

"Equal protection" clause of Constitution.

Cited in *Williams v. Donough*, 65 Ohio St. 506, 56 L. R. A. 769, 63 N. E. 84, holding statute exempting benefits rendered by fraternal organizations from seizure for debt, unconstitutional; *Mykrantz v. Globe Bldg. & Loan Assn.* 19 Ohio C. C. 57, holding act exempting loan associations from usury laws unconstitutional; *Palmer v. Tingle*, 55 Ohio St. 445, 45 N. E. 313, holding act giving lien on owner's property to subcontractors, laborers, and materialmen, unconstitutional; *Southern Gum Co. v. Laylin*, 66 Ohio St. 594, 64 N. E. 564, sustaining state's power to reasonably tax corporate franchise.

Distinguished in *Snell v. Cincinnati Street R. Co.* 60 Ohio St. 270, 54 N. E. 270. Affirming 16 Ohio C. C. 634, sustaining validity of statute providing for change of venue from county where corporation having more than fifty shareholders has principal office.

Succession taxes.

Cited in *Black v. State*, 113 Wis. 223, 90 Am. St. Rep. 853, 89 N. W. 522, holding succession tax on estates of \$10,000 or over, without regard to amount received by individual beneficiary, unconstitutional; *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 492, 84 N. W. 1101, holding succession tax taxation of privilege of inheritance; *Knowlton v. Moore*, 178 U. S. 58, 44 L. ed. 976, 20 Sup. Ct. Rep. 747, 9 Pa. Dist. R. 309, sustaining Federal succession tax; *State ex rel. Garth v. Switzler*, 143 Mo. 332, 40 L. R. A. 290, footnote p. 280, 65 Am. St. Rep. 653, 45 S. W. 245, holding succession tax at different rates on legacies of different amounts, invalid; *State ex rel. Taylor v. Guilbert*, 70 Ohio St. 248, 71 N. E. 636, holding valid, inheritance tax operating uniformly throughout state upon all persons in same category; *Gelsthorpe v. Furnell*, 20 Mont. 306, 39 L. R. A. 173, footnote p. 170, 51 Pac. 267, sustaining exemption, from succession tax, of estate less than \$7,500; *Hinds v. Wilcox*, 22 Mont. 13, 55 Pac. 355, by Pigott, J., in separate opinion, holding inheritance tax on estates exceeding certain value, unconstitutional.

Cited in footnotes to *Billings v. People*, 59 L. R. A. 807, which sustains transfer tax on lineal descendants to whom life estate is given with remainder to lineal descendants, but exempting lineal descendants taking fee; *Ferry v. Campbell*, 50 L. R. A. 92, which holds succession tax void for want of notice of proceedings to fix amount of tax; *Drew v. Tifft*, 47 L. R. A. 525, which requires uniformity and equal application in exemption from inheritance tax; *Re Cope*, 45 L. R. A. 316, which holds void succession tax exempting \$5,000 in each estate.

Distinguished in *Hagerty v. State*, 55 Ohio St. 625, 45 N. E. 1046, sustaining

law imposing collateral inheritance tax on amounts exceeding constitutional exemption; *Re Lacey*, 19 Pa. Co. Ct. 433, 6 Pa. Dist. R. 500, holding succession tax on estates in excess of certain amount constitutional; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 291, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594, sustaining succession tax at different rates on legacies or shares of relatives of different degrees.

30 L. R. A. 225, *HAWES v. CHICAGO*, 158 Ill. 653, 42 N. E. 373.

Necessity that ordinances be reasonable.

Cited in *People ex rel. Akin v. Kipley*, 171 Ill. 86, 41 L. R. A. 789, 49 N. E. 229, holding ordinance extending exemption from classified service under civil service act invalid.

Cited in footnote to *Slaughter v. O'Berry*, 48 L. R. A. 442, which holds void, ordinance that city provide materials and do work of making sewer connections to within 3 feet of building.

What may be considered in construing statute or ordinance.

Cited in *People ex rel. Akin v. Kipley*, 171 Ill. 77, 41 L. R. A. 786, 49 N. E. 229, holding existing circumstances, objects sought to be obtained, and necessity for adoption to be considered in determining meaning of statute; *Wice v. Chicago & N. W. R. Co.* 193 Ill. 356, 56 L. R. A. 271, 61 N. E. 1084, holding reasonableness of ordinance prohibiting getting on or off moving trains determinable with regard to circumstances, object, and necessity.

Power of courts to review reasonableness of ordinances.

Cited in *Wice v. Chicago & N. W. R. Co.* 193 Ill. 356, 56 L. R. A. 271, 61 N. E. 1084, holding that ordinance passed under general power must be reasonable; *Title Guarantee & Trust Co. v. Chicago*, 162 Ill. 509, 44 N. E. 832, holding reasonableness of sewer ordinance subject to review; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 321, 60 L. R. A. 393, 93 Am. St. Rep. 190, 65 N. E. 730, holding reasonableness of ordinance regulating speed of trains, passed under power, subject to review; *Pittsburgh, C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 423, 35 L. R. A. 685, 45 N. E. 587, holding reasonableness of ordinance requiring watchman at railroad crossing subject to review; *People ex rel. Gleason v. Yancey*, 167 Ill. 263, 47 N. E. 521, holding (*obiter*) reasonableness of sidewalk ordinance subject to review.

Cited in footnote to *Beiling v. Evansville*, 35 L. R. A. 272, which refuses to hold void, ordinance prohibiting maintenance of slaughterhouse within city when authorized by statute.

Reasonableness of ordinances for public improvements.

Cited in *Job v. Alton*, 189 Ill. 267, 82 Am. St. Rep. 448, 59 N. E. 622, holding that sidewalk ordinances must be reasonable, not oppressive; *McFarlane v. Chicago*, 185 Ill. 252, 57 N. E. 12, holding ordinance for brick in place of good block pavement, void as unreasonable.

Distinguished in *Walker v. Morgan Park*, 175 Ill. 573, 51 N. E. 636, sustaining sidewalk ordinance not clearly oppressive, although no pressing demand for walk exists; *Field v. Western Springs*, 181 Ill. 192, 54 N. E. 929, holding requiring construction of sidewalk demanded by public convenience, not unreasonable; *Myers v. Chicago*, 196 Ill. 593, 63 N. E. 1037, sustaining ordinance for water-pipe extension and assessment of cost on abutting vacant lots; *Chicago v. Wilson*, 195 Ill. 23, 57 L. R. A. 128, footnote p. 127, 62 N. E. 843, sustaining ordinance for con-

to allow inheritance by wife of husband's property, if she has once been resident of state.

30 L. R. A. 250, MISSOURI P. R. CO. v. MEEH, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 753.

Citizenship of corporations for jurisdictional purposes.

Cited in *Bradley v. Ohio R. & C. Co.* 119 N. C. 923, Appx. 78 Fed. 391, holding foreign corporation made domestic by legislative enfranchisement; *Winn v. Wabash R. Co.* 118 Fed. 65, holding that corporation formed by consolidating railroads becomes citizen of each of states where constituent companies domiciled; *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 369, holding corporation incorporated in Massachusetts and Connecticut not suable in Massachusetts by citizen thereof alleging it to be Connecticut corporation.

Cited as qualified in *Walters v. Chicago, B. & Q. R. Co.* 104 Fed. 378, holding that incorporation in another state does not change citizenship of corporation.

30 L. R. A. 255, ARGENTINE v. ATCHISON, T. & S. F. R. CO. 55 Kan. 730, 41 Pac. 946.

30 L. R. A. 257, PICKETT v. WILMINGTON & W. R. CO. 117 N. C. 616, 53 Am. St. Rep. 611, 23 S. E. 264.

Last clear chance.

Cited in *Bogan v. Carolina C. R. Co.* 129 N. C. 157, 55 L. R. A. 421, 39 S. E. 808, holding that contributory negligence in walking upon trestle will not defeat recovery where engineer could have avoided accident; *Klockenbrink v. St. Louis & M. River R. Co.* 81 Mo. App. 357, holding railway liable for collision of street car with wagon on track where motorman might have avoided accident; *Fulp v. Roanoke & S. R. Co.* 120 N. C. 529, 27 S. E. 74, holding instruction that failure to note approach of train in consequence of drunkenness was contributory negligence, erroneous; *McCracken v. Smathers*, 119 N. C. 619, 26 S. E. 157, holding that instruction that contributory negligence proximately causing injury bars recovery should be accompanied by definition of contributory negligence; *Weitzman v. Nassau Electric R. Co.* 33 App. Div. 596, 53 N. Y. Supp. 905, holding that negligence of motorman in not stopping car after child fell on fender should be submitted to jury; *Styles v. Richmond & D. R. Co.* 118 N. C. 1088, 24 S. E. 740, denying railroad's liability where caving of bank throws section hand in front of train; *Baker v. Wilmington & W. R. Co.* 118 N. C. 1019, 24 S. E. 415, holding negligence in going to sleep on track not proximate cause of injury where engineer exercising ordinary care might have stopped train; *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1013, 54 Am. St. Rep. 764, 24 S. E. 805, holding railroad liable where headlight would have enabled engineer to see man on track in time; *Chesson v. John L. Roper Lumber Co.* 118 N. C. 68, 23 S. E. 925, holding employer liable where inspection of platform would have prevented accident; *Carney v. Concord Street R. Co.* 72 N. H. 371, 57 Atl. 218, denying nonliability of railway company for death of child at crossing unless fair-minded men agree in its freedom from fault; *Purnell v. Raleigh & G. R. Co.* 122 N. C. 844, 29 S. E. 953 (dissenting opinion), majority denying liability of railroad for death of person discovering train in time to escape by ordinary care.

Cited in footnotes to *Thompson v. Salt Lake Rapid-Transit Co.* 40 L. R. A.

172, which holds one having last clear chance, solely responsible for injury; *Baltimore Consol. R. Co. v. Armstrong*, 54 L. R. A. 424, which denies liability towards one caught between two street-cars by becoming confused after assenting to motorman's instructions as to reaching safe place; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 802, which holds that duty to exercise care to avoid injury from other's negligence does not arise till negligence apprehensible; *Tesch v. Milwaukee Electric R. & L. Co.* 53 L. R. A. 618, which denies liability for injury to one guilty of contributory negligence, notwithstanding subsequent opportunity of other party to avoid injury.

Cited in note (55 L. R. A. 420, 423, 444, 455, 456) on doctrine of last clear chance.

Distinguished in *Doster v. Charlotte Street R. Co.* 117 N. C. 663, 34 L. R. A. 486, 23 S. E. 449, denying street car company's liability for failure to stop car frightening mule not on track; *Mayes v. Southern R. Co.* 119 N. C. 769, 26 S. E. 148, holding that court need not charge that person going upon crossing after looking and listening was negligent if he might have seen train.

Railroad's duty to trespassers.

Cited in *Cook v. Southern R. Co.* 128 N. C. 335, 38 S. E. 925, holding that carrier owes ordinary care to person stealing ride; *Pharr v. Southern R. Co.* 119 N. C. 756, 26 S. E. 32, holding railroad liable for killing man lying near track, discoverable by engineer in exercise of ordinary care; *Jeffries v. Seaboard Air Line R. Co.* 129 N. C. 240, 39 S. E. 836, holding it carrier's duty to check train at time when child on track could first have been seen; *Lindsay v. Canadian P. R. Co.* 68 Vt. 566, 35 Atl. 513, holding railroad liable for killing child on track, from failure to keep reasonable lookout.

Cited in footnotes to *Mason v. Southern R. Co.* 53 L. R. A. 913, which holds company liable for death of child on track from failure to keep reasonable lookout; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires stopping to enable trespasser discovered on railroad bridge to escape; *Cleveland, C. C. & St. L. R. Co.* 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Schreiner v. Great Northern R. Co.* 58 L. R. A. 76, which holds failure to build fence not proximate cause of injury to one pushed on track by cow.

Duty to keep lookout.

Cited in *Arrowood v. South Carolina & G. Extension R. Co.* 126 N. C. 631, 36 S. E. 151, holding it railroad's duty to keep proper lookout; *McClanahan v. Vicksburg, S. & P. R. Co.* 111 La. 792, 35 So. 902, holding failure of engineer to keep proper lookout proximate cause of injury; *Lassiter v. Raleigh & G. R. Co.* 133 N. C. 247, 45 S. E. 570, holding question for jury whether failure to keep lookout on moving train was proximate cause of injury.

What constitutes negligence.

Cited in *Little v. Carolina C. R. Co.* 118 N. C. 1076, 24 S. E. 514, holding attempt to walk across high railroad trestle negligence; *Nieboer v. Detroit Electric R. Co.* 128 Mich. 494, 87 N. W. 626 (dissenting opinion), majority holding person riding on rear bumper of crowded car, when he might have taken another car within few minutes, contributorily negligent.

Intoxication as affecting negligence.

Cited in *Lloyd v. Albemarle & R. R. Co.* 118 N. C. 1014, 54 Am. St. Rep. 764.

24 S. E. 805, holding drunkenness of man on track not concurrent negligence, where railroad's ordinary care would prevent accident.

Cited in note (40 L. R. A. 140) on intoxication as affecting negligence.

When plaintiff's negligence immaterial.

Cited in Sherrill v. Western U. Teleg. Co. 117 N. C. 361, 23 S. E. 277, holding that negligence of sender of telegram in making arrangements for delivery of answer will not excuse negligence of company in delivering to wrong person.

Measure of damages for negligent injuries.

Cited in Benton v. North Carolina R. Co. 122 N. C. 1009, 30 S. E. 333, and Coley v. Statesville, 121 N. C. 317, 28 S. E. 482, holding measure of damages for negligently causing death, present value of deceased's net income.

Distinguished in Coley v. North Carolina R. Co. 128 N. C. 542, 57 L. R. A. 830, 39 S. E. 43, holding "present cash value" of injury, considering pain and mental suffering, proper measure of damages.

New trials on restricted issues.

Cited in Strother v. Aberdeen & A. R. Co. 123 N. C. 200, 31 S. E. 386, granting new trial on issue of damages, on reversal for errors affecting damages only; Benton v. Collins, 125 N. C. 90, 47 L. R. A. 37, 34 S. E. 242, sustaining power of superior court to order new trial on issue of damages, where verdict inadequate.

Exceptions to court's framing of issues.

Cited in Williams v. Gill, 122 N. C. 968, 29 S. E. 879, holding that party excepting must show himself injured by exercise of court's discretion in framing issues.

Distinguished in Nathan v. Charlotte Street R. Co. 118 N. C. 1070, 24 S. E. 511, and Baker v. Wilmington & W. R. Co. 118 N. C. 1023, 24 S. E. 415, holding refusal to submit issue involving question whether defendant's or plaintiff's negligence was proximate cause of injury, error.

30 L. R. A. 261, COMMERCIAL & F. BANK v. WORTH, 117 N. C. 146, 23 S. E. 160.

Authority of legislative committee.

Cited in Purnell v. Worth, 117 N. C. 157, 30 L. R. A. 263, 23 S. E. 161, denying authority of legislative investigating committee to employ counsel under provision for necessary expenses.

Claims for which no appropriation exists.

Cited in Garner v. Worth, 122 N. C. 253, 29 S. E. 364, denying mandamus for payment of claim for which no appropriation exists; State *ex rel.* White v. Hill, 125 N. C. 200, 34 S. E. 432, by Clark, J., dissenting, who holds auditor's warrant no protection to treasurer paying claim for which no appropriation made.

30 L. R. A. 262, PURNELL v. WORTH, 117 N. C. 157, 23 S. E. 161.

Rights of legislative committee.

Cited in footnote to Commercial & Farmers' Bank v. Worth, 30 L. R. A. 261, which denies right of legislative committee to draw *per diem* or mileage after legislature adjourns.

30 L. R. A. 263, MURPHY v. PORTRUM, 95 Tenn. 605, 32 S. W. 633.

Decrees of adoption or legitimation.

Cited in Crocker v. Balch, 104 Tenn. 8, 55 S. W. 307, holding county court decrees of adoption or legitimation not assailable collaterally except for want of jurisdiction appearing on record.

Illegitimate's right to inherit.

Cited in Laughlin v. Johnson, 102 Tenn. 460, 52 S. W. 816, holding that illegitimate shares equally with legitimates in estate of deceased sister.

Legal status of adopted children.

Cited in footnotes to Butterfield v. Sawyer, 52 L. R. A. 75, which holds adopted child within deed to woman for life, with remainder to her "child" if any, otherwise to her "heirs generally;" Hartwell v. Tefft, 34 L. R. A. 500, which holds adopted child "lawful issue" within meaning of will; Clarkson v. Hatton, 39 L. R. A. 748, which holds adopted child not within statute giving remainder to children or heirs of life tenant; Gray v. Holmes, 33 L. R. A. 207, which sustains right of inheritance of child adopted in sister state; Glascott v. Bragg, 56 L. R. A. 258, which holds will in favor of third person revoked by marriage and adoption of child.

30 L. R. A. 265, HEWITT v. STORY, 12 C. C. A. 250, 29 U. S. App. 155, 64 Fed. Rep. 510.

Rights of prior appropriators of water.

Cited in Union Mill & Min. Co. v. Dangberg, 81 Fed. 96, holding extent of appropriation of water measured by amount applied to beneficial use within reasonable time.

Cited in footnotes to Salt Lake City v. Salt Lake City Water & Electrical Power Co. 61 L. R. A. 649, which holds appropriator's right to use water not forfeited by not putting to actual use on account of opposition of prior appropriators; Ada County Farmers' Irrig. Co. v. Farmers' Canal Co. 40 L. R. A. 485, which sustains right to convey ditch reserving water right and *vice versa*.

Cited in notes (30 L. R. A. 676) on right of prior appropriation of water; (30 L. R. A. 389) on change of use or channel of water appropriated.

Parties to suit for infringing water rights.

Cited in Union Mill & Min. Co. v. Dangberg, 81 Fed. 87, upholding right of tenant in common to restrain infringement of water rights without joining co-tenants.

30 L. R. A. 281, KELLY v. MINNEAPOLIS, 63 Minn. 125, 65 N. W. 115.

What constitutes municipal indebtedness.

Cited in Burnham v. Milwaukee, 98 Wis. 134, 73 N. W. 1019, holding unpaid instalments for purchase of park lands not corporate indebtedness; Kronsheim v. Rochester, 76 App. Div. 499, 78 N. Y. Supp. 813, holding paving contract limiting liability to sums collected from property owners does not create municipal indebtedness; Swanson v. Ottumwa, 118 Iowa. 190, 59 L. R. A. 630, 91 N. W. 1048, holding purchase-money mortgage on waterworks accompanying bonds payable out of special tax not municipal indebtedness; Perrigo v. Milwaukee, 92 Wis. 242, 65 N. W. 1025, holding contract for purchase of park land creating no

corporate liability not taxable as debt; *Reynolds v. Waterville*, 92 Me. 317, 42 Atl. 553 (dissenting opinion), majority holding act incorporating city hall commission imposes additional indebtedness on city.

Cited in footnote to *Indianapolis v. Wann*, 31 L. R. A. 743, which holds contract for street lights for five years payable monthly void.

How municipal indebtedness ascertained.

Cited in *Johnson v. Pawnee County*, 7 Okla. 692, 56 Pac. 701, holding existing indebtedness ascertained by deducting available county assets from total indebtedness; *Stone v. Chicago*, 207 Ill. 510, 69 N. E. 970, holding amount in treasurer's hands applicable to sinking fund deductible from amount of city's bonded indebtedness in estimating amount thereof.

30 L. R. A. 286, *GERMANIA BANK v. MICHAUD*, 62 Minn. 459, 54 Am. St. Rep. 653, 65 N. W. 70.

30 L. R. A. 290, *INDIANA, I. & I. R. CO. v. SWANNELL*, 157 Ill. 616, 41 N. E. 989.

Following trust property.

Cited in *First Nat. Bank v. Leech*, 207 Ill. 220, 69 N. E. 890, holding that bank acquiring land from guardian with notice of its purchase with ward's money, holds as trustee for ward.

Cited in footnote to *Carter v. Gibson*, 52 L. R. A. 468, which holds right to pursue purchaser of trust property waived by taking judgment for price against trustee.

Purchase by trustee of lien on trust property.

Cited in footnote to *Harrison v. Mulvane*, 54 L. R. A. 405, which holds one charged with selling corporate stock to pay encumbrances one of which he owns, not forbidden, as trustee, to buy prior liens to protect own interests.

30 L. R. A. 297, *KRANTZ v. RIO GRANDE WESTERN R. CO.* 12 Utah, 104, 41 Pac. 717.

Carrier's liability for assault on passenger.

Cited in *Seawell v. Carolina C. R. Co.* 133 N. C. 518, 45 S. E. 850, sustaining liability of carrier for failure to extend protection to passenger against mob.

Cited in footnotes to *Birmingham R. & Electric Co. v. Baird*, 54 L. R. A. 752, which holds carrier liable for conductor's assault on passenger; *Kohner v. Capital Traction Co.* 62 L. R. A. 875, which requires carrier, when peaceable passenger on street car is unlawfully assaulted by conductor, to show that injury was result of unavoidable accident; *Haver v. Central R. Co.* 43 L. R. A. 84, which holds carrier liable for malicious assault by employee on passenger; *Savannah, F. & W. R. Co. v. Quo*, 40 L. R. A. 483, which holds carrier liable for baggage master's assault with intent to rape passenger; *St. Louis S. W. R. Co. v. Jones*, 39 L. R. A. 784, which holds carrier liable for conductor's unreasonably beating passenger slapping his face; *Exton v. Central R. Co.* 56 L. R. A. 509, which holds carrier liable for injury to passenger at station by scuffling cabmen; *Houston & T. C. R. Co. v. Phillio*, 59 L. R. A. 392, which denies duty of carriers to protect persons, resorting to stations to aid departure of friends, from assaults by loungers; *McDermott v. American Brewing Co.* 52 L. R. A. 684, which denies master's liability for assault by servant to protect his own interests.

30 L. R. A. 300, *COMER v. DUFOUR*, 95 Ga. 376, 51 Am. St. Rep. 89, 22 S. E. 543.

Effect on drawer's liability of delay in presenting check.

Cited in *Merritt v. Gate City Nat. Bank*, 100 Ga. 150, 38 L. R. A. 750, 27 S. E. 979, holding drawer of check not absolved from liability thereon where no loss results from delay in presentment.

30 L. R. A. 303, *BLY v. NASHUA STREET R. CO.* 67 N. H. 474, 68 Am. St. Rep. 681, 32 Atl. 764.

Rights of street railroad.

Cited in *Smith v. Nashua Street R. Co.* 69 N. H. 504, 44 Atl. 133, holding street railway liable for injury to traveler from snow bank made in clearing tracks; *Little v. Boston & M. R. Co.* 72 N. H. 503, 57 Atl. 920, holding street railway bound to exercise due care toward traveler negligently upon crossing.

Effect of violating ordinance on liability.

Cited in *Lane v. Concord*, 70 N. H. 487, 85 Am. St. Rep. 643, 49 Atl. 687, holding proof of violation of ordinance forbidding dumping rubbish not conclusive as to nuisance; *Bresnehan v. Gove*, 71 N. H. 239, 51 Atl. 916, holding evidence of unlawful speed not conclusive as to negligence.

Cited in footnote to *Evansville Street R. Co. v. Gentry*, 37 L. R. A. 378, which holds running electric car at unusually rapid rate over much frequented crossing negligence.

30 L. R. A. 305, *HILES v. FISHER*, 144 N. Y. 306, 43 Am. St. Rep. 762, 39 N. E. 337.

Right to usufruct of estate by entirety.

Cited in *Messing v. Messing*, 64 App. Div. 127, 71 N. Y. Supp. 717, sustaining right of tenant by entirety to accounting of rents and profits.

Disapproved in *Dickey v. Converse*, 117 Mich. 453, 72 Am. St. Rep. 568, 76 N. W. 80, holding crops on land held by entireties not subject to execution against one tenant.

Tenancy by entireties.

Cited in *Branch v. Polk*, 61 Ark. 393, 30 L. R. A. 329, 54 Am. St. Rep. 266, 33 S. W. 424, holding separate mortgages of half interests by tenants by entirety give lien on half interest only upon husband's death; *Grosser v. Rochester*, 148 N. Y. 238, 42 N. E. 672, sustaining right of wife holding by entirety to restrain construction of sewer across premises under condemnation award to husband; *Howell v. Folsom*, 38 Or. 187, 84 Am. St. Rep. 785, 63 Pac. 116, sustaining wife's right to mortgage separate interest in land held by entirety; *Toole v. Oneida County*, 13 App. Div. 474, 37 N. Y. Supp. 9, Affirming 16 Misc. 656, 37 N. Y. Supp. 9, holding wife's interest as tenant by entirety assessable; *Laird v. Perry*, 74 Vt. 462, 59 L. R. A. 342, footnote p. 340, 52 Atl. 1040, holding estate by entireties, except wife's right of survivorship, passes by husband's assignment for creditors; *Messing v. Messing*, 64 App. Div. 126, 71 N. Y. Supp. 717, holding land deeded to woman and affianced husband "as joint tenants" cannot be partitioned; *Fulper v. Fulper*, 54 N. J. Eq. 433, 32 L. R. A. 702, footnote p. 701, 55 Am. St. Rep. 590, 34 Atl. 1063, holding tenancy in common created by deed to husband and wife as "tenants in common;" *McCallister v. Folden*, 110 Ky.

736, 62 S. W. 538, holding deed to husband and wife "during their natural lives" provides for right of survivorship within statutory exception.

Cited in footnotes to *Simons v. Bollinger*, 48 L. R. A. 234, which holds estate by entireties created by deed to husband and wife "jointly;" *Johnston v. Johnston*, 61 L. R. A. 166, which holds estate by entirety not created by giving note secured by deed of trust to husband and wife for loan part of which advanced by each; *Price v. Planters' Nat. Bank*, 32 L. R. A. 214, which holds liability of wife's equitable statutory estate for her debts not terminated by her death.

Cited in note (30 L. R. A. 315) on tenancy by entireties.

Disapproved in *McNeeley v. South Penn Oil Co.* 52 W. Va. 628, 62 L. R. A. 570, 44 S. E. 508, holding survivorship in estates by entireties abolished by statute.

30 L. R. A. 315, *COLE MFG. CO. v. COLLIER*, 95 Tenn. 115, 49 Am. St. Rep. 921, 31 S. W. 1000.

Tenancy by entireties.

Cited in footnote to *Re Parry*, 49 L. R. A. 444, which holds estate by entireties created by letter of credit in favor of husband and wife purchased with former's money.

Cited in note (30 L. R. A. 308, 315, 319) on tenancy by entireties.

Distinguished in *Hamilton Bldg. & L. Asso. v. Patton*, 105 Tenn. 410, 58 S. W. 482, holding wife joining husband in mortgage of estate by entireties cannot be dispossessed under stipulation therein upon notice to husband.

30 L. R. A. 320, *BROWN v. BARABOO*, 90 Wis. 151, 62 N. W. 921.

Tenancy of husband and wife.

Second appeal in 98 Wis. 284, 74 N. W. 223, holding that father and mother of deceased intestate take as tenants in common.

Cited in *Fiedler v. Howard*, 99 Wis. 394, 67 Am. St. Rep. 865, 75 N. W. 163, holding note and mortgage running to husband and wife go to survivor; *Fulper v. Fulper*, 54 N. J. Eq. 435, 32 L. R. A. 703, 55 Am. St. Rep. 590, 34 Atl. 1063, holding tenancy in common created by deed to husband and wife "as tenants in common;" *Citizens Loan & T. Co. v. Witte*, 116 Wis. 63, 92 N. W. 443, holding common-law rule as to rights of husband and wife in real estate held as tenants in the entirety, modified by statute enlarging rights of married women.

Cited in note (30 L. R. A. 316) on tenancy by entireties.

Distinguished in *Wallace v. St. John*, 119 Wis. 590, 97 N. W. 197, holding that conveyance to husband and wife makes them joint tenants with right in wife to convey as though unmarried.

30 L. R. A. 324, *BRANCH v. POLK*, 61 Ark. 388, 54 Am. St. Rep. 266, 33 S. W. 424.

Effect of conveyance to husband and wife.

Cited in *Simpson v. Biffle*, 63 Ark. 301, 38 S. W. 345, holding that sale on execution against husband of lands conveyed to husband and wife does not divest wife's right of possession.

Effect of enabling acts.

Cited in *Howell v. Folsom*, 38 Or. 187, 84 Am. St. Rep. 785, 63 Pac. 116, sus-

taining validity of wife's mortgage of land held by entirety, and referring particularly to annotation in 30 L. R. A. 324; *Kies v. Young*, 64 Ark. 385, 62 Am. St. Rep. 198, 42 S. W. 669, holding husband liable for wife's antenuptial debts.

30 L. R. A. 331, *ROBINSON'S APPEAL*, 88 Me. 17, 51 Am. St. Rep. 367, 33 Atl. 652.

Effect of enabling acts.

Cited in *Morrison v. Clark*, 89 Me. 105, 56 Am. St. Rep. 395, 35 Atl. 1034, and *Helvie v. Hoover*, 11 Okla. 693, 69 Pac. 958, holding deed to husband and wife creates tenancy in common; *McNeeley v. South Penn Oil Co.* 52 W. Va. 627, 62 L. R. A. 569, 44 S. E. 508, and *Armstrong v. Johnson*, 93 Mo. App. 501, 67 S. W. 733, holding common-law rule of survivorship as applied to husband and wife abolished by enabling acts, the latter referring particularly to annotation in 30 L. R. A. 331.

Partition between life tenant and remainderman.

Cited in footnote to *Love v. Blauw*, 48 L. R. A. 257, which holds void on collateral attack partition decree made on petition showing plaintiff only life tenant.

30 L. R. A. 336, *BIGELOW v. NICKERSON*, 17 C. C. A. 1, 34 U. S. App. 261, 70 Fed. 113.

Actions for death from negligent collision of vessels.

Cited in *The Onoko*, 47 C. C. A. 112, 107 Fed. 986, holding statute making vessel liable for damages to person or property does not give lien in favor of next of kin of persons negligently killed; *Chicago Transit Co. v. Campbell*, 110 Ill. App. 370, holding law of state applicable in action for death from negligent collision upon high seas within its jurisdiction.

Limit of state sovereignty on seas.

Distinguished in *Carlson v. United New York Sandy Hook Pilots' Asso.* 93 Fed. 472, raising, without deciding, question whether state jurisdiction extends to exterior boundary for application of rules for harbor navigation beyond 3-mile limit.

Jurisdiction of Federal courts.

Cited in *Williams v. Crabb*, 59 L. R. A. 429, 54 C. C. A. 217, 117 Fed. 195, holding equity suit to set aside probated will maintainable in Federal courts.

Failure to choose best way of escape from danger.

Cited in *The Marguerite*, 87 Fed. 955, holding vessel not at fault for unwise maneuver under extreme danger.

Care required from passing vessels.

Cited in *The E. Luckenbach*, 35 C. C. A. 631, 93 Fed. 844, holding enhanced degree of caution required from tug with tow passing sailing vessel.

Number of actions for same wrongful act.

Cited in *Sweetland v. Chicago & G. T. R. Co.* 117 Mich. 343, 43 L. R. A. 573, 75 N. W. 1066, court divided as to whether actions maintainable for pain and suffering and for loss occasioned to heirs of person negligently killed.

30 L. R. A. 345, MYERS v. HOLBORN, 58 N. J. L. 193, 55 Am. St. Rep. 606, 33 Atl. 389.

Physician's liability for malpractice.

Cited in Keller v. Lewis, 65 Ark. 580, 47 S. W. 755, holding doctor not liable for negligence of another to whom case turned over.

Cited in note (37 L. R. A. 834) on degree of care and skill which physician or surgeon must exercise.

Liability of employer furnishing physician to employee.

Cited in Haggerty v. St. Louis, K. & N. W. R. Co. 100 Mo. App. 449, 74 S. W. 456, denying liability of railroad company for malpractice of physician furnished to care for employees unless there was want of care in his selection.

Action for causing person's death.

Cited in Consolidated Traction Co. v. Hone, 60 N. J. L. 445, 38 Atl. 759, holding funeral expenses not recoverable under statute giving right of action for causing person's death.

30 L. R. A. 346, ERMENTROUT v. GIRARD F. & M. INS. CO. 63 Minn. 305, 56 Am. St. Rep. 485, 65 N. W. 635.

What losses covered by insurance.

Cited in Hartford Steam Boiler Inspection & Ins. Co. v. Sonneborn, 96 Md. 629, 54 Atl. 610, holding damage by automatic sprinkler proximate result of boiler explosion.

Cited in footnote to Leonard v. Orient Ins. Co. 54 L. R. A. 706, which authorizes recovery for insured building destroyed by fire breaking out immediately after one corner knocked down by explosion in neighboring building.

Failure to give notice or proofs of loss or death.

Cited in California Sav. Bank v. American Surety Co. 87 Fed. 123, holding condition in surety bond that claim be made as soon as practicable after discovering loss, precedent to recovery; Woodmen Acci. Asso. v. Pratt, 62 Neb. 683, 55 L. R. A. 295, footnote p. 291, 89 Am. St. Rep. 777, 87 N. W. 546, holding failure to give notice of injury excused by derangement of insured; Granite Bldg. Co. v. Saville, 101 Va. 223, 43 S. E. 351, upholding provision in indemnity bond limiting time within which claims may be made thereunder.

Cited in footnotes to Foster v. Fidelity & C. Co. 40 L. R. A. 833, which holds twenty-nine days' delay in giving notice of accident fatal under policy requiring immediate notice; Peabody v. Satterlee, 52 L. R. A. 956, which requires reception, not mere mailing, of statement as to time and origin of fire, within time specified; Munz v. Standard Life & Acci. Ins. Co. 62 L. R. A. 485, which holds insurer not released from liability for failure to furnish notice and proofs of death within required time where beneficiary did not learn of death or of policy within such time.

Distinguished in Mason v. St. Paul F. & M. Ins. Co. 82 Minn. 339, 83 Am. St. Rep. 433, 85 N. W. 13, holding, in absence of express provision, failure to furnish proofs of loss within specified time does not invalidate policy; Partridge v. Milwaukee Mechanics' Ins. Co. 13 App. Div. 528, 43 N. Y. Supp. 632, holding immediate written notice of loss unnecessary where local agent notified company.

Power of insurance agent to bind company.

Cited in *Travelers' Ins. Co. v. Myers*, 62 Ohio St. 541, 49 L. R. A. 764, 57 N. E. 458, denying local soliciting agent's authority to waive written notice of accident contrary to stipulation in policy; *Cyrenius v. Mutual L. Ins. Co.* 18 App. Div. 605, 46 N. Y. Supp. 549, holding that agent receiving application and premium and delivering policy cannot waive condition requiring cash payment; *Merchants' Ins. Co. v. New Mexico Lumber Co.* 10 Colo. App. 235, 51 Pac. 174, denying local agent's authority to compromise claim repudiated by company.

Cited in footnote to *Hall v. Union Cent. L. Ins. Co.* 51 L. R. A. 288, which holds admissions by insurance agent after death of insured, that all premiums paid, binding on company.

Not followed in *Nickell v. Phoenix Ins. Co.* 144 Mo. 425, 46 S. W. 166, sustaining authority of local agent's signing policies and collecting premiums to waive proof of loss.

Waiver of proof of loss.

Cited in *Hart v. Fraternal Alliance*, 108 Wis. 496, 84 N. W. 851, holding insurer's denial of liability after expiration of time to furnish proofs of death not waiver of defects in proofs.

30 L. R. A. 351, *HOADLEY v. PURIFOY*, 107 Ala. 276, 18 So. 220.

Restrictions on business of foreign insurance companies.

Cited in footnotes to *People ex rel. Traders' F. Ins. Co. v. Van Cleave*, 47 L. R. A. 795, which sustains right of foreign insurance company to license when it has complied with statutory requirements regardless of similarity of name to that of domestic corporation; *Bankers' L. Ins. Co. v. Howland*, 57 L. R. A. 374, which denies insurance commissioners' power to question foreign company's mode of computing reserve set forth in statement for license.

30 L. R. A. 354, *BUCKNER v. LYNIP*, 22 Nev. 426, 41 Pac. 762.

Appeals in contested election cases.

Cited in *Sweeney v. Karsky*, 25 Nev. 201, 58 Pac. 813, holding undertaking on appeal in contested election cases regulated by civil practice act.

Marks distinguishing ballots.

Cited in *Dennis v. Caughlin*, 22 Nev. 457, 29 L. R. A. 733, 58 Am. St. Rep. 761, 41 Pac. 768, holding erasure or inadvertent mark does not invalidate ballot; *Slaymaker v. Phillips*, 5 Wyo. 491, 47 L. R. A. 855, 42 Pac. 1049 (dissenting opinion), majority holding ballot not officially stamped nor bearing judge's initials, void.

Cited in footnotes to *Jennings v. Brown*, 34 L. R. A. 45, which holds legality of ballot not destroyed by addition of party name after candidate's name; *Parker v. Orr*, 30 L. R. A. 227, which holds provision as to marking ballot with a cross not mandatory.

Limited in *Sweeney v. Hjul*, 23 Nev. 428, 48 Pac. 1036, holding ballots with stub and number attached illegal.

30 L. R. A. 360, *GRIGGS v. DOCTER*, 89 Wis. 161, 46 Am. St. Rep. 824, 61 N. W. 761.

Injunctions against judgments.

Cited in notes (31 L. R. A. 758) on injunction against judgments for defenses

existing prior to their rendition; (32 L. R. A. 323, 324) on general equitable jurisdiction in regard to injunctions against judgments.

Garnishment.

Cited in *Leeman v. McGrath*, 116 Wis. 52, 92 N. W. 425, holding actionable abuse of process not shown by unsuccessful attempt at garnishment made in another state in order to evade exemption laws.

30 L. R. A. 364, *REIMERS v. SEATCO MFG. CO.* 17 C. C. A. 228, 37 U. S. App. 426, 70 Fed. Rep. 573.

Protection of nonresident creditor against garnishment.

Cited in *Ashley v. Quintard*, 90 Fed. 92, holding nonresident's stock not garnishable in state where foreign corporation does business; *Louisville & N. R. Co. v. Nash*, 118 Ala. 487, 41 L. R. A. 333, footnote p. 331, 72 Am. St. Rep. 181, 23 So. 825, holding garnishment of debt due nonresident not personally served in state, invalid.

Cited in footnotes to *Hawley v. Hurd*, 52 L. R. A. 195, which sustains discrimination between banks in and out of state as to attachment of negotiable paper; *Ward v. Boyce*, 36 L. R. A. 549, which holds trustee process in other state to reach note held by nonresident not personally served, ineffectual; *Pennsylvania R. Co. v. Rogers*, 62 L. R. A. 178, which holds nonresident summoned as garnishee while temporarily within state not subject to further proceedings unless he has property within state.

Situs of debt for purpose of garnishment.

Cited in *Swedish-American Nat. Bank v. Bleecker*, 72 Minn. 390, 42 L. R. A. 287, 71 Am. St. Rep. 492, 75 N. W. 740, and *Morawetz v. Sun Ins. Office*, 96 Wis. 180, 65 Am. St. Rep. 43, 71 N. W. 109, holding loss occurring in another state, payable by foreign insurance company to nonresident, not garnishable; *Strause Bros. v. Aetna F. Ins. Co.* 126 N. C. 229, 48 L. R. A. 454, footnote p. 452, 35 S. E. 471, holding debt of insurance company of one state for loss in other state without situs for garnishment purposes in third state where company has agent; *Tootle v. Coleman*, 57 L. R. A. 124, footnote p. 120, 46 C. C. A. 136, 107 Fed. 43, holding right to garnish debtor not limited to situs of chose in action.

Cited in footnote to *Lancashire Ins. Co. v. Corbetts*, 36 L. R. A. 640, which authorizes garnishment of foreign corporation for debt due nonresident.

Distinguished in *Mooney v. Buford & G. Mfg. Co.* 18 C. C. A. 429, 34 U. S. App. 581, 72 Fed. 40, authorizing garnishment of foreign insurance company for debt due nonresident.

30 L. R. A. 368, *SMITH v. GERMAN INS. CO.* 107 Mich. 270, 65 N. W. 236.

Disqualification of juror for interest.

Cited in footnote to *Reed v. Peacock*, 49 L. R. A. 423, which holds Odd Fellow not disqualified as juror in action by Odd Fellow of other lodge.

Forfeiture of policy by employment of mechanics.

Cited in footnote to *German Ins. Co. v. Hearne*, 59 L. R. A. 492, which holds rubbing and polishing woodwork, etc., within provisions avoiding policy if mechanics engaged in repairing.

Waiver of cause of forfeiture.

Cited in *Power v. Monitor Ins. Co.* 121 Mich. 368, 80 N. W. 111, holding for-

feiture for double insurance waived by declining to pay loss on other grounds; *Hilt v. Metropolitan L. Ins. Co.* 110 Mich. 523, 68 N. W. 300, holding provision that policy not binding unless insured sound at date thereof waived by collecting premiums after discovering insured's sickness.

Keeping prohibited articles on insured premises.

Cited in *Adair v. Southern Mut. Ins. Co.* 107 Ga. 301, 45 L. R. A. 206, 73 Am. St. Rep. 122, 33 S. E. 78, holding that stipulation in policy against change in use of insured premises does not apply to temporary use.

Cited in footnotes to *Heron v. Phoenix Mut. F. Ins. Co.* 36 L. R. A. 517, which holds policy avoided by taking fireworks into residence for use in celebrating on following evening; *Springfield F. & M. Ins. Co. v. Wade*, 58 L. R. A. 714, which holds policy not avoided by bringing gallon of gasoline on premises for temporary use though causing their destruction.

Distinguished in *Boyer v. Grand Rapids F. Ins. Co.* 124 Mich. 459, 83 Am. St. Rep. 338, 83 N. W. 124, holding insurance avoided by storing on premises small quantity of gasoline for stove.

30 L. R. A. 379, *HAND v. OSGOOD*, 107 Mich. 55, 61 Am. St. Rep. 312, 64 N. W. 867.

30 L. R. A. 380, *LEVY BROS. v. CHICAGO NAT. BANK*, 158 Ill. 88, 42 N. E. 129.

Followed without discussion in *Levy v. Metropolitan Nat. Bank*, 158 Ill. 258, 42 N. E. 134.

Computation of dividends on secured claims.

Cited in *State Sav. Loan & T. Co. v. Stewart*, 65 Ill. App. 399, holding secured creditor entitled to have dividends computed on amount unpaid at time of filing claim; *Wheeler v. Walton & W. Co.* 72 Fed. 968, holding creditor not required to exhaust remedy upon collateral before receiving dividend; *Friedlander v. Fenton*, 180 Ill. 317, 72 Am. St. Rep. 207, 54 N. E. 329, holding creditor secured by real-estate mortgage may levy on goods without first foreclosing; *Whitbeck v. Ramsay*, 74 Ill. App. 544, holding collaterals collected after claim filed against estate need not be deducted prior to judgment.

Cited in footnote to *Sacramento Bank v. Pacific Bank*, 45 L. R. A. 863, which holds creditor of insolvent bank receiving part of claim from dividends and also by enforcing stockholder's liability entitled to have subsequent dividends computed on original claim.

Distinguished in effect in *Merrill v. National Bank*, 173 U. S. 137, 43 L. ed. 642, 19 Sup. Ct. Rep. 360, holding secured creditor entitled to dividends on claim as of time of declaration of insolvency without crediting collaterals; *Ramsay v. Ramsay*, 196 Ill. 186, 63 N. E. 618, Affirming 97 Ill. App. 275, denying preference to foreign creditors as to decedent's assets in state where they reside.

Rights of creditors of insolvent.

Cited in *Taylor v. Seiter*, 100 Ill. App. 666, holding rights of creditors in insolvent estate become vested on proving claims; *Weir v. Mowe*, 182 Ill. 450, 55 N. E. 530, Affirming 81 Ill. App. 300, holding general creditors proving claims not bound by decree awarding preference when not made parties; *Higinbotham v. Chicago Title & T. Co.* 182 Ill. 74, 54 N. E. 1012, holding that court cannot discontinue assignment proceedings before expiration of time for filing claims.

Pledgee's right to sell collateral.

Cited in *Powell v. Ong*, 92 Ill. App. 97, holding that pledgee cannot sell commercial paper in absence of special authority.

Appeals in insolvency cases.

Cited in *McCune v. American Screw Co.* 170 Ill. 623, 49 N. E. 209, Affirming 70 Ill. App. 633, holding that appeal lies from county to appellate court in voluntary assignment case; *Brown-Chapin Lumber Co. v. Union Nat. Bank*, 159 Ill. 462, 42 N. E. 967, holding that appeal lies from county to appellate court in suit to declare insolvent's transfers general assignment.

30 L. R. A. 384, *McGUIRE v. BROWN*, 106 Cal. 660, 39 Pac. 1060.

Diversion of water on homestead claim.

Distinguished in *Senior v. Anderson*, 138 Cal. 722, 72 Pac. 349, holding appropriation not invalidated by diversion on homestead land by mistake as to boundary.

Change of channel of water appropriated.

Cited in *Wood v. Etiwanda Water Co.* 122 Cal. 161, 54 Pac. 726, raising, without deciding, right to reconstruct abandoned flume upon enjoining use of pipe line.

Prior appropriation of water.

Cited in *Salt Lake City v. Salt Lake City Water & Electrical Power Co.* 24 Utah, 266, 61 L. R. A. 654, 67 Pac. 672, sustaining right of power company to use water previously appropriated, returning it to canal.

Cited in footnote to *Hague v. Nephi Irrigation Co.* 41 L. R. A. 311, which holds appropriation of more water than needed ineffectual to prevent subsequent appropriation of excess.

Cited in notes (30 L. R. A. 678) on right of prior appropriation of water; (30 L. R. A. 266) on abandonment or loss of rights of prior appropriators of water.

30 L. R. A. 390, *HARGRAVE v. COOK*, 108 Cal. 72, 41 Pac. 18.

Right of prior appropriation of water.

Cited in *Bathgate v. Irvine*, 126 Cal. 140, 77 Am. St. Rep. 158, 58 Pac. 442, and *Crawford Co. v. Hall* (Neb.) 60 L. R. A. 909, 93 N. W. 781, holding that prescriptive right to appropriate waters of stream cannot be acquired as against upper riparian owner; *Cave v. Tyler*, 133 Cal. 568, 65 Pac. 1089, holding that nonriparian appropriators acquire no rights in stream by prescription as against upper riparian owner; *California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co.* 127 Fed. 742, holding that lower riparian proprietor may not divert water from above upper proprietor for use on his lands; *Cardelli v. Comstock Tunnel Co.* 26 Nev. 297, 66 Pac. 950, holding waters of artificial and temporary stream not subject to appropriation.

Cited in footnote to *Salt Lake City v. Salt Lake City Water & Electrical Power Co.* 61 L. R. A. 649, which holds appropriator's right to use water not forfeited by not putting to actual use from opposition of prior appropriators.

Cited in note (30 L. R. A. 678) on right of prior appropriation of water.

Distinguished in effect in *Copper King v. Wabash Min. Co.* 114 Fed. 992, holding mining company liable for cutting off subterranean waters flowing into creek previously appropriated.

30 L. R. A. 393, *WILKES BARRE v. ROCKAFELLOW*, 171 Pa. 177, 50 Am. St. Rep. 795, 33 Atl. 269.

Liability based on invalid contract.

Cited in *Phoenix Silk Mfg. Co. v. Reilly*, 43 W. N. C. 139, holding that no liability can be based on unlawful contract.

Deposit of public money as loan.

Cited in footnotes to *Bartley v. Meserve*, 36 L. R. A. 746, which holds deposit of public money by state treasurer in legally constituted depository a loan of such money; *Allibone v. Ames*, 33 L. R. A. 585, which holds deposit of public money by county treasurer in bank designated as depository not unlawful loan.

Liability on official bond for money lost by bank failure.

Cited in *Sioux City Independent School Dist. v. Hubbard*, 110 Iowa, 68, 80 Am. St. Rep. 271, 81 N. W. 241, holding school treasurer liable for money lost by bank failure.

Cited in footnote to *Bush v. Johnson County*, 32 L. R. A. 223, which holds county treasurer liable on bond for public money stolen or lost by bank failure.

Liability for interest collected on deposit of public funds.

Cited in footnote to *Maloy v. Bernalillo County*, 52 L. R. A. 126, which denies defaulting county treasurer's liability to county for interest paid to him by bank, wherein public money is deposited, after he has settled in full with county.

Validity of contract to influence election.

Cited in footnote to *Livingston v. Page*, 59 L. R. A. 336, which holds void, contract by publisher of newspaper to use it in influencing choice of delegates and action of convention.

30 L. R. A. 396, *COM. v. PAUL*, 170 Pa. 284, 5 Inters. Com. Rep. 506, 33 Atl. 82.

Followed without discussion in *Com. v. Schollenberger*, 170 Pa. 296, 33 Atl. 85; *Com. v. Paul*, 170 Pa. 297, 33 Atl. 85.

Order affirming judgment of court below in accordance with judgment of reversal of United States Supreme Court, in 189 Pa. 559, 42 Atl. 1117.

What constitutes original package.

Reversed in *Schollenberger v. Pennsylvania*, 171 U. S. 20, 43 L. ed. 56, 18 Sup. Ct. Rep. 757, sustaining validity of sale to consumer of oleomargarine in original 10 pound package.

Cited in *Austin v. Tennessee*, 179 U. S. 357, 45 L. ed. 232, 21 Sup. Ct. Rep. 132, holding paper packages of cigarettes, transported in open baskets, not original packages; *McGregor v. Cone*, 104 Iowa, 473, 39 L. R. A. 487, footnote p. 484, 65 Am. St. Rep. 522, 73 N. W. 1041, holding pine box in which sealed packages of cigarettes are packed for shipment, original package.

Disapproved in *Guckenheimer v. Sellers*, 81 Fed. 1000, defining original package as package delivered by importer to carrier at initial point of shipment.

Regulation of sale of food.

Cited in footnotes to *State v. Myers*, 35 L. R. A. 844, which sustains statute requiring oleomargarine and artificial butter to be colored pink; *State ex rel. Monnett v. Capital City Dairy Co.* 57 L. R. A. 181, which sustains statute forbidding sale of unmarked oleomargarine; *State v. Hanson*, 54 L. R. A. 468, which holds sale of unlabeled cottolene forbidden by statute against selling unlabeled

imitation of lard; *Frost v. Chicago*, 49 L. R. A. 657, which holds void, ordinance prohibiting colored netting over package of fruit, etc.; *State v. Layton*, 62 L. R. A. 164, which sustains statutory prohibition against manufacture or sale of baking powder containing alum.

30 L. R. A. 400, *LYON v. CLEVELAND*, 170 Pa. 611, 50 Am. St. Rep. 782. 33 Atl. 143.

Revival of judgment.

Cited in *Hayes v. Lentz*, 15 Montg. Co. L. Rep. 41, 6 Northampton Co. Rep. 383, 8 Pa. Dist. R. 629, holding that general judgment of revival does not continue waiver clause in original judgment; *Sloan v. McMullen*, 5 Pa. Dist. R. 433, holding execution upon unrevived judgment after five years, void.

Cited in note (53 L. R. A. 703, 705) on effect on existing judgment lien of proceedings to renew, revive, or extend judgment.

Distinguished in *Sherrard v. Johnston*, 193 Pa. 174, 44 W. N. C. 519, 74 Am. St. Rep. 680, 44 Atl. 252, holding execution on judgment more than five years old without revival not void, but irregular.

— As to terretenants.

Cited in *Lyon v. Cleveland*, 170 Pa. 623, 33 Atl. 145, holding proceedings to revive judgment as to terretenant after learning of secret deed erroneous; *Suter v. Findley*, 5 Super. Ct. 167, 40 W. N. C. 553, Affirming 13 Montg. Co. L. Rep. 76. 27 Pittsb. L. J. N. S. 352, 19 Pa. Co. Ct. 13, 6 Pa. Dist. R. 255, holding subsequent proceedings ineffectual to revive judgment against grantee under recorded deed, not party to original revival; *Smith v. Eline*, 18 Pa. Co. Ct. 562, 5 Pa. Dist. R. 93. 2 Lack. Legal News, 20, holding remote grantee of debtor bound by revival of judgment without notice where intervening deeds unrecorded; *Uhler v. Moses*, 200 Pa. 502, 50 Atl. 231, Reversing 10 Pa. Super. Ct. 195, holding act of 1849 defining lien of revived judgments against terretenants not repealed by act of 1887 prescribing proceedings to continue lien.

30 L. R. A. 403, *PEOPLE v. HECKER*, 109 Cal. 451, 42 Pac. 307.

What declarations part of res gestæ.

Cited in footnote to *Sample v. Consol. Light & R. Co.* 57 L. R. A. 186, which holds admissible, declaration of motorman as to cause of accident while car still on body of injured child.

Homicide in self-defense.

Cited in *State v. Rolla*, 21 Mont. 586, 55 Pac. 523, holding instruction that person assaulted must "exhaust all other reasonable means within his power consistent with safety to prevent homicide" erroneous; *People v. Farley*, 124 Cal. 597, 57 Pac. 571, holding instruction that apprehension of danger no defense to one provoking quarrel, erroneous.

Cited in note (45 L. R. A. 688, 692, 695, 704, 707, 710) on self-defense set up by accused who began conflict.

Duty to decline combat.

Cited in *People v. Scott*, 123 Cal. 436, 56 Pac. 102, holding instruction as to declining struggle, failing to recognize that declination must be made known, erroneous; *People v. Flannelly*, 128 Cal. 92, 60 Pac. 670, holding trespasser not justifi-

fied in killing person whose room he entered armed and making threats without first retreating.

30 L. R. A. 400, BUCK v. EUREKA, 109 Cal. 504, 42 Pac. 243.

Estoppel to assert invalidity of act.

Cited in New York v. Gorman, 26 App. Div. 195, 49 N. Y. Supp. 1026, holding executrix of sheriff receiving statutory salary estopped to claim act fixing compensation unconstitutional; Collier v. Montgomery County, 103 Tenn. 715, 54 S. W. 989, holding sheriff contracting to care for workhouse convicts for certain sum cannot set up illegality of authorizing act.

Recovery upon implied contract where express contract void.

Reaffirmed on later appeal in 124 Cal. 64, 56 Pac. 612, sustaining recovery on *quantum meruit* for services rendered as city attorney under void contract.

Cited in Bassett v. Fairchild, 132 Cal. 647, 52 L. R. A. 617, 64 Pac. 1082, holding person acting as manager of corporation under invalid resolution may recover reasonable value of services; Whyte v. Rosencrantz, 123 Cal. 638, 69 Am. St. Rep. 90, 56 Pac. 436, holding that action for money had lies against one to whom money was loaned during minority under agreement to give security at majority.

Effect of reference in charter to Code sections.

Cited in *Ex parte Lemon*, 143 Cal. 561, 65 L. R. A. 948, 77 Pac. 455, holding that reference by charter to sections of Political Code incorporates them therein.

30 L. R. A. 415, STATE *ex rel.* TOI v. FRENCH, 17 Mont. 54, 41 Pac. 1078.

License taxes.

Cited in State v. Camp Sing, 18 Mont. 137, 32 L. R. A. 637, 56 Am. St. Rep. 551, 44 Pac. 516, sustaining license tax law giving part of proceeds to county, as not violating provision prohibiting legislature from levying taxes for municipal purposes; Northwestern Mut. L. Ins. Co. v. Lewis & Clarke County, 28 Mont. 490, 98 Am. St. Rep. 572, 72 Pac. 982, sustaining tax in nature of license, upon insurance companies doing business within state.

Cited in footnotes to Price v. People, 55 L. R. A. 588, which sustains license fee on employment agencies; Com. v. Fowler, 33 L. R. A. 839, which sustains restraint of sales of liquor by druggists for medicinal purpose except on physician's prescription.

Cited in note (32 L. R. A. 116) on police power as exercised by municipalities over business of pawn brokers, junk dealers, and dealers in second-hand clothing.

Limitation of amount of license fees.

Cited in Burlington v. Unterkircher, 99 Iowa, 406, 68 N. W. 795, sustaining municipal license tax on conveyances for hire not shown to be unreasonable, and referring with approval to annotation in 30 L. R. A. 415; State v. Harrington, 68 Vt. 630, 34 L. R. A. 102, footnote p. 100, 35 Atl. 515, sustaining state license of \$25 on itinerant venders and deposit of \$500 as security, and referring with approval to annotation in 30 L. R. A. 415.

Cited in footnotes to Fleetwood v. Read, 47 L. R. A. 205, which sustains ordinance for license fee of \$100 for use of trading stamps by merchants; Stull v. De Mattos, 51 L. R. A. 892, which sustains license tax of \$25 per day on sales of merchandise at auction; Carrollton v. Bazzette, 31 L. R. A. 522, which holds ordinance imposing license fee of \$10 per day on itinerant merchant regardless of

amount of business invalid; *People ex rel. Valentine v. Coolidge*, 50 L. R. A. 493, which holds void, act requiring large bond from merchants selling farm produce; *Morton v. Macon*, 50 L. R. A. 485, which denies power to subject to prohibitory license tax business of loaning money on household furniture.

Uniformity in license taxes.

Cited in *Hammond v. Muskegon School Board*, 109 Mich. 678, 67 N. W. 973, sustaining annual license tax on teachers.

Cited in footnotes to *Banta v. Chicago*, 40 L. R. A. 611, which requires uniformity of license taxes on occupations, only as to class on which it operates; *Re Haskell*, 32 L. R. A. 527, which sustains license for specified amount for retailer having fixed place of business in city though heavier than that charged regular dealers at fixed places; *Knisely v. Cotterel*, 50 L. R. A. 87, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; *Com. use of Titusville v. Clark*, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real-estate dealers, but not others, whose business less than \$1,000; *Harrodsburg v. Renfro*, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere.

Discrimination in license taxes.

Cited in *Hill v. Abbeville*, 59 S. C. 417, 38 S. E. 11, sustaining ordinance imposing licenses upon specified occupations in so far as it taxed, without discrimination, all occupations of same class.

Cited in footnotes to *State v. Conlon*, 31 L. R. A. 55, which holds invalid act giving municipal authorities discretion in licensing transient merchants; *State v. Garbroski*, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement for license to peddle.

30 L. R. A. 429, *STATE v. WHEELOCK*, 95 Iowa, 577, 58 Am. St. Rep. 442, 64 N. W. 620.

Police power to regulate sales.

Cited in *Easterly v. Irwin*, 99 Iowa, 698, 68 N. W. 919, holding ordinance prohibiting sales by unlicensed peddlers valid exercise of police power; *McGregor v. Cone*, 104 Iowa, 475, 39 L. R. A. 488, 65 Am. St. Rep. 522, 73 N. W. 1041, sustaining state's right to prohibit sale of imported cigarettes not in original packages.

Cited in footnote to *Rosenbloom v. State*, 57 L. R. A. 923, which sustains license tax on peddlers, though venders of own products exempt.

Cited in note (32 L. R. A. 116) on police power as exercised by municipalities over business of pawnbrokers, junk dealers, and dealers in second-hand clothing.

Right to take orders in interstate business.

Cited in footnotes to *State v. Coop*, 41 L. R. A. 501, which holds purchase of frame for portrait in accordance with option included in order for making portrait in other state not within statute against peddling; *Brownback v. North Wales*, 49 L. R. A. 446, which holds valid as to residents, ordinance requiring license for sale of goods on street or by soliciting orders from house to house; *Re Wilson*, 48 L. R. A. 417, which holds void as applied to sale of original packages territorial statute requiring license for sale of coal oil.

Limitation of license fees.

Annotation in 30 L. R. A. 429, referred to with approval in *State v. Harrington*, 68 Vt. 630, 34 L. R. A. 102, 35 Atl. 515, sustaining state license of \$25 on itinerant venders and deposit of \$500 security.

Distinction between tax and license.

Cited in footnote to *State ex rel. Auburn School Dist. v. Boyd*, 58 L. R. A. 108, which holds ordinance imposing license tax for revenue only, tax ordinance, though right to engage in business depends on having license.

30 L. R. A. 441, *BAUM v. LYNN*, 72 Miss. 932, 18 So. 428.

Parol evidence of consideration.

Cited in *Thompson v. Bryant*, 75 Miss. 16, 21 So. 655, holding assumption of debts by purchaser of co-partner's interest not provable by parol where bill of sale states consideration as cash and note; *Milich v. Armour Packing Co.* 60 Kan. 238, 56 Pac. 1, holding parol evidence inadmissible, of agreement to employ, as part consideration of release of liability.

Cited in footnote to *Johnson v. Elmen*, 52 L. R. A. 162, which holds admissible, oral evidence of promise to assume payment of certain liens by grantee in deed with covenant against encumbrances.

Effect on original of filing additional bond.

Cited in *Rush v. State*, 19 Ind. App. 530, 49 N. E. 839, holding guardian's bond not discharged by filing of additional bond on augmentation of estate.

30 L. R. A. 444, *SHINGLEUR v. WESTERN U. TELEG. CO.* 72 Miss. 1030, 48 Am. St. Rep. 604, 18 So. 425.

Liability for mistake in transmitting telegram.

Cited in *Postal Teleg. & Cable Co. v. Wells*, 82 Miss. 741, 35 So. 190, sustaining recovery against telegraph company for negligent error in transmission of cipher message received by it in another state; *Shaw v. Postal Teleg. & Cable Co.* 79 Miss. 695, 56 L. R. A. 493, footnote p. 487, 89 Am. St. Rep. 666, 31 So. 222 (dissenting opinion), majority denying power to enforce in other state liability for mistakes in transmitting cipher telegram without payment of additional fee required to insure against mistake.

Cited in footnotes to *Reed v. Western U. Teleg. Co.* 34 L. R. A. 492, which holds void, stipulation limiting liability for mistakes in transmitting unrepeatd telegrams; *German Fruit Co. v. Western U. Teleg. Co.* 59 L. R. A. 575, which denies liability for loss by performing contract closed at price incorrectly quoted in telegram to sendee's knowledge.

Cited in note (50 L. R. A. 252) on telegrams as writings to make contract within statute of frauds.

Who may sue telegraph company for default.

Cited in *Postal Teleg. Cable Co. v. Ford*, 117 Ala. 674, 23 So. 684, holding sendee suing *ex contractu* for failure to deliver telegram must show himself party or privy to contract for transmission.

Cited in footnote to *McCormick v. Western U. Teleg. Co.* 38 L. R. A. 684, which denies telegraph company's liability to banker cashing draft on faith of incorrectly transmitted telegram from drawee purporting to authorize drawer to make draft.

30 L. R. A. 447, *AMERICAN WATERWORKS CO. v. STATE*, 46 Neb. 194, 50 Am. St. Rep. 610, 64 N. W. 711.

Demurrer, as admission of conclusions of law.

Cited in *Bellevue Improv. Co. v. Kayser*, 1 Herdman (Neb.) 66, 95 N. W. 499, holding that general demurrer to petition does not admit mere conclusion of pleader, not naturally following from facts alleged.

Compulsory service by corporations affected by public use.

Cited in *Nebraska Teleph. Co. v. State*, 55 Neb. 635, 45 L. R. A. 117, 76 N. W. 171, holding it duty of telephone company occupying streets to furnish service at reasonable and uniform rates; *State ex rel. Payne v. Kinloch Teleph. Co.* 93 Mo. App. 358, 67 S. W. 684, holding telephone company bound to furnish service to persons complying with reasonable requirements; *State ex rel. Wool v. Consumers Gas Trust Co.* 157 Ind. 352, 55 L. R. A. 248, 61 N. E. 674, requiring service by gas company occupying streets, although supply insufficient; *Indiana Natural & Illuminating Gas Co. v. State*, 158 Ind. 519, 57 L. R. A. 762, footnote p. 761, 63 N. E. 220, denying right of natural gas company to discriminate against single consumer by enforcing meter rate instead of flat rate against him; *Crumley v. Watauga Water Co.* 99 Tenn. 425, 41 S. W. 1058; *Watauga Water Co. v. Wolfe*, 99 Tenn. 431, 63 Am. St. Rep. 841, 41 S. W. 1060, holding water company bound to supply water to all applicants tendering usual rates.

Cited in footnotes to *Ladd v. Boston*, 40 L. R. A. 171, which upholds removal of water meter though fixtures so arranged as to cost consumer after removal twenty times as much as others pay; *Bienville Water Supply Co. v. Mobile*, 33 L. R. A. 59, which authorizes injunction against water company shutting off supply of water for public purposes; *Kelsey v. Fire & Water Comrs.* 37 L. R. A. 675, which denies owner's right to require supply of water to each tenant as separate consumer; *State ex rel. Milsted v. Butte City Water Co.* 32 L. R. A. 697, which denies right of water company to refuse to supply water to tenant.

Cited in note (61 L. R. A. 99, 105, 106) on establishment and regulation of municipal water supply.

— Refusing service for noncompliance with rules.

Cited in *Watauga Water Co. v. Wolfe*, 99 Tenn. 431, 63 Am. St. Rep. 841, 41 S. W. 1060, sustaining water company's power to deny water to applicant refusing to comply with rule requiring hydrants to be kept closed; *Mackin v. Portland Gas Co.* 38 Or. 125, 49 L. R. A. 598, 61 Pac. 134, sustaining rule of gas company permitting discontinuance of service until payment for gas furnished at previous residence.

— What rules unreasonable.

Cited in *Turner v. Revere Water Co.* 171 Mass. 336, 40 L. R. A. 660, 68 Am. St. Rep. 432, 50 N. E. 634, denying right of water company to refuse to supply lessee of house unless landlord's arrearage paid; *Crumley v. Watauga Water Co.* 99 Tenn. 427, 41 S. W. 1058, denying water company's right to refuse to supply water to one failing to pay previous indebtedness.

30 L. R. A. 450, *McGINN v. STATE*, 46 Neb. 427, 50 Am. St. Rep. 617, 65 N. W. 46.

Computation of time.

Cited in *Daly v. Concordia F. Ins. Co.* 16 Colo. App. 352, 65 Pac. 416, holding

month beginning on certain day expires on corresponding day of next month; *Perkins v. Jennings*, 27 Wash. 151, 67 Pac. 590, holding statute of limitations begins to run on note from day following date of last partial payment; *McKinney v. State*, 43 Tex. Crim. Rep. 389, 69 S. W. 769, holding that term "month" as used in criminal statute means solar month of thirty days.

Cited in note (49 L. R. A. 199, 244) on rule as to first and last days in computation of time.

When enactments take effect.

Cited in *State ex rel. City Water Co. v. Kearney*, 49 Neb. 332, 68 N. W. 533; and *State ex rel. Franklin County v. Vincent*, 46 Neb. 409, 65 N. W. 50, holding act, in absence of special provision, takes effect on day following expiration of three calendar months from legislature's adjournment.

Retrial of person convicted.

Cited in *State v. Reddington*, 8 S. D. 319, 66 N. W. 464, holding conviction set aside on defendant's motion for errors in court's charge no bar to second trial.

30 L. R. A. 456, *ST. LOUIS TRUST CO. v. RILEY*, 16 C. C. A. 610, 36 U. S. App. 100, 70 Fed. 32.

What claims preferred to corporation mortgage.

Cited in *Veatch v. American Loan & T. Co.* 25 C. C. A. 42, 49 U. S. App. 191, 79 Fed. 474; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 24 C. C. A. 512, 48 U. S. App. 324, 79 Fed. 227; *Ames v. Union P. R. Co.* 74 Fed. 339; *Farmers' Loan & T. Co. v. Northern P. R. Co.* 74 Fed. 435,—holding judgment for negligence prior to receivership not entitled to preference over prior mortgage of railroad; *Atlantic Trust Co. v. Dana*, 62 C. C. A. 664, 128 Fed. 216, holding judgment for injuries obtained prior to receivership not preferential to mortgage debts; *Ames v. Union P. R. Co.* 73 Fed. 57, giving preference to payment out of receiver's earnings to connecting lines of share of earnings from interchanged business; *Ames v. Union P. R. Co.* 74 Fed. 345, holding taxes and operating expenses of railroad first charge on receiver's earnings; *New York Guaranty & Indemnity Co. v. Tacoma R. & Motor Co.* 27 C. C. A. 555, 48 U. S. App. 668, 83 Fed. 370, holding claim for cable furnished cable-car company preferred to prior mortgage; *Central Trust Co. v. Clark*, 26 C. C. A. 400, 49 U. S. App. 453, 81 Fed. 271, holding claim for gear wheel furnished cable railroad entitled to preference over prior mortgage; *Illinois Trust & Sav. Bank v. Doud*, 52 L. R. A. 489, 44 C. C. A. 402, 105 Fed. 136, holding loan for construction of substantial addition to mortgaged property inferior to lien of prior mortgage; *State Trust Co. v. Kansas City, P. & G. R. Co.* 120 Fed. 402, holding claims for unliquidated damages not preferential demands; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* 79 Fed. 40, giving preference over mortgage to labor and supply claims on repairs to irrigation works; *Veatch v. American Loan & T. Co.* 28 C. C. A. 387, 55 U. S. App. 191, 84 Fed. 277, raising, without deciding, right of judgment creditor to payment out of earnings of stockholder's receiver; *Central Trust Co. v. Warren*, 58 C. C. A. 292, 121 Fed. 326, holding statute making judgment for injury against railway corporation superior to lien of mortgage, inapplicable to street railroads.

Cited in footnotes to *Whitely v. Central Trust Co.* 34 L. R. A. 303, which holds preference to railroad mortgages not gained by paying judgment for damages

against company by surety on supersedeas bond; *Illinois Trust & Sav. Bank v. Doud*, 52 L. R. A. 481, which holds claim for money loaned to pay interest on mortgage debt inferior to lien of prior mortgage.

Disapproved in *Green v. Coast Line R. Co.* 97 Ga. 37, 33 L. R. A. 814, footnote p. 806, 54 Am. St. Rep. 379, 24 S. E. 814, holding judgment for personal injuries prior to mortgage on railroad.

30 L. R. A. 460, *Re WALKER*, 110 Cal. 387, 42 Pac. 815.

Proof of execution of will.

Cited in *McCarn v. Rundall*, 111 Iowa, 408, 82 N. W. 924, holding will subscribed by one witness, others being present, invalid.

Distinguished in *Re Tyler*, 121 Cal. 413, 53 Pac. 928, holding will sufficiently proved where only living witness, not named in attestation clause, testifies to signing in presence of testatrix and other witness.

30 L. R. A. 464, *PEOPLE v. GAY*, 107 Mich. 422, 65 N. W. 292.

Restrictions on business of foreign insurance companies.

Cited in footnote to *Cook v. Howland*, 59 L. R. A. 338, which sustains confinement to residents of right to act as agents for foreign insurance companies.

30 L. R. A. 465, *WEARE COMMISSION CO. v. DRULEY*, 156 Ill. 25, 41 N. E. 48.

What intent to defraud sustains attachment.

Cited in *Wadsworth v. Laurie*, 164 Ill. 48, 45 N. E. 435, Affirming 63 Ill. App. 514; *Hanford v. Richart*, 66 Ill. App. 444; *Hargadine-McKittrick Dry Goods Co. v. Belt*, 74 Ill. App. 585; *First Nat. Bank v. McMillan*, 9 S. D. 229, 68 N. W. 537; *Nelson v. Leiter*, 190 Ill. 418, 83 Am. St. Rep. 142, 60 N. E. 851, Affirming 93 Ill. App. 180,—holding that fraudulent conveyance to be ground for attachment, must be with actual fraudulent intent; *McNeil & H. Co. v. Plows & Co.* 83 Ill. App. 190, holding conveyance kept secret sustains attachment; *Curran v. Rothschild*, 14 Colo. App. 500, 60 Pac. 1111, holding attachment justified by transfer of property with intent to delay creditors, though without dishonest intent.

Cited in footnotes to *Queen City Mfg. Co. v. Blalack*, 31 L. R. A. 222, which holds shipment by insolvents of manufactured products out of state, removal of property authorizing attachment; *Penoyar v. Kelsey*, 34 L. R. A. 248, which holds false written statement as to financial ability not known at time credit given, not basis for attachment.

30 L. R. A. 491, *VOGEL v. PEKOC*, 157 Ill. 339, 42 N. E. 386.

Followed without discussion in *Vogel v. Febertz*, 158 Ill. 395, 43 N. E. 367; *Vogel v. Dunn*, 158 Ill. 504, 43 N. E. 361; and *Vogel v. Conrad*, 157 Ill. 368, 42 N. E. 389.

Contracts signed by one party.

Cited in *American Pub. & Engraving Co. v. Walker*, 87 Mo. App. 508, holding written proposal, assented to by nonsigning party, valid contract; *Raphael v. Hartman*, 87 Ill. App. 636, holding written contract under which nonsigning party worked, valid; *Sellers v. Greer*, 172 Ill. 552, 40 L. R. A. 591, 50 N. E.

246, holding assent to and retention of contract by nonsigning party equivalent to execution.

Contracts without mutuality.

Cited in *Woolsey v. Ryan*, 59 Kan. 605, 54 Pac. 664, holding agreement for services, not mutually binding, no basis for action for damages by nonperformance; *Allen v. Rouse*, 78 Ill. App. 73, holding contract to act as agent, imposing no obligation on one party, void; *Missouri, K. & T. R. Co. v. Bagley*, 60 Kan. 431, 56 Pac. 759, holding railroad's undertaking to transport corn, not obligating shipper to ship, void; *Allen B. Wrisley Co. v. Mathieson Alkali Works*, 107 Ill. App. 382, holding that memorandum which did not bind purchaser to order at all, nor any certain quantity, void as contract, for want of mutuality; *El Paso Gas, Electric Light & P. Co. v. El Paso*, 22 Tex. Civ. App. 313, 54 S. W. 798, holding contract to furnish as many lights as city may designate void for want of mutuality; *Eclipse Oil Co. v. South Penn Oil Co.* 47 W. Va. 89, 34 S. E. 923, holding lease not binding on lessee not enforceable in equity; *Harding v. Olson*, 76 Ill. App. 480, holding land contract binding one party to make payments binds other to deliver deed.

Distinguished in *Prudential Ins. Co. v. Hite*, 69 Ill. App. 417, sustaining contract of employment stipulating for ten days' notice of claim before action.

Special legislation.

Distinguished in *Lippman v. People*, 175 Ill. 109, 51 N. E. 872, holding act to protect manufacturers and dealers in certain beverages from loss of packages, special legislation.

— Provision for recovery of attorney's fee.

Followed in *Opaque Cloth Shade Co. v. Veight*, 161 Ill. 338, 43 N. E. 1075, sustaining recovery of attorney's fee in action for wages.

Cited in *Duckwall v. Jones*, 156 Ind. 686, 58 N. E. 1056, sustaining statute permitting recovery of attorney's fee on foreclosure of mechanic's lien; *Sanitary District v. Ray*, 199 Ill. 65, 93 Am. St. Rep. 102, 64 N. E. 1048, sustaining statute permitting plaintiff to recover attorney's fees in action against sanitary district for overflowing land; *Lancashire Ins. Co. v. Bush*, 60 Neb. 124, 82 N. W. 313, and *Farmers & M. Ins. Co. v. Dobney*, 62 Neb. 222, 97 Am. St. Rep. 624, 86 N. W. 1070, sustaining statute permitting recovery of attorney's fee in action on real insurance policy; *Liquidating Comrs. v. Marrero*, 106 La. 135, 30 So. 305, sustaining statute permitting recovery of attorney's fee from unsuccessful register of taxes; *Gano v. Minneapolis & St. L. R. Co.* 114 Iowa, 716, 55 L. R. A. 265, footnote p. 263, 89 Am. St. Rep. 393, 87 N. W. 714, sustaining requirement for payment of attorney's fee on successful appeal by landowner from award in eminent domain; *Dell v. Marvin*, 41 Fla. 227, 45 L. R. A. 203, footnote p. 201, 79 Am. St. Rep. 171, 26 So. 188, sustaining statute allowing attorney's fees to successful plaintiff, but not to defendant, in mechanics' lien case; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 168, 41 L. ed. 672, 17 Sup. Ct. Rep. 255 (dissenting opinion), majority holding statute permitting recovery of attorney's fees by plaintiff in certain actions against railroad companies, unconstitutional.

Cited in footnotes to *Cameron v. Chicago, M. & St. P. R. Co.* 31 L. R. A. 553, which holds valid, act allowing attorneys' fees in actions against railroad companies for taking land without making compensation; *Turner v. Boger*, 49 L. R. A. 590, which holds provision for attorneys' fees in trust deed, void; *Atkinson v.*

Woodmansee, 64 L. R. A. 325, which holds void, statute allowing reasonable attorneys' fees to successful plaintiff in action to enforce mechanic's lien.

Cited in note (60 L. R. A. 322) on constitutional equality in the United States in relation to corporate taxation.

Interpretation of unambiguous contracts or statutes.

Cited in **Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.** 57 L. R. A. 699, 52 C. C. A. 29, 114 Fed. 81, holding that courts will not construe unambiguous contract to conform with supposed intention; **Johnson v. Southern P. Co.** 54 C. C. A. 511, 117 Fed. 462; and **Union Cent. L. Ins. Co. v. Champlin**, 54 C. C. A. 210, 116 Fed. 860, holding that courts will not import supposed intention into unambiguous law; **Chauncey v. Dyke Bros.** 55 C. C. A. 591, 119 Fed. 13, by Sanborn, J., dissenting, who holds secret intention cannot be read into unambiguous statute.

30 L. R. A. 495, **JARNAGIN v. STRATTON**, 95 Tenn. 619, 32 S. W. 625.

Liability of joint makers or indorsers of notes.

Cited in **Sully v. Campbell**, 99 Tenn. 438, 43 L. R. A. 165, 42 S. W. 15, holding several suits maintainable against makers of joint note.

Cited in footnote to **Hutchison v. Crutcher**, 37 L. R. A. 89, which requires presentation of note payable at insolvent bank to bank receiver administering at other place in same city.

Cited in note (36 L. R. A. 703) on presentment to joint makers to hold indorsers of note.

Distinguished in **Northrup v. Chambers**, 90 Mo. App. 66, holding failure to give notice of protest to one releases all joint indorsers of note.

30 L. R. A. 497, **ALLEN v. ALLEN**, 19 R. I. 114, 61 Am. St. Rep. 738, 32 Atl. 166.

Rights in shore below high-water mark.

Cited in **Walsh v. Hopkins**, 22 R. I. 420, 48 Atl. 390, holding no prescriptive right acquirable in tide-flowed lands; **Carr v. Carpenter**, 22 R. I. 535, 53 L. R. A. 336, footnote p. 333, 48 Atl. 805, sustaining upland owner's right to take seaweed stranded on beach.

Cited in note (60 L. R. A. 516) on right to fish.

30 L. R. A. 498, **HANOVER F. INS. CO. v. SHRADER**, 89 Tex. 35, 59 Am. St. Rep. 25, 32 S. W. 872, 33 S. W. 112.

Inclusion of Sundays and holidays in computing time.

Cited in **American Tobacco Co. v. Strickling**, 88 Md. 509, 41 Atl. 1083, holding Sundays included in computing thirty days allowed for signing bills of exception after verdict rendered.

Cited in footnotes to **Merritt v. Gate City Nat. Bank**, 38 L. R. A. 749, which holds Sunday before term of court beginning on Monday not excluded in fixing time for filing action before term; **Morris v. Union Nat. Bank**, 50 L. R. A. 182, which denies bank's liability for failure to protest in due season note falling due on holiday under honest mistake as to proper time.

Distinguished in **Bond v. Rintleman**, 24 Tex. Civ. App. 299, 59 S. W. 48, holding motion will not be considered as overruled on last day to act, falling on Sunday.

Filing judicial papers on Sunday.

Cited in *Havens v. Stiles*, 8 Idaho, 252, 56 L. R. A. 737, footnote p. 736, 67 Pac. 919, authorizing filing complaint and issuing summons on Sunday; *Stephens v. Porter*, 29 Tex. Civ. App. 559, 69 S. W. 423, holding valid, application to purchase state school land filed Sunday in General Land Office.

Cited in footnote to *Pepin v. Societe St. Jean Baptiste*, 60 L. R. A. 626, which authorizes hearing and determination on Sunday of charges against member of benefit society resulting in expulsion.

What constitutes filing of papers.

Cited in footnote to *Meridian Nat. Bank v. Hoyt & Bros. Co.* 36 L. R. A. 796, which holds creditor's bill not filed by taking to clerk's office and having it indorsed and record entered in docket.

30 L. R. A. 500, *STATE v. AUSTIN CLUB*, 89 Tex. 20, 33 S. W. 113.

Sale of liquors by clubs.

Cited in footnotes to *People v. Adelphi Club*, 31 L. R. A. 510, which holds distribution of liquor by social club to members not illegal sale; *State ex rel. Stevenson v. Law & Order Club*, 62 L. R. A. 885, which denies right of social club, without license, to dispense liquors to members in exchange for checks given them on payment of special assessments.

Distinguished in *Krnavek v. State*, 38 Tex. Crim. Rep. 48, 41 S. W. 612, holding sale of liquor by steward to member of social club violation of local option law.

30 L. R. A. 504, *SMITH v. MILWAUKEE BUILDERS' & T. EXCHANGE*, 91 Wis. 360, 51 Am. St. Rep. 912, 64 N. W. 1041.

Ordinances regulating building operations.

Cited in footnote to *Bostock v. Sams*, 59 L. R. A. 282, which holds unauthorized, ordinance permitting refusal of permits for erecting buildings not conforming in size, appearance, etc., to existing buildings.

Distinguished in *Koch v. Fox*, 71 App. Div. 293, 75 N. Y. Supp. 913, construing ordinance requiring owner or contractor to build covered way over sidewalk as imposing duty on one doing work.

Liability for acts of independent contractor.

Cited in *Carlson v. Stocking*, 91 Wis. 435, 65 N. W. 58, holding employer not liable for acts of independent contractor unless damage necessarily results from ordinary mode of doing work; *Vosbeck v. Kellogg*, 78 Minn. 181, 80 N. W. 957; and *Pioneer Fireproof Constr. Co. v. Hansen*, 176 Ill. 110, 52 N. E. 17, holding reservation of right of inspection does not render one liable for negligence of contractor's servants.

Cited in footnotes to *Wertheimer v. Saunders*, 37 L. R. A. 146, which holds landlord liable for independent contractor's negligence in putting new roof on building; *Peerless Mfg. Co. v. Bagley*, 53 L. R. A. 285, which holds landlord liable for independent contractor's negligence in putting in automatic fire extinguisher; *Boomer v. Wilbur*, 53 L. R. A. 172, which denies owner's liability for injury by fall of bricks through negligence of independent contractor repairing chimney; *Sanford v. Pawtucket Street R. Co.* 33 L. R. A. 564, which denies liability of street railway company for negligence of contractor building road; *Thompson v. Lowell*,

I. & H. Street R. Co. 40 L. R. A. 345, which holds street railway company liable for injury to spectator at free exhibition of marksmanship given by independent contractor on company's grounds; Hoff v. Shockley, 64 L. R. A. 538, which holds property owner not liable for injuries to traveler by obstructions placed in street, without danger signals, by independent contractor constructing building.

Violation of statute or ordinance as negligence.

Cited in Klatt v. N. C. Foster Lumber Co. 97 Wis. 646, 73 N. W. 563, holding failure to comply with statute requiring guards on dangerous gearing negligence *per se*; Decker v. McSorley, 111 Wis. 96, 86 N. W. 554, holding violation of ordinance against letting horses run at large in streets, negligence *per se*; Brown v. Chicago & N. W. R. Co. 109 Wis. 390, 85 N. W. 271, holding failure to comply with statutory regulations as to speed of trains negligence *per se*; Young v. Chicago, M. & St. P. R. Co. 100 Iowa, 360, 69 N. W. 682, holding violation of statute prohibiting boarding moving train negligence *per se*; Burns v. Chicago, M. & St. P. R. Co. 104 Wis. 654, 80 N. W. 927, holding railroad's failure to comply with statute requiring unloading stock for rest, actionable negligence.

Distinguished in Stafford v. Chippewa Valley Electric R. Co. 110 Wis. 352, 85 N. W. 1036, holding failure to comply with ordinance requiring continuous ringing of bell on street cars, not promoting safety, not actionable negligence; Toutloff v. Green Bay, 91 Wis. 494, 65 N. W. 168, holding lot owner not liable to passerby under charter provision requiring abutter to keep sidewalk in repair.

Recovery for future suffering.

Cited in Boelter v. Ross Lumber Co. 103 Wis. 330, 79 N. W. 243, holding that future disability must be reasonably certain to justify damages; Illinois C. R. Co. v. Davidson, 22 C. C. A. 313, 46 U. S. App. 300, 76 Fed. 524, holding instruction that jury may consider suffering which person "may" have endured or "is likely" to endure, harmless; Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 36, 124 Fed. 144, sustaining charge allowing recovery for future pain and suffering, in case of finding of reasonable certainty of future suffering.

Distinguished in Bailey v. Centerville, 108 Iowa, 27, 78 N. W. 831, sustaining instruction permitting recovery for "probably" continuing disability.

Weight of negative testimony.

Cited in Hildman v. Phillips, 106 Wis. 617, 82 N. W. 566, holding it court's duty to instruct jury that negative is entitled to little weight as against positive credible testimony.

30 L. R. A. 508, CINCINNATI STREET R. CO. v. MURRAY, 53 Ohio St. 570, 42 N. E. 596.

Running street car over crossing.

Cited in footnotes to State, Cape May, D. B. & S. P. R. Co., Prosecutor, v. Cape May. 36 L. R. A. 657, which sustains ordinance requiring electric street car to stop before crossing intersecting street; New York & G. Lake R. Co. v. New Jersey Electric R. Co. 38 L. R. A. 516, which requires same care from those operating electric car to prevent collision with steam car as is required from other persons.

Violation of statute or ordinance as negligence.

Cited in footnotes to Fielders v. North Jersey Street R. Co. 59 L. R. A. 455, which denies liability of street railway company for injury by defect in pavement between tracks; Holwerson v. St. Louis & Suburban R. Co. 50 L. R. A. 850, which

denies effect on street railway company's liability towards person injured by car, of general city ordinance unconnected with grant of franchise; *Marino v. Lehmaier*, 61 L. R. A. 812, which holds violation of penal statute against employing children of certain age in factory, negligence.

When question of negligence for court.

Cited in *Bohl v. Dell Rapids*, 15 S. D. 624, 91 N. W. 315, holding that question whether jury would be warranted in finding negligence is for court when facts undisputed.

30 L. R. A. 513, *HUDSON FURNITURE CO. v. HARDING*, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468.

When Federal courts not bound by state decisions.

Cited in *Manship v. New South Bldg. & L. Asso.* 110 Fed. 858, holding state decisions as to law governing contract between loan association and borrower residing in another state not binding on Federal courts.

What law governs contracts.

Cited in *Western Springs v. Collins*, 40 C. C. A. 35, 98 Fed. 935, holding liability on covenants of wife joining in husband's deed governed by law of state where land situated.

Cited in note (61 L. R. A. 194, 200, 217) on conflict of laws as to negotiable paper.

Power of insolvent corporation to create preference.

Cited in *Atlas Tack Co. v. Exchange Bank*, 111 Ga. 708, 36 S. E. 939, denying validity of mortgage to secure creditor of insolvent corporation holding note indorsed by directors.

What reviewable on appeal from general finding.

Cited in *Fourth Nat. Bank v. Belleville*, 27 C. C. A. 675, 53 U. S. App. 628, 83 Fed. 675, and *Burrows v. Niblack*, 28 C. C. A. 131, 53 U. S. App. 712, 84 Fed. 113, holding that appellate court cannot review trial court's alleged error in making general finding; *Randle v. Barnard*, 26 C. C. A. 570, 53 U. S. App. 377, 81 Fed. 684, holding that appellate court will only consider whether judgment was correctly rendered upon special finding of facts.

30 L. R. A. 521, *MORGAN v. KENNEDY*, 62 Minn. 348, 54 Am. St. Rep. 847, 64 N. W. 912.

Effect of married women's acts on husband's common-law liability.

Cited in *Kies v. Young*, 64 Ark. 388, 62 Am. St. Rep. 198, 42 S. W. 669, holding husband's common-law liability for wife's antenuptial debts not abrogated by enabling acts.

Cited in footnotes to *Lane v. Bryant*, 36 L. R. A. 709, which denies husband's liability for slander by wife; *Henley v. Wilson*, 58 L. R. A. 941, which sustains husband's common-law liability for wife's torts.

Distinguished in *Blake v. Smith*, 19 R. I. 478, 34 Atl. 995, holding that wife cannot be made defendant in action for slanderous words spoken by husband.

Wife as witness against husband.

Cited in footnotes to *Frankenthal v. Solomonson*, 44 L. R. A. 311, which authorizes wife's examination on supplementary proceedings against husband without his

consent; *State v. Kodat*, 51 L. R. A. 509, which holds that divorce does not make wife competent witness against husband as to crime previously committed.

What charges defamatory.

Cited in footnote to *Hollenbeck v. Hall*, 39 L. R. A. 734, which holds publication that trader is dishonest, in pleading statute of limitations, not libelous.

30 L. R. A. 532, *STATE ex rel. STANFORD v. ELLINGTON*, 117 N. C. 158, 53 Am. St. Rep. 580, 23 S. E. 250.

Presumption as to quorum.

Cited in *State ex rel. Cherry v. Burns*, 124 N. C. 766, 33 S. E. 136, holding quorum of legislature presumed present at election of officer.

What constitutes quorum.

Cited in *Re Schuylkill Haven Nominations*, 20 Pa. Co. Ct. 420, holding that majority of political borough executive committee constitutes quorum.

Cited in footnote to *Wampler v. State*, 38 L. R. A. 829, which authorizes mandamus to compel township trustee to meet with others in order to obtain quorum.

Validity of election by less than quorum.

Cited in *State Prison v. Day*, 124 N. C. 383, 46 L. R. A. 302, 32 S. E. 748 (dissenting opinion), as to invalidity of election of officers by legislature when no quorum is present.

Right to recover office.

Cited in *State ex rel. Cherry v. Burns*, 124 N. C. 766, 33 S. E. 136, holding that claimant of office can succeed only when legally elected.

30 L. R. A. 534, *GURNEY v. MINNEAPOLIS UNION ELEVATOR CO.* 63 Minn. 70, 65 N. W. 136.

Effect of order authorizing condemnation of fee.

Cited in *Fletcher v. Chicago*, St. P. M. & O. R. Co. 67 Minn. 344, 69 N. W. 1085, holding that order in railroad condemnation proceedings providing for acquisition of fee authorizes taking of easement only.

Railroad's right to lease lands.

Cited in *Michigan C. R. Co. v. Bullard*, 120 Mich. 418, 79 N. W. 635, upholding validity of lease of portion of right of way to facilitate handling lessee's freight; *Abraham v. Oregon & C. R. Co.* 37 Or. 502, 64 L. R. A. 395, 82 Am. St. Rep. 779, 60 Pac. 899, upholding railroad's right to lease lands for hotel.

What is a public use.

Cited in *Stewart v. Great Northern R. Co.* 65 Minn. 518, 33 L. R. A. 429, 68 N. W. 208, sustaining statute authorizing acquisition of land for public grain elevators by condemnation.

30 L. R. A. 537, *WHITE v. SOLOMON*, 164 Mass. 516, 42 N. E. 104.

When vendor may recover purchase price.

Cited in *Mitchell v. Le Clair*, 165 Mass. 311, 43 N. E. 117, holding that setting apart goods on receipt of acceptance of offer entitles vendor to recover price; *Smith v. Aldrich*, 180 Mass. 369, 62 N. E. 381, sustaining right of conditional vendor to recover unpaid instalments; *Perkins v. Grobben*, 116 Mich. 178, 39 L. R.

A. 818, 72 Am. St. Rep. 512, 74 N. W. 469, holding that retaking property conditionally sold precludes recovery of unpaid purchase price; *Rastetter v. Reynolds*, 160 Ind. 139, 66 N. E. 612, sustaining recovery for elm strips cut according to order, delivered to purchaser, but rejected on account of shrinkage, when usage existed of ordering them over size to allow for shrinkage.

Cited in note (32 L. R. A. 458) on rights and liabilities of vendor and purchaser by conditional sale on default of payment.

Evidence of handwriting.

Cited in note (63 L. R. A. 980) on competency of witness to handwriting.

30 L. R. A. 540, *JACKSONVILLE ELECTRIC LIGHT CO. v. JACKSONVILLE*, 36 Fla. 229, 51 Am. St. Rep. 24, 18 So. 677.

Extent of municipal powers.

Cited in *Florida, C. & P. R. Co. v. Ocala Street & Suburban R. Co.* 39 Fla. 322, 22 So. 692, denying city's power to give street railroad exclusive right to construct tracks in street for stated period; *Mayo v. Washington*, 122 N. C. 25, 40 L. R. A. 169, footnote p. 163, 29 S. E. 343 (dissenting opinion), majority denying right of municipality to purchase electric light plant and create debt for same; *Mealey v. Hagerstown*, 92 Md. 754, 48 Atl. 746, favoring, but not deciding, question as to authority of municipal corporation, owning its own plant, to furnish electric light to citizens.

Cited in footnotes to *Mitchell v. Negaunee*, 38 L. R. A. 157, which sustains right of city to own electric light plant to furnish light to citizens; *Edgerton v. Goldsboro Water Co.* 48 L. R. A. 444, which holds cost of providing water for city authorized by charter not a "necessary expense;" *Fawcett v. Mt. Airy*, 63 L. R. A. 870, which sustains municipality's power to incur expense of owning and operating water and electric light plants without submitting proposition to voters.

Distinguished in effect in *Mernaugh v. Orlando*, 41 Fla. 437, 27 So. 34, holding that power in city to regulate, does not authorize ordinance prohibiting, sale of liquor; *Wadsworth v. Concord*, 133 N. C. 598, 45 S. E. 948, holding that town commissioners cannot make binding contract for electric lighting extending beyond their term.

30 L. R. A. 546, *MORRISON v. ST. PAUL & N. P. R. CO.* 63 Minn. 75, 65 N. W. 141.

Long-term railroad leases.

Cited in *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 426, 76 N. W. 217, holding lease of railroad to another company assuming debts, which proceeds of land sales also go to pay, no sale.

Cited in footnote to *St. Bernarde v. Kemper*, 45 L. R. A. 662, which sustains right of lessee in possession under lease for ninety-nine years, renewable forever, to petition for street improvement.

30 L. R. A. 549, *THAYER v. HUMPHREY*, 91 Wis. 276, 51 Am. St. Rep. 887, 64 N. W. 1007.

Relative priorities of individual and firm creditors.

Cited in *Re Gilbert*, 94 Wis. 115, 68 N. W. 863, holding firm debts of partnership provable against partnership which is individual member thereof subject to

rights of latter's separate creditors; *Weil v. Jaeger*, 73 Ill. App. 277, holding that creditor of old firm may prove claim against estate of new firm treated as valid in assignment; *Rollins v. Humphrey*, 98 Wis. 72, 73 N. W. 331, holding partnership postponed to individual creditors in distributing estate of insolvent partner; *Re Wilcox*, 94 Fed. 102, holding individual creditors of bankrupt preferred to firm creditors, though no partnership assets exist.

Cited in footnote to *Clark v. Stanwood*, 34 L. R. A. 378, which authorizes proof of debts of solvent firm against single insolvent partner.

Liability of ostensible partner.

Cited in *Evens & H. Fire Brick Co. v. Hadfield*, 93 Wis. 669, 68 N. W. 468, holding continued use of person's name renders him liable as partner in fact; *Garlick v. Karger*, 97 Wis. 159, 72 N. W. 223, holding retired partner's claim for capital subordinate to claims of firm creditors.

Effect of transfer of assets on firm creditors' priorities.

Cited in *Densmore Commission Co. v. Shong*, 98 Wis. 384, 74 N. W. 114, holding that firm creditors have no equity in assets transferred in good faith to succeeding corporation without provision for payment of debts; *Franklin Sugar Ref. Co. v. Henderson*, 86 Md. 461, 63 Am. St. Rep. 524, 38 Atl. 991, holding that transfer to copartners by retiring member of insolvent firm does not divest priority of partnership creditors; *Pfister v. Graton & K. Mfg. Co.* 97 Wis. 211, 72 N. W. 883, holding noncollusive judgment against partnership not impeachable by creditors as based on partner's individual debt; *Excelsior Mill Co. v. Hanover*, 102 Wis. 313, 73 N. W. 737, by Marshall, J., in separate opinion, holding conveyance of firm assets by members of insolvent firm to pay individual debt valid as to partnership creditors.

30 L. R. A. 560, *LITTLE ROCK & FT. S. R. CO. v. WELLS*, 61 Ark. 354, 54 Am. St. Rep. 216, 54 Am. St. Rep. 260, 33 S. W. 208.

Injunctions against judgments.

Cited in *Eppinger v. Scott*, 130 Cal. 277, 62 Pac. 460, enjoining proceedings on judgment pending appeal from denial of motion to recall execution, and referring particularly to annotation in 30 L. R. A. 560; *Thomas v. Jones*, 98 Va. 329, 36 S. E. 382, granting equitable relief against tax deed obtained by fraud and surprise; *George v. Nowlan*, 38 Or. 541, 64 Pac. 1, refusing to enjoin decree rendered by default for greater amount than authorized by pleadings.

Cited in notes (31 L. R. A. 66) on enjoining judgments against or in favor of sureties; (31 L. R. A. 36, 39) on negligence as cause for, and bar to, injunctions against judgments; (30 L. R. A. 800) on injunction against judgments obtained by fraud, accident, mistake, surprise, and duress; (30 L. R. A. 707) on injunctions against judgments for errors and irregularities.

What interest disqualifies juror.

Cited in footnote to *Reed v. Peacock*, 49 L. R. A. 423, which holds Odd Fellow not disqualified as juror in action by Odd Fellow of other lodge.

30 L. R. A. 574, *PARSHLEY v. THIRD M. E. CHURCH*, 147 N. Y. 583, 70 N. Y. S. R. 346, 42 N. E. 15.

Admissions of liability.

Cited in *Johnson v. Buffalo Homeopathic Hospital*, 53 App. Div. 515, 65 N. Y.

Supp. 1087, holding third person's statement at informal meeting where trustees and others are present, incompetent as admission of trustees.

Implied agreement to pay for benefits.

Cited in footnote to *Travelers' Ins. Co. v. Johnson City*, 49 L. R. A. 123, which denies bona fide purchaser's right to maintain action for money had and received on railroad aid bonds issued by city without authority.

30 L. R. A. 576, *FORSYTH v. HAMMOND*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950.

Appeal by some of several coparties.

Cited in *Pritchett v. McGaughey*, 151 Ind. 639, 52 N. E. 397, holding filing of declination to join in appeal, and waiver of notice, authorizes court to entertain jurisdiction.

Annexation to municipality.

Cited in *Vigo County v. Terre Haute*, 147 Ind. 135, 46 N. E. 350, referring to annexation proceedings as being in accordance with statute.

Cited in footnotes to *Taggart v. Claypole*, 32 L. R. A. 586, which holds annexation to city not taking of property; *State ex rel. Childs v. Crow Wing County*, 35 L. R. A. 745, which authorizes quo warranto to oust county from adjoining territory illegally annexed.

Effect of plat of farm lands.

Cited in *Woodruff Place v. Raschig*, 147 Ind. 525, 46 N. E. 990, and *Strunk v. Pritchett*, 27 Ind. App. 585, 61 N. E. 973, holding that absence of state authorizing platting of farm lands does not nullify dedication of streets where purchasers relied thereon.

Powers of courts to review action of town or county boards.

Cited in *Paul v. Walkerton*, 150 Ind. 572, 50 N. E. 725, sustaining court's jurisdiction to try annexation cases *de novo* on appeal; *Forsyth v. Hammond*, 18 C. C. A. 182, 34 U. S. App. 552, 71 Fed. 450, Reversing 68 Fed. 776, holding provisions for appeal to courts from determination of county commissioners in annexation cases unconstitutional; *Monroe County v. Conner*, 155 Ind. 496, 58 N. E. 828, holding that appeal lies from action of county commissioners authorized by election to construct gravel road.

Cited in footnote to *Re North Milwaukee*, 33 L. R. A. 638, which holds void, act requiring court to determine whether or not territory should be incorporated as village.

Distinguished in *Woolverton v. Albany*, 152 Ind. 79, 52 N. E. 455, denying court's jurisdiction to review town board of trustees' refusal to act upon petition for disannexation.

30 L. R. A. 584, *ASHTON v. STOY*, 96 Iowa, 197, 64 N. W. 804.

Appeal to district court from action of public board.

Cited in *Ross v. Campbell*, 98 Iowa, 5, 66 N. W. 1064, holding that charge of fraud in list of subscribers cannot be first made on appeal from supervisor's selection of county newspaper; *Frost v. Oskaloosa Bd. of Review*, 114 Iowa, 106, 86 N. W. 213, holding that district court cannot try appeal from board of review of assessments where no record filed.

30 L. R. A. 586, FIDELITY & C. CO. v. EICKHOFF, 63 Minn. 170, 56 Am. St. Rep. 464, 65 N. W. 351.

Action for malicious prosecution against guaranty company in 74 Minn. 139, 76 N. W. 1030.

Guaranty insurance.

Cited in footnotes to *Shakman v. United States Credit System Co.* 32 L. R. A. 383, which holds contract to indemnify merchant against loss by insolvency of customers, contract of insurance; *Fidelity & C. Co. v. Gate City Nat. Bank.* 33 L. R. A. 821, which holds guarantor of honesty of bank teller liable for dishonesty of assistant cashier; *People ex rel. Kasson v. Rose*, 44 L. R. A. 124, which holds guaranteeing fidelity of officers and performance of contracts, insurance; *Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co.* 44 L. R. A. 213, which sustains contract to indemnify carrier against loss from injuries to passenger.

Stipulations as to evidence of liability.

Followed in *Fidelity & C. Co. v. Crays*, 76 Minn. 455, 79 N. W. 531, holding stipulation making voucher for payment by surety to employer conclusive as to fact and extent of liability, void.

Cited in *Easton v. Scofield*, 66 Minn. 430, 69 N. W. 326, holding purchaser at tax sale not entitled to refundment when acting in bad faith in action declaring sale void.

Sufficiency of complaint on fidelity bond.

Followed in *Fidelity & C. Co. v. Lawler*, 64 Minn. 148, 66 N. W. 143, holding default in condition of bond sufficiently alleged.

30 L. R. A. 590, GOULD v. GREAT NORTHERN R. CO. 63 Minn. 37, 56 Am. St. Rep. 453, 65 N. W. 125.

Right to connect fences.

Cited in footnote to *Agne v. Seitsinger*, 36 L. R. A. 701, which sustains right to cattle pass under bridge over ravine under reservation in grant for highway.

30 L. R. A. 593, HUBBARD v. TURNER, 93 Ga. 752, 20 S. E. 640.

Who are "heirs" or "legal representatives."

Cited in footnotes to *Hindry v. Holt*, 39 L. R. A. 351, which holds right of action for death limited to lineal descendants by words "heir or heirs" in statute; *Noble v. Seattle*, 40 L. R. A. 822, which denies parents' right of action as "heirs" for death of person killed in duel; *Voss v. Connecticut Mut. L. Ins. Co.* 44 L. R. A. 689, which holds interest of children to whom policy on father's life payable if mother previously dies descends to next of kin of one dying before insured.

Cited in note (30 L. R. A. 611) on who are "legal representatives" within meaning of life insurance policies.

Proceeds of life insurance.

Cited in *People use of Brooks v. Petrie*, 191 Ill. 507, 85 Am. St. Rep. 268, 61 N. E. 499, Affirming 94 Ill. App. 658, holding proceeds of benefit certificate payable to devisees, devised to executor in trust for heirs, not part of estate.

Cited in footnotes to *Sternberg v. Levy*, 53 L. R. A. 438, which sustains right as against creditors to procure, with exempt wages, insurance for sister and her

children constituting family; *Williams v. Donough*, 56 L. R. A. 766, which holds void, statute exempting proceeds of fraternal benefit certificate from liability for debts.

30 L. R. A. 598, *TOLEDO v. SHEILL*, 53 Ohio St. 447, 42 N. E. 323.

Followed without discussion in *Toledo v. Just*, 53 Ohio St. 677, 44 N. E. 1133; *Studer v. Columbus*, 53 Ohio St. 677, 44 N. E. 1148, and *Shattuck v. Cincinnati*, 53 Ohio St. 678, 44 N. E. 1147.

Frontage assessment of corner lots.

Cited in *Metcalf v. Carter*, 19 Ohio C. C. 199, holding corner lot not assessable for improving side street as having side street frontage merely because basement of building has entrances therefrom.

Distinguished in effect in *Emery v. Cincinnati*, 4 Ohio N. P. 222, sustaining statute providing for assessment of corner lots for street improvement according to abutting feet.

Assessment for street improvements.

Cited in *Nevin v. Dayton*, 4 Ohio N. P. 206, holding petitioner agreeing to pay expense of street improvement estopped to deny legality of assessment.

30 L. R. A. 604, *STANDISH v. BABCOCK*, 53 N. J. Eq. 376, 51 Am. St. Rep. 633, 33 Atl. 385.

Relative rights of individual and partnership creditors.

Cited in footnotes to *Re Baldwin*, 58 L. R. A. 122, which sustains individual liability of member of banking firm, signing name to certificate of deposit, enforceable against estate in preference to claims against firm; *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate with other partners' consent interest in firm to pay individual in preference to firm debts.

Distinguished in *Hoaglin v. Henderson*, 119 Iowa, 729, 61 L. R. A. 760, 97 Am. St. Rep. 335, 94 N. W. 247, holding that claim against one of partners cannot be set off in action on partnership claim.

Following trust funds.

Distinguished in *Ellicott v. Kuhl*, 60 N. J. Eq. 337, 46 Atl. 945, holding claim of *cestui que trust* against trustee's estate not preferred, trust funds not being traceable.

30 L. R. A. 607, *BRISCOE v. ALFREY*, 61 Ark. 196, 54 Am. St. Rep. 203, 32 S. W. 505.

Liability for trespass by animals.

Cited in footnote to *May v. Poindexter*, 47 L. R. A. 588, which holds owner liable for trespass of animals turned by him on unfenced lands.

30 L. R. A. 609, *ROSE v. WORTHAM*, 95 Tenn. 505, 32 S. W. 458.

Creditor's rights in proceeds of life insurance.

Cited in footnotes to *Sternberg v. Levy*, 53 L. R. A. 438, which sustains right, as against creditors, to procure with exempt wages, insurance for sister of insured and her children constituting his family; *Morris v. Georgia Loan, Sav. &*

Bkg. Co. 46 L. R. A. 506, which holds creditor taking assignment of policy entitled to retain from proceeds sufficient to pay debt and advances only.

Distinguished in *Wright v. Wright*, 100 Tenn. 315, 45 S. W. 672, holding proceeds of unmarried man's insurance payable to himself "executors, administrators or assigns" part of estate.

Who are "heirs."

Cited in footnote to *Voss v. Connecticut Mut. L. Ins. Co.* 44 L. R. A. 689, which holds interest of children to whom policy on father's life payable if mother previously dies descends to next of kin of one dying before insured.

Cited in note (30 L. R. A. 595) on who are "heirs" within meaning of life insurance policies.

Statutory construction to effect legislature's purpose.

Cited in *Lewis v. Mynatt*, 105 Tenn. 514, 58 S. W. 857, construing "relatives" in statute of distribution as including relations by affinity and consanguinity, where legislature's intent so appears.

30 L. R. A. 612, *KIRBY v. WESTERN U. TELEG CO.* 4 S. D. 105, 439, 55 N. W. 759, 57 N. W. 199, 7 S. D. 623, 65 N. W. 37.

Compulsory obligation to serve public.

Cited in footnotes to *Inter-Ocean Pub. Co. v. Associated Press*, 48 L. R. A. 563, which denies right of news collecting corporation operating telegraph lines to discriminate between publishers in sale of news; *Conn. v. Western U. Teleg. Co.* 57 L. R. A. 614, which holds delivery of telegrams containing necessary information at place used for pool selling, not a common nuisance; *Memphis News Pub. Co. v. Southern R. Co.* 63 L. R. A. 150, which holds train run by carrier at solicitation of newspaper publisher guaranteeing daily revenue of specified amount, not a chartered train justifying carrier's exclusion of other publishers from its use.

Carrier's right to limit liability.

Cited in *Meuer v. Chicago, M. & St. P. R. Co.* 5 S. D. 575, 25 L. R. A. 84, 49 Am. St. Rep. 848, 59 N. W. 945, holding that common carrier may limit liability by express contract, except as against gross negligence, fraud, or wilful wrong.

Cited in footnotes to *Birkett v. Western U. Teleg. Co.* 33 L. R. A. 404, which holds valid, condition against liability beyond amount paid for sending unrepeatd message; *Western U. Teleg. Co. v. Eubank*, 36 L. R. A. 711, which denies right to limit recovery for unrepeatd messages to amount paid for sending or to require presenting of claim within sixty days; *Ullman v. Chicago & N. W. R. Co.* 56 L. R. A. 246, which sustains carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance; *Mears v. New York, N. H. & H. R. Co.* 56 L. R. A. 884, which authorizes carrier to stipulate for exemption from liability for injury by wet; *Central R. Co. v. Murphey*, 53 L. R. A. 720, which holds negligent carrier liable for true value, notwithstanding arbitrary pre-adjustment in bill of lading assented to by shipper; *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 558, which holds prohibition against carriers limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state.

Contracts for telegrams not on blanks.

Cited in note (56 L. R. A. 745) on contracts for telegrams not written on company's blanks.

30 L. R. A. 626, VAIL v. BROADWAY R. CO. 147 N. Y. 377, 70 N. Y. S. R. 33, 42 N. E. 4.

Riding on outside of street car as negligence.

Cited in Seelig v. Metropolitan Street R. Co. 18 Misc. 385, 41 N. Y. Supp. 656, holding riding on front platform of street car not negligence *per se*; Wood v. Brooklyn City R. R. Co. 5 App. Div. 493, 38 N. Y. Supp. 1077, holding contributory negligence of plaintiff riding on running board of street car question for jury; Watson v. Portland & C. E. R. Co. 91 Me. 591, 44 L. R. A. 159, footnote p. 157, 64 Am. St. Rep. 268, 40 Atl. 699, holding riding on front platform of electric car not negligence *per se*; Sias v. Rochester R. Co. 169 N. Y. 127, 56 L. R. A. 854, 62 N. E. 132, distinguished in court below, 71 N. Y. S. R. 152, 36 N. Y. Supp. 378, by O'Brien, J., dissenting, who holds contributory negligence of passenger putting head beyond edge of platform to see fire question for jury.

Cited in footnotes to North Chicago Street R. Co. v. Baur, 45 L. R. A. 108, which holds standing on street-car platform with back against dash-board not necessarily negligent; Fisher v. West Virginia & P. R. Co. 33 L. R. A. 69, which holds riding on car platform and refusing to go inside at request, negligence; Third Ave. R. Co. v. Barton, 52 L. R. A. 471, which denies right of passenger on running board of street car to recover for injuries by contact with pillar near track while passing around conductor; Sweetland v. Lynn & B. R. Co. 51 L. R. A. 783, which sustains rule forbidding passenger's riding on front platform of electric car.

Strict construction of penal statutes.

Cited in Stewart v. Metropolitan Street R. Co. 20 Misc. 608, 46 N. Y. Supp. 414, holding statutory penalty for excessive fare not recoverable by passenger requested to pay second time on taking following car.

30 L. R. A. 628, NATIONAL TELEPH. MFG. CO. v. DU BOIS, 165 Mass. 117, 52 Am. St. Rep. 503, 42 N. E. 510.

Right to sue in another state.

Cited in Eingartner v. Illinois Steel Co. 94 Wis. 84, 34 L. R. A. 508, 59 Am. St. Rep. 859, 68 N. W. 664 (dissenting opinion), majority denying court's discretionary power to dismiss action on cause arising in and between citizens of another state.

Validity of personal judgment against nonresident constructively served.

Cited in footnotes to Kemper-Thomas Paper Co. v. Shyer, 58 L. R. A. 173, which denies right to execution against other property in state for unpaid part of judgment against nonresident served by attachment and publication; Cabanne v. Graf, 59 L. R. A. 735, which holds void, act authorizing service, in personal action against nonresident, on agent in charge of business in state without seizure of property.

30 L. R. A. 630, STATE *ex rel.* CHILDS v. SUTTON, 63 Minn. 147, 56 Am. St. Rep. 459, 65 N. W. 262.

Eligibility for public office.

Cited in Opinion of the Justices, 95 Me. 589, 51 Atl. 224 (by minority), holding that resignation does not remove member of legislature's disqualification to hold office during term for which elected; State *ex rel.* Dowdall v. Dahl, 69 Minn. 111,

72 N. W. 53, raising, without deciding, question whether member of legislature may hold position of district court stenographer.

Cited in footnote to State *ex rel.* Goodell v. McGeary, 44 L. R. A. 446, which holds building and furnishing new house with intention of living in same not make owner elector of ward while renting elsewhere.

Constitutional interpretation.

Cited in Davis v. Hugo, 81 Minn. 223, 83 N. W. 984, construing constitutional provision that municipal charter shall take effect thirty days after ratification according to apparent meaning.

30 L. R. A. 633, AGRICULTURAL INS. CO. v. HAMILTON, 82 Md. 88, 51 Am. St. Rep. 457, 33 Atl. 429.

Condition in insurance policy against vacancy.

Cited in Home Ins. Co. v. Boyd, 19 Ind. App. 187, 49 N. E. 285, holding that ceasing to use house for living purposes violates anti-vacancy clause.

Cited in footnotes to Home Ins. Co. v. Hancock, 52 L. R. A. 665, which holds house not vacant because custodian has access to only one room; German Ins. Co. v. Russell, 58 L. R. A. 234, which holds policy absolutely forfeited by allowing premises to remain vacant time specified in policy; Henderson Trust Co. v. Stuart, 48 L. R. A. 49, which holds executor liable for loss of insurance from failure to apply for extension of vacancy permit.

Severability of insurance.

Cited in Dumas v. Northwestern Nat. Ins. Co. 12 App. D. C. 265, 40 L. R. A. 364, footnote p. 358, holding entirely void, policy for certain amount on furniture as a whole for breach of condition as to part; Germania F. Ins. Co. v. Schild, 69 Ohio St. 141, 100 Am. St. Rep. 663, 68 N. E. 706, holding provision that "this entire policy shall be void," under specified circumstances, makes policy not severable risk.

Cited in footnote to Southern F. Ins. Co. v. Knight, 52 L. R. A. 70, which holds policy on different classes of property for premium payable in gross sum, indivisible.

Distinguished in Taylor v. Anchor Mut. F. Ins. Co. 116 Iowa, 631, 57 L. R. A. 331, 93 Am. St. Rep. 261, 88 N. W. 807, holding insurance severable on dwelling and live stock separately valued for entire premium.

Effect of insured's forfeiture upon mortgagee's interest.

Cited in footnote to Oakland Home Ins. Co. v. Bank of Commerce, 36 L. R. A. 673, which holds policy not avoided as to mortgagee's interest by insured's violation of provision against transfer of property without consent.

30 L. R. A. 636, JACKSON v. BRITISH AMERICA ASSUR. CO. 106 Mich. 47, 63 N. W. 899.

Followed without discussion in Jackson v. Orient Ins. Co. 106 Mich. 59, 63 N. W. 968.

Effect of riders or slips attached to insurance policies.

Cited in footnotes to Hardy v. Lancashire Ins. Co. 33 L. R. A. 241, which holds mortgagee's rights unaffected by additional insurance taken by mortgagor; Cutler v. Royal Ins. Co. 41 L. R. A. 159, which holds that standard guaranty to

maintain 80 per cent insurance stamped on policy does not supersede clause avoiding policy for additional insurance.

30 L. R. A. 644, *STORZ v. FINKELSTEIN*, 46 Neb. 577, 65 N. W. 195.

Actions on unlawful contracts.

Followed in *P. Schoenhofen Brewing Co. v. Whipple*, 2 Herdman (Neb.) 709, 89 N. W. 751, denying recovery for liquors sold by firm without license under license issued to another under pretended relation of principal and agent.

Cited in *Storz v. Finklestein*, 48 Neb. 33, 66 N. W. 1020, denying vendor's right to recover for beer sold for purpose of unlawful resale; *Rocco v. Frapoli*, 50 Neb. 667, 70 N. W. 236, refusing to enforce accounting upon contract for unlicensed commission sales of liquor; *Short v. Bullion-Beck & C. Min. Co.* 20 Utah, 32, 45 L. R. A. 607, 57 S. W. 720, denying employee's right to recover for overtime work in violation of eight-hour law.

30 L. R. A. 648, *Re BELTON*, 47 La. Ann. 1614, 18 So. 642.

Sole ownership of corporate stock.

Cited in *State v. Morgan's L. & T. R. & S. S. Co.* 106 La. 526, 31 So. 115, holding judgment against sole owner of corporate stock not binding on corporation.

Liquidation of corporations.

Cited in *Re New Orleans Sanitary Asso.* 105 La. 177, 83 Am. St. Rep. 230, 29 So. 337, sustaining putting private corporation established for public purpose in liquidation.

30 L. R. A. 651, *EVANS v. KEYSTONE GAS CO.* 148 N. Y. 112, 54 N. Y. S. R. 861, 51 Am. St. Rep. 681, 42 N. E. 513.

Res ipsa loquitur.

Cited in *Dwyer v. Buffalo General Electric Co.* 20 App. Div. 136, 46 N. Y. Supp. 874, holding evidence that insulation of dangerous electric wire wore off where touching brace on telegraph pole justifies jury's finding of negligence.

Liability for injury by dangerous agencies.

Cited in footnote to *Purdy v. Westinghouse Electric & Mfg. Co.* 51 L. R. A. 881, which holds use of barrels formerly containing explosive substance for shipping iron does not render liable for injury to employee by explosion.

— For escape of gas.

Cited in *Wichita Gas, Electric Light & P. Co. v. Wright*, 9 Kan. App. 736, 59 Pac. 1085, holding company liable for destruction of shade trees, shrubbery, and grass by gas escaping from street main; *Armbruster v. Auburn Gaslight Co.* 18 App. Div. 448, 46 N. Y. Supp. 158, and *Siebrecht v. East River Gas Co.* 21 App. Div. 112, 47 N. Y. Supp. 262, holding company liable for plants in greenhouse destroyed by gas from corroded main.

Cited in footnote to *Consolidated Gas Co. v. Crocker*, 31 L. R. A. 785, which holds failure of gas company to exercise care to discover and remedy leak, negligence.

Measure of damages for trespass.

Distinguished in *Mott v. Lewis*, 52 App. Div. 561, 65 N. Y. Supp. 31, holding

charge that plaintiff may recover difference in value of land with and without dirt piled on it, error.

30 L. R. A. 653, SCHMEER v. GASLIGHT CO. 147 N. Y. 529, 70 N. Y. S. R. 92, 42 N. E. 202.

Liability for escape of gas.

Cited in German-American Ins. Co. v. Standard Gaslight Co. 34 Misc. 595, 70 N. Y. Supp. 384, holding gas company liable for fire resulting from employee's applying match to pipe; Anderson v. Standard Gaslight Co. 17 Misc. 627, 40 N. Y. Supp. 671, holding gas company liable for fire due to leaky meter improperly inspected; Tiehr v. Consolidated Gas Co. 51 App. Div. 447, 65 N. Y. Supp. 10, holding jury's finding that gas company was liable for explosion in street manhole, sustained by evidence; Siebrecht v. East River Gas Co. 21 App. Div. 112, 47 N. Y. Supp. 262, holding company liable for plants in greenhouse destroyed by gas from corroded main; Schaum v. Equitable Gaslight Co. 15 App. Div. 76, 44 N. Y. Supp. 284, denying gas company's liability for explosion from cause not shown where employee was fixing pipes; Paden v. Van Blarcom, 100 Mo. App. 195, 74 S. W. 124, holding it question for jury whether master should not have examined gas valves before turning on and lighting gas resulting in explosion and injury to domestic.

Cited in footnotes to Pine Bluff Water & Light Co. v. Schneider, 33 L. R. A. 366, which requires gas company with notice of break in pipes to take precautions against injury; Richmond Gas Co. v. Baker, 36 L. R. A. 683, which holds gas company liable for escape of gas from cracked elbow in pipe unsuccessfully attempted to be repaired; Barrickman v. Marion Oil Co. 44 L. R. A. 92, which holds gas company liable for furnishing natural gas at so great a pressure as to set building on fire; McKenna v. Bridgewater Gas Co. 47 L. R. A. 790, which denies gas company's liability for explosion due to blundering act of employee of other company.

When question of contributory negligence for jury.

Cited in People's Gaslight & Coke Co. v. Amphlett, 93 Ill. App. 203, holding negligence in hunting gas leak with lighted match question for jury.

Liability for injury by dangerous objects.

Cited in Kleebauer v. Western Fuse & Explosives Co. 138 Cal. 505, 60 L. R. A. 382, 94 Am. St. Rep. 62, 71 Pac. 617, holding storage of gun powder by fuse manufacturer for business purposes not negligence *per se*.

Cited in footnotes to Vieth v. Hope Salt & Coal Co. 57 L. R. A. 410, which denies liability for injury to neighbor by explosion of steam boiler operated on own premises with care and skill; Purdy v. Westinghouse Electric & Mfg. Co. 51 L. R. A. 881, which holds use of barrels formerly containing explosive substance for shipping iron does not render liable for injury to employee by explosion.

30 L. R. A. 658, HARMON v. OLD COLONY R. CO. 165 Mass. 100, 52 Am. St. Rep. 499, 42 N. E. 505.

Effect of married women's enabling acts on husband's common-law rights.

Followed in Texas P. R. Co. v. Humble, 181 U. S. 64, 45 L. ed. 751, 21 Sup. Ct. Rep. 526, Affirming 38 C. C. A. 507, 97 Fed. 842, and Hamilton v. Great Falls

Street R. Co. 17 Mont. 352, 43 Pac. 713, sustaining married woman's right to recover for impairment of capacity to labor.

Cited in *Kennelly v. Savage*, 18 Mont. 122, 44 Pac. 400, holding husband need not join in wife's lease of separate property; *Ago v. Canner*, 167 Mass. 392, 45 Atl. 754, sustaining wife's right of action for conversion of personalty sold by husband in her absence; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 311, 38 L. R. A. 633, 60 Am. St. Rep. 397, 46 N. E. 1063, holding husband's right of action for loss of consortium through injury to wife unaffected by married women's statutes; *Southern R. Co. v. Crowder*, 135 Ala. 426, 33 So. 335, sustaining action by husband to recover for loss of wife's services and companionship caused by injury to her; *Bradford v. Worcester*, 184 Mass. 561, 69 N. E. 310, holding that married woman may gain settlement in state although husband is, during all that time, absent therefrom.

Distinguished in *Cullar v. Missouri, K. & T. R. Co.* 84 Mo. App. 351, sustaining husband's right to recover for loss of wife's domestic service by negligent injury.

30 L. R. A. 660, *SPRINGFIELD F. & M. INS. CO. v. KEESEVILLE*, 148 N. Y. 46, 51 Am. St. Rep. 667, 42 N. E. 405.

Insufficiency of water supply.

Cited in footnote to *Du Bois v. Du Bois City Waterworks Co.* 34 L. R. A. 92, which holds cancelation of contract by city for water supply not justified for inadequacy of supply.

— Liability for fire loss from insufficiency.

Cited in *Miller v. Minneapolis*, 75 Minn. 133, 77 N. W. 788, denying city's liability for negligently suffering fire hydrants to become clogged; *Planters' Oil Mill v. Monroe Waterworks & Light Co.* 52 La. Ann. 1248, 27 So. 684, denying municipal liability for failure of contracting private water company to furnish adequate fire protection; *Ukiah City v. Ukiah Water & Improv. Co.* 142 Cal. 178, 64 L. R. A. 234, 100 Am. St. Rep. 107, 75 Pac. 773, denying liability of water company to city for loss by negligent failure to furnish sufficient water, in absence of express contract to that effect; *Smith v. Great South Bay Water Co.* 82 App. Div. 428, 81 N. Y. Supp. 812, denying right of taxpayer to action against water company under contract with municipality, to recover for loss by inadequate force for fire extinguishment.

Cited in footnotes to *Gorrell v. Greensboro Water Supply Co.* 46 L. R. A. 513, which sustains right of action by citizen for breach of water company's contract to supply sufficient water to prevent loss by fire; *Middlesex Water Co. v. Knappmann Whiting Co.* 49 L. R. A. 572, which holds water company failing to supply sufficient water for fire purposes liable to consumer for loss of property by fire.

Cited in note (61 L. R. A. 35, 95) on establishment and regulation of municipal water supply.

Disapproved in *Lenzen v. New Braunfels*, 13 Tex. Civ. App. 361, 35 S. W. 341, holding city liable for negligent failure to supply water to extinguish fires.

Municipal waterworks as nongovernmental enterprise.

Cited in footnote to *Newport v. Com.* 45 L. R. A. 518, which holds city taxable for waterworks franchise.

Liability for nonfeasance or malfeasance in performing governmental function.

Cited in *Lefrois v. Monroe County*, 162 N. Y. 567, 50 L. R. A. 206, 57 N. E. 185, denying county's liability for acts of officials creating nuisance by spreading sewage on almshouse farm; *Peaty v. New York*, 33 Misc. 235, 67 N. Y. Supp. 276, denying city's liability for death of employee caused by breaking of defective fire alarm pole; *Doty v. Port Jervis*, 23 Misc. 314, 52 N. Y. Supp. 57, denying liability of village for killing of person by incompetent policeman; *Reynolds v. Board of Education*, 33 App. Div. 93, 53 N. Y. Supp. 75, denying school board's liability for act of "attendance officer" wrongfully arresting scholar killed by train while trying to escape; *Nicholson v. Detroit*, 129 Mich. 256, 56 L. R. A. 605, 88 N. W. 695, denying city's liability for death of employee contracting smallpox in tearing down pesthouse; *Hughes v. Auburn*, 161 N. Y. 106, 46 L. R. A. 639, 55 N. E. 389, denying city's liability for disease or death superinduced by negligent construction or maintenance of sewer; *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 22, 68 N. E. 997, Affirming 79 App. Div. 349, 79 N. Y. Supp. 369, holding charitable corporation acting as one of governmental agencies of state in receiving boy convicted of crime, not liable for negligence toward him; *Snouffer v. Cedar Rapids & M. C. R. Co.* 118 Iowa, 307, 92 N. W. 79, holding power of city over streets, legislative one, vested in it, to which all ordinances and regulations are subject.

Distinguished in effect in *Tilford v. New York*, 1 App. Div. 201, 37 N. Y. Supp. 185, denying city's liability for *ultra vires* act of officers imposing quarantine; *Workman v. New York City*, 179 U. S. 579, 45 L. ed. 327, 21 Sup. Ct. Rep. 212 (dissenting opinion), majority holding city liable for negligent collision of fireboat with another vessel; *Esberg Cigar Co. v. Portland*, 34 Or. 289, 301, 43 L. R. A. 440, 75 Am. St. Rep. 651, 55 Pac. 961, holding city liable for damages caused by bursting of improperly constructed water main; *Fordham v. Gouverneur*, 15 App. Div. 624, 44 N. Y. Supp. 1117, by Landon, J., dissenting, who holds village liable for creation of obstruction in highway by water commissioners.

Right of action for municipal negligence.

Cited in *Barry v. Port Jervis*, 64 App. Div. 278, 72 N. Y. Supp. 104, holding charter requirement of forty-eight-hour notice of personal injuries resulting from negligence as condition precedent to action, unconstitutional.

Water rates.

Cited in footnotes to *Brymer v. Butler Water Co.* 36 L. R. A. 260, which holds system of water rates yielding only fair profit to owners after paying charges should not be reduced; *Detroit v. Board of Water Comrs.* 31 L. R. A. 463, which denies right to compel incorporated board of water commissioners to furnish water free to house of correction.

30 L. R. A. 665, *ISAACS v. BARBER*, 10 Wash. 124, 45 Am. St. Rep. 772, 38 Pac. 871.

Rights of prior appropriator of water.

Followed in *Wold v. May*, 10 Wash. 158, 38 Pac. 875, sustaining right of prior appropriator of waters of creek, according to prevailing custom, as against riparian owner.

Cited in *Benton v. Johncox*, 17 Wash. 280, 39 L. R. A. 109, footnote p. 107,

61 Am. St. Rep. 912, 49 Pac. 495, requiring protection of riparian owner against subsequent appropriation; Crawford Co. v. Hall (Neb.) 60 L. R. A. 905, 93 N. W. 781, construing statute as recognition of custom of appropriation of water, and as vesting title in prior appropriators thereof, as against subsequent riparian owners.

Cited in footnotes to Charnock v. Higuerra, 32 L. R. A. 190, which sustains riparian owner's right to raise water by pumps for irrigation; Longmire v. Smith, 58 L. R. A. 308, which holds first appropriator for irrigation not deprived of rights by failure at first to describe definite measurement of what he uses and to furnish clear evidence of amount required; North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co. 40 L. R. A. 851, which holds right to irrigate land, subject to duty to take care not to injure others with seepage or waste water unfit for irrigation; Salt Lake City v. Salt Lake City Water & Electrical Power Co. 61 L. R. A. 648, which denies prior appropriator's right to complain of noninjurious use by upper proprietor; Hague v. Nephi Irrig. Co. 41 L. R. A. 311, which holds appropriation of more water than needed ineffectual to prevent subsequent appropriation of excess; Bruening v. Dorr, 35 L. R. A. 640, which denies right to use water of spring for irrigation as against prior appropriator of stream into which it percolates; Crawford Co. v. Hall, 60 L. R. A. 889, which holds right to use water acquired by appropriation superior to that of subsequent riparian proprietor.

Cited in notes (30 L. R. A. 186) on appropriation of percolating waters on public lands; (41 L. R. A. 743) on correlative rights of upper and lower proprietors as to use and flow of water in stream; (59 L. R. A. 821) on liability for damming back water of stream.

30 L. R. A. 680, BROWN v. SMITH, 19 R. I. 319, 33 Atl. 466.

Divorced father's liability for support of child.

Cited in McKay v. McKay, 125 Cal. 71, 57 Pac. 677, denying court's power to require reimbursement of stepfather by divorced father for support of children.

Cited in footnotes to Foss v. Hartwell, 37 L. R. A. 589, which denies divorced father's liability to subsequent husband of wife for support of child surreptitiously taken by mother; Re Zilley, 40 L. R. A. 579, which holds father liable to pay mother after divorce for keeping child which father entitled to under decree; Keller v. St. Louis, 47 L. R. A. 391, which denies mother's right of action for injury to child given her by divorce decree without provision as to its support.

Action by mother for loss by child's injury.

Cited in McGarr v. National & P. Worsted Mills, 24 R. I. 449, 60 L. R. A. 124, 96 Am. St. Rep. 749, 53 Atl. 320, sustaining right of mother, supporting family, to recover expense caused by wrongful injury to child.

30 L. R. A. 682, MILLER v. MCCARDELL, 19 R. I. 304, 33 Atl. 445.

Covenant to maintain leased premises.

Cited in Lovejoy v. Townsend, 25 Tex. Civ. App. 386, 61 S. W. 331, holding landlord agreeing to repair and keep in repair, obligated to do so, without regard to condition of roof at date of lease.

Cited in footnote to Marshall v. Rugg, 33 L. R. A. 679, which holds actual termination of tenancy "expiration" of lease within covenant as to restoring property.

30 L. R. A. 684, *HOWE v. MINNEAPOLIS, ST. P. & S. STE. M. R. CO.* 62 Minn. 71, 54 Am. St. Rep. 616, 64 N. W. 102.

Duty to look and listen at crossing.

Cited in *Snider v. New Orleans & C. R. Co.* 48 La. Ann. 12, 18 So. 695, holding person before crossing car track should look and listen at time and place where precaution effective.

Cited in footnotes to *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 803, which holds failure to look within 30 feet of track not prevent recovery; *Woehrle v. Minnesota Transfer R. Co.* 52 L. R. A. 349, which holds traveler's failure to look and listen when watchman absent not negligence *per se*; *Lorenz v. Burlington, C. R. & N. R. Co.* 56 L. R. A. 753, which holds negligence of one pursuing cow, in not looking and listening before crossing railroad track, for jury.

Imputing driver's negligence to passenger.

Cited in *Johnson v. St. Paul City R. Co.* 67 Minn. 262, 36 L. R. A. 587, 69 N. W. 900, holding negligence of driver not imputable to person riding in funeral procession; *Finley v. Chicago, M. & St. P. R. Co.* 71 Minn. 476, 74 N. W. 174, holding negligence of husband driving not imputable to wife; *Cunningham v. Thief River Falls*, 84 Minn. 28, 86 N. W. 763, holding negligence of driver not imputable to person invited to ride with friends; *Koplitz v. St. Paul*, 86 Minn. 375, 58 L. R. A. 75, 90 N. W. 794, holding negligence of member of picnic party driving omnibus not imputable to young lady passenger.

Cited in footnote to *Illinois C. R. Co. v. McLeod*, 52 L. R. A. 954, which holds hirer of team and driver bound to check latter's attempt to cross track without stopping or listening for train.

When contributory negligence question for jury.

Cited in *Wosika v. St. Paul City R. Co.* 80 Minn. 368, 83 N. W. 386, holding negligence of passenger by invitation in wagon, without control over team or driver, question for jury.

30 L. R. A. 689, *ANOKA LUMBER CO. v. FIDELITY & C. CO.* 63 Minn. 286, 65 N. W. 353.

Notice to insurer.

Cited in *Grand Rapids Electric Light & P. Co. v. Fidelity & C. Co.* 111 Mich. 151, 69 N. W. 249, holding notice need not be given to insurer against employer's liability until accident and claim for damages; *Comstock v. Fraternal Acci. Asso.* 116 Wis. 390, 93 N. W. 22, holding accident policy not avoided in absence of unequivocal language, by failure of insured to give notice of accident within time specified, because of incapacity.

Cited in footnote to *Munz v. Standard Life & Acci. Ins. Co.* 62 L. R. A. 485, which holds insurer not released from liability for failure to furnish notice and proofs of death within required time, by beneficiary not learning of death or of policy within such time.

Distinguished in *Underwood Veneer Co. v. London Guarantee & Acci. Co.* 100 Wis. 382, 75 N. W. 996, construing provision for notice "upon occurrence of accident and also upon receipt of claim," as requiring notice on both occasions.

Liability to assured not paying judgment.

Cited in *Pickett v. Fidelity & C. Co.* 60 S. C. 491, 38 S. E. 160, holding insurer liable to insolvent assured not paying employee's judgment; *Hoven v. Em-*

employers Liability Assur. Corp. 93 Wis. 208, 32 L. R. A. 390, footnote p. 388, 32 N. W. 388, holding payment of claims for injuries to employee not condition precedent to suit on employer's liability policy; Sanders v. Frankfort M. Acci. & Plate Glass Ins. Co. 72 N. H. 493, 101 Am. St. Rep. 688, 57 Atl. 655, construing employer's liability policy as indemnity against liability.

Right of employee to proceeds of employer's liability insurance.

Cited in Moore v. Los Angeles Iron & Steel Co. 89 Fed. 75, holding insurer and insured may be sued jointly by injured employee under statute making indemnitor and indemnitee jointly liable.

Cited in footnotes to Embler v. Hartford Steam Boiler Inspection & Ins. Co. 44 L. R. A. 512, which denies right of personal representatives of employee to recover on policy taken out by employer insuring against injury to employees; Boisseau v. Penn, 57 L. R. A. 380, which holds execution not lien on interest of debtor in twenty-year distribution policy on his life which ceases on failure to pay premiums.

Distinguished in Frye v. Bath Gas & Electric Co. 97 Me. 245, 59 L. R. A. 446, 94 Am. St. Rep. 500, 54 Atl. 395, denying right of injured employee to enforce indemnity insurance where employer insolvent; Bain v. Atkins, 181 Mass. 244, 57 L. R. A. 792, footnote p. 791, 92 Am. St. Rep. 411, 63 S. E. 414, denying right of injured person to sue insurer against loss through liability for injuries, after settlement with insured.

Employer's liability insurance.

Cited in Employers Liability Assur. Corp. v. Light, Heat & Power Co. 28 Ind. App. 441, 63 N. E. 54, holding "immediate medical attention" for which insurer liable, as attention during period necessary to notify insurer; Cornell v. Travelers' Ins. Co. 66 App. Div. 563, 73 N. Y. Supp. 341, holding that insured may recover expense of successfully defending suit, where insurance company fails to defend.

Cited in footnotes to Shakman v. United States Credit System Co. 32 L. R. A. 383, which holds contract to indemnify merchant against loss by insolvency of customers, contract of insurance; People *ex rel.* Kasson v. Rose, 44 L. R. A. 124, which holds guaranteeing fidelity of officers and performance of contracts, insurance.

Assignment of indemnity insurance.

Cited in Fenton v. Fidelity & C. Co. 36 Or. 290, 48 L. R. A. 772, footnote p. 770, 56 Pac. 1096, holding indemnity against liability for injuries to employees assignable though employer insolvent.

Cited in note (44 L. R. A. 180, 183) on assignability of cause of action for personal injuries.

30 L. R. A. 693, STRAUSS v. CAROLINA INTERSTATE BLDG. & L. ASSO.
117 N. C. 308, 53 Am. St. Rep. 585, 23 S. E. 450.

Rights of borrowing member of insolvent loan association.

Cited in Manorita v. Fidelity Trust & Loan Co. 101 Fed. 12, and Williams v. Maxwell, 123 N. C. 593, 31 S. E. 821, holding borrowing stockholder of loan association entitled to credit for all payments, less *pro rata* share of losses; Meares v. Davis, 121 N. C. 120, 28 S. E. 188, holding borrowing stockholder of insolvent loan association not entitled to surplus on mortgage sale equal to

pro rata share of deficiency; *Meares v. Duncan*, 123 N. C. 205, 31 S. E. 476, holding married woman who is borrowing stockholder of loan association liable for share of losses; *Armstrong v. United States Bldg. & L. Asso.* 15 App. D. C. 18, holding borrowing member of insolvent loan association chargeable with present money value of unpaid instalments; *Hale v. Cairns*, 8 N. D. 150, 44 L. R. A. 262, 73 Am. St. Rep. 746, 77 N. W. 1010, denying right of borrowing member of insolvent loan association to apply stock payments on mortgage; *Young v. Improvement Loan & Bldg. Asso.* 48 W. Va. 524, 38 S. E. 670, holding borrowing member of insolvent association chargeable with debt and interest, crediting all payments except stock dues; *Coltrane v. Baltimore Bldg. & L. Asso.* 110 Fed. 305, holding borrower upon winding up insolvent association entitled to credit for interest and premiums paid; *People's Bldg. & L. Asso. v. McPhilamy*, 81 Miss. 82, 59 L. R. A. 745, footnote p. 743, 95 Am. St. Rep. 693, 32 So. 1001, requiring stock payments of borrowing member to share losses and expenses of winding up loan association; *Reddick v. United States Bldg. & L. Asso.* 106 Ky. 112, 49 S. W. 1075, charging borrowing member with amount of loan and interest, and crediting him with amounts paid in and reasonably certain approximate value of his stock; *Meares v. Finlayson*, 55 S. C. 117, 32 S. E. 986, raising, without deciding, question of liability of borrowing member assigning stock as security for *pro rata* share of losses.

Application of payments to loan association.

Cited in *Hollowell v. Southern Bldg. & L. Asso.* 120 N. C. 287, 26 S. E. 781, holding loan association charges against borrowing member in excess of lawful interest, usurious; *Pollock v. Carolina Interstate Bldg. & L. Asso.* 51 S. C. 426, 64 Am. St. Rep. 683, 29 S. E. 77, holding borrowing member of loan association entitled to credit on debt for all moneys paid; *People's Loan & Sav. Asso. v. Fowble*, 17 Utah, 130, 53 Pac. 999, and *Hale v. Thomas*, 20 Utah, 432, 59 Pac. 241, holding borrower from loan association entitled to have stock dues credited on loan; *Western Sav. Co. v. Houston*, 38 Or. 381, 65 Pac. 611, and *Hale v. Stenger*, 22 Wash. 520, 61 Pac. 156, holding that on foreclosure, borrower from loan association entitled to have all payments, under whatever name, credited; *Meares v. Butler*, 123 N. C. 207, 31 S. E. 477, holding that wife mortgaging land to secure husband's debt to loan association cannot counterclaim usurious interest not paid by her.

Cited in footnote to *Roberts v. American Bldg. & L. Asso.* 33 L. R. A. 744, which holds amount recoverable on loan association mortgage, amount of interest, dues, and fines and present value of anticipated payments.

Cited in note (35 L. R. A. 222) on fines in building and loan associations.

Power of sale in mortgage.

Cited in *Hussey v. Hill*, 120 N. C. 316, 58 Am. St. Rep. 789, 26 S. E. 919, holding that assignment of mortgage does not carry with it power of sale therein.

30 L. R. A. 696, *SCOTT v. FISHBLATE*, 117 N. C. 265, 23 S. E. 436.

Liability of officer for judicial act.

Cited in *Calhoun v. Little*, 106 Ga. 341, 43 L. R. A. 632, footnote p. 630, 71 Am. St. Rep. 254, 32 S. E. 86, denying personal liability of inferior judicial officer for unofficial sentence imposed under illegal ordinance which judge held valid; *Albers v. Merchants' Exchange*, 138 Mo. 164, 39 S. W. 473, holding cor-

porate directors not liable for suspending member of merchant's exchange without malice.

Cited in footnotes to *Webb v. Fisher*, 60 L. R. A. 791, which holds judge not subject to private action for corruptly entering decree disbarring attorney; *Tillman v. Beard*, 46 L. R. A. 215, which denies liability of village president, procuring arrest for violating void ordinance.

Distinguished in *Re Briggs*, 135 N. C. 129, 47 S. E. 403, sustaining right of appeal of witness adjudged guilty of contempt for unlawful refusal to answer.

30 L. R. A. 697, *MAJOR v. CAYCE*, 98 Ky. 357, 33 S. W. 93.

30 L. R. A. 700, *GUM-ELASTIC ROOFING CO. v. MEXICO PUB. CO.* 140 Ind. 158, 39 N. E. 443.

Exhibit as part of complaint.

Cited in *Indiana Mut. Bldg. & L. Asso. v. Plank*, 152 Ind. 198, 52 N. E. 991, holding exhibit not foundation of pleading cannot be considered in determining sufficiency; *Dudley v. Pigg*, 149 Ind. 364, 48 N. E. 642, holding in action to revoke widow's election, copy filed as exhibit cannot be considered; *Fitch v. Byall*, 149 Ind. 557, 49 N. E. 455, holding copy of summons filed as exhibit cannot be considered in aid of complaint to set aside judgment for want of proper service; *First Nat. Bank v. Greger*, 157 Ind. 480, 62 N. E. 21, holding minutes of board reducing assessment attached as exhibit cannot be considered in determining sufficiency of complaint to enjoin collection of taxes; *Marley v. National Bldg. Loan & Sav. Asso. No. 2*, 28 Ind. App. 370, 62 N. E. 1023, holding in suit to cancel, bond and mortgage attached as exhibit cannot be considered in aid of complaint; *Kelley v. Houts*, 30 Ind. App. 477, 66 N. E. 408, denying necessity of making judgment in foreclosure part of complaint in subsequent action to foreclose equities of junior lien holders theretofore omitted.

Pleading legal conclusions.

Cited in *Foland v. Frankton*, 142 Ind. 550, 41 N. E. 1031, holding allegation in action to restrain execution of lighting contract, that town will not have money to meet indebtedness, legal conclusion; *Weir v. State*, 161 Ind. 438, 68 N. E. 1023, holding averment that relatrix was entitled to attend public school, mere conclusion, not obviating necessity of averment that she was unmarried.

Irregularity of judgment as basis for collateral attack.

Cited in *George v. Nowlan*, 38 Or. 541, 64 Pac. 1, denying equitable relief against judgment in excess of amount demanded in complaint; *Mott v. State*, 145 Ind. 354, 44 N. E. 548, holding judgment including improper items by court having jurisdiction not collaterally assailable, and referring particularly to annotation in 30 L. R. A. 700; *Winslow v. Green*, 155 Ind. 370, 58 N. E. 259, holding conviction not assailable on habeas corpus for failure to arraign or enter plea; *Davis v. Clements*, 148 Ind. 607, 62 Am. St. Rep. 539, 47 N. E. 1056, holding judgment of foreclosure not enjoinable for mere irregularities; *Fitch v. Byall*, 149 Ind. 557, 49 N. E. 455, denying injunction against judgment asked on ground of want of proper service.

Cited in notes (30 L. R. A. 793) on injunction against judgments obtained by fraud, accident, mistake, surprise, and duress; (31 L. R. A. 202, 203, 208) on injunctions against judgments for want of jurisdiction, or which are void.

30 L. R. A. 707, *LEVYSTEIN BROS. v. O'BRIEN*, 106 Ala. 352, 54 Am. St. Rep. 56, 17 So. 550.

30 L. R. A. 713, *HOUSTON DIRECT NAV. CO. v. INSURANCE CO. OF N. A.* 89 Tex. 1, 59 Am. St. Rep. 17, 32 S. W. 889.

What constitutes interstate commerce.

Cited in *Texas & P. R. Co. v. Payne*, 15 Tex. Civ. App. 60, 38 S. W. 366, holding shipment over line within, from point without, state interstate commerce; *Texas & P. R. Co. v. Davis*, 93 Tex. 380, 54 S. W. 383, in opinion of court of civil appeals, holding shipment from point to point within state, of cattle driven in from another, interstate commerce (reversed by supreme court on other points); *State v. International & G. N. R. Co.* 31 Tex. Civ. App. 222, 71 S. W. 994, holding shipment, foreign one, when its final destination was outside state, although first shipped to point within state, from which foreign bill of lading was taken.

Cited as overruled in *Texas & P. R. Co. v. Walker*, 25 Tex. Civ. App. 217, 60 S. W. 796, refusing to sustain assignment of error that shipment from point to point in state is interstate commerce, although final destination is without state.

State laws and interstate commerce.

Cited in *Robinson v. New York & T. S. S. Co.* 36 Misc. 706, 74 N. Y. Supp. 384, holding contract for transportation to point without state, not governed by state statute; *Houston, E. & W. T. R. Co. v. Seale*, 28 Tex. Civ. App. 366, 67 S. W. 437, sustaining limitation of liability to its own line, by railroad company engaged in interstate carriage.

Cited in note (60 L. R. A. 644) on corporate taxation and the commerce clause.

30 L. R. A. 716, *TAYLOR v. HART*, 73 Miss. 22, 18 So. 546.

Effect of destruction of premises on tenant's liability.

Cited in footnote to *Arbenz v. Exley*, 61 L. R. A. 957, which holds tenant of land not released by total destruction of building included in lease.

30 L. R. A. 719, *WEBSTER v. DWELLING HOUSE INS. CO.* 53 Ohio St. 558, 53 Am. St. Rep. 658, 42 N. E. 546.

Provision of policy relative to insured's title to land.

Cited in *Mascott v. First Nat. F. Ins. Co.* 69 Vt. 120, 37 Atl. 255, sustaining validity of insurance running to husband and wife on building built by both on wife's land; *Warren v. Springfield F. & M. Ins. Co.* 13 Tex. Civ. App. 469, 35 S. W. 810, holding insurance in husband's name on homestead built with community funds on wife's land, valid.

Forfeitures.

Cited in *Brush Electric Co. v. Warwick Electric Mfg. Co.* 4 Ohio N. P. 280, holding that failure to pay purchase money on day named in land contract does not work forfeiture; *Forest City Ins. Co. v. Hardesty*, 182 Ill. 45, 74 Am. St. Rep. 161, 55 N. E. 139, holding change of title by death of assured does not work forfeiture of fire insurance.

Construction of insurance contracts.

Cited in *Terwilliger v. National Masonic Acci. Asso.* 197 Ill. 13, 63 N. E. 1034, holding insured entitled to most favorable construction of insurance contract.

Construction of statute fixing insurer's liability.

Distinguished in *Doten v. Aetna Ins. Co.* 77 Minn. 477, 80 N. W. 630, holding statute avoiding insurance upon vacancy without permission unaffected by clause fixing insurer's liability in absence of change increasing risk.

30 L. R. A. 722, *DE FORD v. PAINTER*, 3 Okla. 80, 41 Pac. 96.

Court's power to examine witness.

Cited in note (57 L. R. A. 879) on power of court to call and examine witness.

What included under homestead exemption statute.

Cited in *Smith v. Guckenheimer*, 42 Fla. 47, 27 So. 900 (dissenting opinion), majority holding that homestead exemption law does not include store rooms inseparably attached to residence of owner.

30 L. R. A. 730, *NORTHERN P. R. CO. v. PAUSON*, 17 C. C. A. 287, 44 U. S. App. 178, 70 Fed. Rep. 585.

Liability for expulsion of passenger presenting defective ticket.

Cited in *Hot Springs R. Co. v. Deloney*, 65 Ark. 181, 67 Am. St. Rep. 913, 45 S. W. 351, holding railroad liable for ejection of passenger with ticket improperly made out; *Scofield v. Pennsylvania Co.* 56 L. R. A. 226, 50 C. C. A. 555, 112 Fed. 858 holding railroad liable for expulsion of passenger whose ticket was wrongfully taken up by another conductor before reaching stop-over; *Indianapolis Street R. Co. v. Wilson*, 161 Ind. 158, 100 Am. St. Rep. 261, 66 N. E. 950, and *O'Rourke v. Citizens' Street R. Co.* 103 Tenn. 132, 46 L. R. A. 616, 76 Am. St. Rep. 639, 52 S. W. 872, holding railway liable for ejection of passenger presenting wrongly punched transfer slip; *Pittsburgh, C. C. & St. L. R. Co. v. Reynolds*, 55 Ohio St. 384, 60 Am. St. Rep. 706, 45 N. E. 712, holding railroad liable in tort for expulsion of passenger told by station agent to take train not stopping at destination; *Pennsylvania Co. v. Lenhart*, 56 C. C. A. 469, 120 Fed. 63, holding railroad company liable for ejecting passenger tendering mileage ticket under such circumstances that conductor was bound to receive it.

Cited in footnotes to *Atkinson v. Southern R. Co.* 55 L. R. A. 223, which holds carrier liable for ejection of passenger because train does not stop at his station as ticket seller had incorrectly told him; *Southern R. Co. v. Wood*, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round-trip ticket is unstamped from inability to find agent; *Illinois C. R. Co. v. Harper*, 64 L. R. A. 283, which denies right to eject passenger presenting ticket not specifying route to place of destination, because of regulations requiring her to take another route.

Requirement that return coupon be stamped.

Cited in footnote to *Watson v. Louisville & N. R. Co.* 49 L. R. A. 454, which holds condition requiring return coupon of round-trip ticket to be stamped, reasonable.

30 L. R. A. 734, *COM. v. MURPHY*, 165 Mass. 66, 52 Am. St. Rep. 496, 42 N. E. 504.

Sufficiency of indictment for rape.

Cited in *Com. v. Hackett*, 170 Mass. 196, 48 N. E. 1087, holding indictment charging defendant with carnally knowing and abusing female under sixteen good.

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Cruel and unusual punishments.

Cited in note (35 L. R. A. 562, 565, 576, 579) on cruel and unusual punishments.

Knowledge as element of crime.

Cited in *State v. Kelly*, 54 Ohio St. 179, 43 N. E. 163, holding ignorance of adulteration no defense in prosecution for violating law against sale of adulterated food; *Com. v. Smith*, 166 Mass. 376, 44 N. E. 503, holding that complaint for being in gambling place need not allege defendant's knowledge thereof; *State ex rel. Milwaukee v. Newman*, 96 Wis. 270, 71 N. W. 438, sustaining ordinance authorizing arrest of persons found in gambling house.

30 L. R. A. 736, *Ex parte HAWKINS*, 61 Ark. 321, 54 Am. St. Rep. 209, 33 S. W. 106.

30 L. R. A. 737, *HOULTON v. DUNN*, 60 Minn. 26, 51 Am. St. Rep. 493, 61 N. W. 698.

Contracts to procure legislation.

Cited in *Owens v. Wilkinson*, 20 App. D. C. 71, denying validity of attorney's agreement to procure legislation favorable to claim involving personal solicitation.

Cited in footnotes to *Richardson v. Scotts Bluff County*, 48 L. R. A. 294, which holds void contract to secure passage of bill by legislature; *Crichfield v. Bermudez Asphalt Paving Co.* 42 L. R. A. 347, which holds void, employment to promote business of paving company including procuring of passage of ordinance for paving streets and alleys, with commissions contingent on success; *William Deering & Co. v. Cunningham*, 54 L. R. A. 410, which holds void, contract to withdraw opposition to granting of pardon; *Veazey v. Allen*, 62 L. R. A. 362, which holds contract to share profits of "short" sale of stock of corporation with one about to bring its affairs before the legislature for investigation, void.

Distinguished in *Houlton v. Nichol*, 93 Wis. 402, 33 L. R. A. 170, footnote p. 166, 57 Am. St. Rep. 928, 67 N. W. 715, sustaining contract to aid in acquiring title to public lands by services to be rendered.

30 L. R. A. 743, *DAVIS v. COM.* 164 Mass. 241, 41 N. E. 292.

Contracts to procure legislation.

Cited in note (30 L. R. A. 739) on validity of contract for services to procure legislation.

Employment of counsel for state.

Cited in *Opinion of the Justices*, 72 N. H. 604, 54 Atl. 950, sustaining appointment by legislature of attorney to prosecute claims of state for agreed compensation.

Cited in note (55 L. R. A. 496) on governor's power to employ counsel for state.

Compensation for collecting claim against government.

Cited in note (42 L. R. A. 51, 52, 53) on what claims constitute valid demand against a state.

Distinguished in *Ball v. Halsell*, 161 U. S. 83, 40 L. ed. 625, 16 Sup. Ct. Rep. 554, denying attorney's right to enforce agreement to pay half of claim recovered from government; *Lynch v. Pollard*, 26 Tex. Civ. App. 105, 62 S. W. 945, holding void, agreement allowing attorney larger per cent for collection of Indian depredation claims than is expressly allowed by statute.

30 L. R. A. 747, SMITH v. CORNELIUS, 41 W. Va. 59, 23 S. E. 599.

Acts of directors binding corporation.

Cited in Limer v. Traders Co. 44 W. Va. 181, 28 S. E. 730, holding director's individual assent to contract cannot bind corporation.

Ultra vires acts of corporation.

Cited in Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 749, 50 L. R. A. 152, 35 S. E. 994, holding municipality not bound by *ultra vires* grant of exclusive street railroad franchise.

30 L. R. A. 754, WIGGINS v. WILLIAMS, 36 Fla. 637, 18 So. 859.

Right to jury trial.

Cited in Hughes v. Hannah, 39 Fla. 371, 22 So. 613, sustaining right to trial by jury in action by heirs against persons in possession under tax title.

Injunction against trespass.

Cited in Brown v. Solary, 37 Fla. 110, 19 So. 161, enjoining mining of phosphate rock; Moore v. Halliday, 43 Or. 247, 99 Am. St. Rep. 724, 72 Pac. 801, denying injunction against trespass which does not result in irreparable injury.

30 L. R. A. 761, STATE *ex rel.* RUSHWORTH v. INFERIOR COURT OF COMMON PLEAS JUDGES, 58 N. J. L. 97, 32 Atl. 743.

Administration of Federal laws in state courts.

Cited in note (48 L. R. A. 36) on administration of Federal laws in state courts.

30 L. R. A. 765, ORIENTAL HOTEL CO. v. GRIFFITHS, 88 Tex. 574, 53 Am. St. Rep. 790, 33 S. W. 652.

Mechanic's liens.

Cited in Cain v. Texas Bldg. & L. Asso. 21 Tex. Civ. App. 67, 51 S. W. 879, holding that original mechanic's lien attaches to building erected after destruction of first; Texas Builders' Supply Co. v. National Loan & Invest. Co. 22 Tex. Civ. App. 352, 54 S. W. 1059, holding claims of unpaid subcontractors, prior lien on fund assigned to contractor in payment; Kahler v. Carruthers, 18 Tex. Civ. App. 225, 45 S. W. 160, sustaining decree for sale of whole property, prorating proceeds among lien holders on lot and building.

Superiority of mechanic's lien to mortgage.

Cited in Farmers' & M. Nat. Bank v. Taylor, 91 Tex. 80, 40 S. W. 876, holding material man's lien superior to mortgage given while work in progress.

Cited in footnotes to Vilas v. McDonough Mfg. Co. 30 L. R. A. 778, which holds lien for machinery in mill superior to prior mortgages on premises; Fisher v. Wineman, 52 L. R. A. 192, which holds void judgment giving preference to labor debt over pre-existing lien without making lienor party.

Payment in stock or bonds.

Cited in footnote to Johnson v. Dooley, 40 L. R. A. 74, which holds note payable in bonds not payable in money, on failure to tender bonds when due.

"Inception" of mechanic's liens.

Cited in West Virginia Bldg. Co. v. Saucer, 45 W. Va. 485, 72 Am. St. Rep. 822, 31 S. E. 965, sustaining builder's right to file lien before completion of work.

Distinguished in *Sullivan v. Texas Briquette & Coal Co.* 94 Tex. 545, 63 S. W. 307, holding that recital in mortgage that loan is for purpose of completing plant, does not constitute inception of material men's liens.

Effect of change in language of re-enacted statute.

Cited in *Halbert v. San Saba Springs Land & Live Stock Asso.* 89 Tex. 232, 49 L. R. A. 198, 34 S. W. 639, holding that change of language of statute prescribing when laws take effect raises presumption of intention to change rule.

30 L. R. A. 778, *VILAS v. McDONOUGH MFG. CO.* 91 Wis. 607, 51 Am. St. Rep. 925, 65 N. W. 488.

Mechanic's liens.

Cited in *Fitzgerald v. Walsh* 107 Wis. 97, 81 Am. St. Rep. 824, 82 S. W. 717, holding that commencement of building subsequently abandoned gives architect right to lien.

Distinguished in *Rogers-Ruger Co. v. Murray*, 115 Wis. 271, 59 L. R. A. 741, 95 Am. St. Rep. 901, 91 N. W. 657, holding statute making purchaser of property on which log lien is claimed liable for full amount, unconstitutional.

Superiority of mechanic's liens over mortgages.

Followed in *J. B. Alfree Mfg. Co. v. Henry*, 96 Wis. 333, 71 N. W. 370, holding that lien for machinery in mill takes precedence over mortgage executed after commencing construction of mill and making contract.

Cited in *Kay v. Towsley*, 113 Mich. 283, 71 N. W. 490, giving mechanic's lien priority over mortgage given after commencement of building but before labor performed.

Cited in footnote to *Fisher v. Wineman*, 52 L. R. A. 192, which holds void, judgment giving preference to labor debt over pre-existing lien without making lienor party.

30 L. R. A. 783, *FAUST v. AMERICAN F. INS. CO.* 91 Wis. 158, 51 Am. St. Rep. 876, 64 N. W. 883.

Keeping prohibited articles on insured premises.

Cited in *Davis v. Pioneer Furniture Co.* 102 Wis. 397, 78 N. W. 596, holding policy not avoided by keeping reasonable quantity of benzine in furniture factory; *Smith v. German Ins. Co.* 107 Mich. 282, 30 L. R. A. 373, 65 N. W. 236, holding that keeping can of gasoline on premises, for burning off paint, does not avoid policy; *American Cent. Ins. Co. v. Green*, 16 Tex. Civ. App. 538, 41 S. W. 74, holding that use of gasoline cooking stove, customary in vicinity, does not avoid policy; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 58, 39 L. R. A. 791, 67 Am. St. Rep. 900, 44 S. W. 464, holding that keeping benzine, bottled in small quantities, does not avoid policy on stock of drugs and chemicals; *Mascott v. First Nat. F. Ins. Co.* 69 Vt. 122, 37 Atl. 255, holding insurance on paint-shop not avoided by use of benzine; *Phenix Ins. Co. v. Walters*, 24 Ind. App. 52, 79 Am. St. Rep. 257, 56 N. E. 257, holding insurance on retail hardware stock not avoided by keeping dynamite.

Cited in footnotes to *Yoch v. Home Mut. Ins. Co.* 34 L. R. A. 857, which holds policy not avoided by gasoline kept as part of usual stock in country store; *Maril v. Connecticut F. Ins. Co.* 30 L. R. A. 835, which holds policy not avoided by use of inflammable substances necessary and customarily incident to business: Spring-

field F. & M. Ins. Co. v. Wade, 58 L. R. A. 714, which holds policy not avoided by bringing gallon of gasoline on premises for temporary use though causing their destruction; Heron v. Phoenix Mut. F. Ins. Co. 36 L. R. A. 517, which holds policy avoided by taking fireworks into residence for use in celebrating on following evening.

Distinguished in Mitchell v. Potomac Ins. Co. 16 App. D. C. 263, holding that gasoline cannot be regarded as part of insured stock of stove store where special permit to keep obtained.

Waiver of proof of loss.

Cited in footnote to Hoffman v. Michigan Home & Hospital Asso. 54 L. R. A. 746, which holds failure to comply with requirements as to proofs of loss not fatal when liability was denied for other reason.

Distinguished in Matthews v. Capital F. Ins. Co. 115 Wis. 275, 91 N. W. 675, holding that denial by agent of company's liability for loss estops company from insisting upon failure to furnish proofs of loss, as a defense.

30 L. R. A. 786, MERRIMAN v. WALTON, 105 Cal. 403, 45 Am. St. Rep. 50, 38 Pac. 1108.

Injunctions against judgments.

Cited in footnotes to Dowell v. Goodwin, 51 L. R. A. 873, which authorizes injunction against action at law on judgment obtained by sheriff's false return of service; Travelers' Protective Asso. v. Gilbert, 55 L. R. A. 538, which denies right to resort to equity to vacate judgment for fraud when remedy at law adequate; National Surety Co. v. State Bank, 61 L. R. A. 394, which sustains injunction in Federal court against using unconscionable judgment of state court to extort from defendant money not justly due; Peterson v. Atlantic City R. Co. 34 L. R. A. 593, which denies validity of judgment taken while counsel absent in other court.

Cited in notes (31 L. R. A. 34) on negligence as cause for, and as bar to, injunctions against judgments; (31 L. R. A. 205) on injunctions against judgments for want of jurisdiction, or which are void; (32 L. R. A. 328) on general equitable jurisdiction in regard to injunctions against judgments.

Necessary parties.

Cited in McGill v. Sutton, 67 Kan. 236, 72 Pac. 853, holding other codefendants not necessary parties in action by one to enjoin execution upon land owned by him not subject thereto.

30 L. R. A. 803, FITZGERALD v. CLARK, 17 Mont. 100, 52 Am. St. Rep. 665, 42 Pac. 273.

Affirmed in 171 U. S. 92, 43 L. ed. 87, 18 Sup. Ct. Rep. 941.

Right to follow dip of vein.

Cited in Tyler Min. Co. v. Last Chance Min. Co. 71 Fed. 850; Del Monte Min. Co. v. Last Chance Min. Co. 171 U. S. 91, 43 L. ed. 86, 18 Sup. Ct. Rep. 895, sustaining right of locator to follow extralaterally vein whose apex crosses end and side line of claim; Carson City Gold & Silver Min. Co. v. North Star Min. Co. 73 Fed. 602, holding right to follow dip of vein terminating in claim confined between vertical end plane and parallel plane at termination; Parrot Silver & Copper Co. v. Heinze, 25 Mont. 144, 53 L. R. A. 497, 87 Am. St. Rep. 386. 64 Pac.

326, denying right to follow dip of vein beyond vertical planes passing downward through and parallel with side lines when apex of vein enters and leaves by crossing side lines; *Ajax Gold Min. Co. v. Hilkey*, 31 Colo. 139, 62 L. R. A. 558, 72 Pac. 447, sustaining right to follow dip of secondary vein outside side lines although its apex is beyond line drawn parallel with end line at point in side line where discovery vein leaves claim; *State ex rel. Anaconda Copper Min. Co. v. District Court*, 25 Mont. 514, 65 Pac. 1020, denying right to follow dip of vein beyond vertical plane of end line extended downward and in same direction; *Butte & B. Min. Co. v. Societe Anonyme*, 23 Mont. 193, 75 Am. St. Rep. 505, 58 Pac. 111, raising, without deciding, question whether rights of purchaser of portion of claim are determined by vertical plane of end line or plane at vein's departure.

Cited in note (53 L. R. A. 496) on right to follow vein or lode on its dip beyond surface lines of location.

Distinguished in *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 56 L. R. A. 728, 44 C. C. A. 123, 104 Fed. 668, holding prior locator entitled to follow dip of secondary vein crossing side line at angle apexing partly on each claim.

Locating mining claim.

Cited in footnote to *McShane v. Kenkle*, 33 L. R. A. 851, which holds expectation of finding paying mineral unnecessary to valid location of mining claim.

30 L. R. A. 814, *PROSSER v. MONTANA C. R. CO.* 17 Mont. 372, 43 Pac. 81.

Contributory negligence as question for jury.

Cited in *Thompson v. Montana C. R. Co.* 17 Mont. 432, 43 Pac. 496, upholding jury's finding of contributory negligence of switchman using road-engine without flat car in front; *Wastl v. Montana Union R. Co.* 24 Mont. 171, 61 Pac. 9, holding contributory negligence of roundhouse helper injured by hostler moving engine, question for jury.

Cited in footnote to *Neeley v. Southwestern Cotton Seed Oil Co.* 64 L. R. A. 146, which holds contributory negligence of employee in using defective ladder to adjust belt after complaining to manager and being told that it was all right, question for jury.

Objections to hypothetical questions.

Cited in *Roark v. Greeno*, 61 Kan. 308, 59 Pac. 655, holding objection that hypothetical question assumes facts not proved must state objectionable particulars.

Burden of proof as to contributory negligence.

Cited in *Snook v. Anaconda*, 26 Mont. 138, 66 Pac. 756, holding contributory negligence matter of defense when complaint alleges that injury occurred without fault or negligence on plaintiff's part.

30 L. R. A. 820, *WHOLEY v. CALDWELL*, 108 Cal. 95, 49 Am. St. Rep. 64, 41 Pac. 31.

Riparian rights.

Cited in note (41 L. R. A. 744) on correlative rights of upper and lower proprietors as to use and flow of water in stream.

30 L. R. A. 823, SOUTHERN R. CO. v. BOUKNIGHT, 17 C. C. A. 181, 25 U. S. App. 415, 70 Fed. 442.

Followed without special discussion in Central Trust Co. v. Madden, 17 C. C. A. 238, 25 U. S. App. 430, 70 Fed. 453.

Postponement of railroad mortgages to other claims.

Cited in King v. Thompson, 49 C. C. A. 64, 110 Fed. 324, holding mortgages on railroad of foreign corporation postponed by state statute to judgments for personal injuries.

Cited in footnote to Illinois Trust & Sav. Bank v. Doud, 52 L. R. A. 481, which holds claim for money loaned to pay interest on mortgage debt inferior to lien of prior mortgage.

Distinguished in Hampton v. Norfolk & W. R. Co. 62 C. C. A. 392, 127 Fed. 666, denying right to priority of payment, out of earnings of road, of judgment for tort against lessee over prior mortgage, executed before lease, to foreclose which, road was placed in receiver's hands.

Corporate liability for predecessor's debts.

Cited in footnotes to Morgan v. Randolph-Clowes Co. 51 L. R. A. 653, which denies right of firm creditor to sue corporation assuming firm debts; Lamkin v. Baldwin & L. Mfg. Co. 44 L. R. A. 786, which holds taxes against partnership not payable from assets from corporation subsequently formed, till corporate debts are paid; Capital Traction Co. v. Offcut, 53 L. R. A. 390, which denies liability of street railway company for debts of other company whose property and franchises it bought.

Liability of lessor of railroad.

Cited in footnote to Lee v. Southern P. R. Co. 38 L. R. A. 71, which holds lessor of railroad liable to employee of lessee for injury due to defects of rails and track.

Cited in note (4 L. R. A. 738) on liability of lessor of railroad for injuries caused by negligence of another company using road under lease, license, or other contract.

30 L. R. A. 829, UNION MORTG. BKG. & T. CO. v. PETERS, 72 Miss. 1058, 18 So. 497.

Subrogation of third party paying debt.

Cited in Merchants & M. Bank v. Tillman, 106 Ga. 58, 31 S. E. 794, and Home Sav. Bank v. Bierstadt, 168 Ill. 625, 61 Am. St. Rep. 146, 48 N. E. 161, Affirming 68 Ill. App. 661, sustaining right of lender of money, with promise of first lien, to be subrogated to mortgage paid by loan; Bank of Ipswich v. Brock, 13 S. D. 417, 83 N. W. 436, holding lender entitled to be subrogated to first mortgage paid where borrower fails to get agreed release of second; Warford v. Hankins, 150 Ind. 494, 50 N. E. 468, sustaining subrogation to vendor's lien of one paying note thereby secured, under agreement with maker to hold note and lien as security; Cumberland Bldg. & L. Asso. v. Sparks, 49 C. C. A. 514, 111 Fed. 652, holding that lender of money to pay encumbrance whose security proves defective, may be subrogated thereto as against purchaser with knowledge; Dorrah v. Hill, 73 Miss. 793, 32 L. R. A. 632, footnote p. 631, 19 So. 961, sustaining right of one loaning money on invalid deed of

trust to be subrogated to prior valid deed paid off with money loaned; *Irvine v. Kearney County*, 75 Fed. 767, sustaining right of purchaser of invalid county bonds to be subrogated to warrants paid with proceeds.

Cited in footnote to *United States use of Fidelity Nat. Bank v. Rundle*, 52 L. R. A. 505, which holds money furnished to pay labor claims not within bond for paying persons supplying principal with labor or materials for prosecuting work.

What defeats right to subrogation.

Cited in *Wilkins v. Gibson*, 113 Ga. 50, 84 Am. St. Rep. 204, 38 S. E. 374, holding delay of lender to assert right of subrogation to mortgage paid, prejudicing intervening lienors, defeats such right.

When subrogation barred by limitations.

Cited in *Zinkeison v. Lewis*, 63 Kan. 594, 66 Pac. 644, holding subrogation to liens discharged not barred where belief in validity of lender's security induced by mortgagors' fraud.

Estoppel to plead statute of limitations.

Cited in *Klass v. Detroit*, 129 Mich. 40, 95 Am. St. Rep. 407, 88 N. W. 204, holding city not estopped to plead statute of limitations to action for injuries in absence of acts on its part intended to cause plaintiff to expect settlement.

Cited in note (63 L. R. A. 202) on estoppel to plead defense of limitations.

30 L. R. A. 835, *MARIL v. CONNECTICUT F. INS. CO.* 95 Ga. 604, 51 Am. St. Rep. 102, 23 S. E. 463.

Keeping prohibited articles on insured premises.

Cited in *American Cent. Ins. Co. v. Green*, 16 Tex. Civ. App. 538, 41 S. W. 74, holding use of gasoline does not avoid policy where gasoline stove was among articles insured; *Phenix Ins. Co. v. Walters*, 24 Ind. App. 92, 79 Am. St. Rep. 257, 56 N. E. 257, holding insurance on retail hardware stock not avoided by keeping dynamite; *Mascott v. First Nat. F. Ins. Co.* 69 Vt. 123, 37 Atl. 255, holding insurance on paintshop not avoided by use of benzine.

Cited in footnotes to *Yoch v. Home Mut. Ins. Co.* 34 L. R. A. 857, which holds policy not avoided by gasoline kept as part of usual stock in country store; *Springfield F. & M. Ins. Co. v. Wade*, 58 L. R. A. 714, which holds policy not avoided by bringing gallon of gasoline on premises for temporary use though causing their destruction; *Faust v. American F. Ins. Co.* 30 L. R. A. 783, which holds policy not forfeited by keeping small quantity of benzine for use in furniture repair shop; *Heron v. Phoenix Mut. F. Ins. Co.* 36 L. R. A. 517, which holds policy avoided by taking fireworks into residence for use in celebrating on following evening.

Distinguished in *Mitchell v. Potomac Ins. Co.* 16 App. D. C. 263, holding that gasoline cannot be regarded as part of insured stock where special permission to keep obtained.

Parol evidence as to subject of insurance.

Cited in *Yoch v. Home Mut. Ins. Co.* 111 Cal. 508, 34 L. R. A. 859, 44 Pac. 189, holding parol evidence admissible to show gasoline included in insurance on "stock usually kept in country stores."

30 L. R. A. 838, SUPREME LODGE, K. OF P. v. LA MALTA, 95 Tenn. 157, 31 S. W. 493.

By-laws of benefit association as part of contract.

Cited in McLendon v. Woodmen of the World, 106 Tenn. 707, 52 L. R. A. 447, 64 S. W. 36, holding application, constitution, and by-laws incorporated into benefit certificate by reference therein.

Cited in footnote to Peterson v. Gibson, 54 L. R. A. 836, which holds provision in benefit certificate for compliance with constitution and by-laws, refers to existing ones only.

Power to change by-laws affecting members' insurance.

Cited in Dornes v. Supreme Lodge K. of P. 75 Miss. 481, 23 So. 191, holding member agreeing to be subject to by-laws thereafter enacted bound by adoption of anti-suicide by-law by supreme lodge; Supreme Tent, K. of M. v. Hammers, 81 Ill. App. 568, holding member agreeing to be subject to future general legislation bound by subsequent anti-suicide by-law; Hughes v. Wisconsin Odd Fellows' Mut. L. Ins. Co. 98 Wis. 298, 73 N. W. 1015, holding member of mutual life insurance company agreeing to conform to by-laws thereafter adopted bound by anti-suicide by-law; Chambers v. Supreme Tent, K. of M. 200 Pa. 245, 86 Am. St. Rep. 716, 49 Atl. 784, holding change of by-law of benefit society enlarging anti-suicide clause binding on member and beneficiary.

Cited in footnotes to Bragaw v. Supreme Lodge K. & L. of H. 54 L. R. A. 602, which denies power of benefit society to change at will contract of insurance made with each member; Thibert v. Supreme Lodge, K. of H. 47 L. R. A. 136, which holds member of beneficial insurance association protected against unreasonable amendments of by-laws; Strauss v. Mutual Reserve Fund Life Asso. 54 L. R. A. 605, which holds unauthorized, changes in constitution and by-laws destroying value of contract with insured; Parish v. New York Produce Exchange, 56 L. R. A. 149, which denies power to bind dissenting members by amending by-laws so as to distribute among living members, fund accumulated for persons dependent on members at time of death; Shipman v. Protected Home Circle, 63 L. R. A. 347, which holds adoption of by-law relieving benefit society from liability in case of suicide applicable to existing members who agreed to be bound by all rules enacted.

Distinguished and limited in Gaut v. American Legion of Honor, 107 Tenn. 616, 55 L. R. A. 469, footnote p. 465, 64 S. W. 1070, denying power of benefit society to reduce amount of certificate after payment of assessments for years.

Disapproved in Morton v. Supreme Council, R. L. 100 Mo. App. 97, 73 S. W. 259, holding that provision requiring compliance with subsequent by-laws, means only such as relate to duties as member, but not such as impair the contract of insurance.

Power to enact by-laws.

Followed in Toomey v. Supreme Lodge, K. of P. 74 Mo. App. 517, and Supreme Lodge, K. of P. v. Kutscher, 179 Ill. 343, 70 Am. St. Rep. 115, 53 N. E. 620, Reversing on another point 72 Ill. App. 475, holding that supreme lodge of benefit society cannot delegate power to legislate to board of control.

Cited in Supreme Lodge, K. of P. v. Stein, 75 Miss. 117, 37 L. R. A. 777, footnote p. 775, 65 Am. St. Rep. 589, 21 So. 559, holding anti-suicide clause adopted by board of control and inserted in application not binding unless adopted by supreme lodge; Supreme Lodge, K. of P. v. McLennan, 69 Ill. App. 604, raising,

without deciding, question whether board of control could enact anti-suicide by-law.

30 L. R. A. 842, *W. B. GOODE & CO. v. GEORGIA HOME INS. CO.* 92 Va. 392, 53 Am. St. Rep. 817, 23 S. E. 744.

Power of insurance agent's employee to bind company.

Followed in *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 770, 30 S. E. 366, holding acts of solicitor for insurance agent binding on company to same extent as agent's acts.

Cited in footnotes to *Bradford v. Hanover F. Ins. Co.* 49 L. R. A. 530, which denies insurance agent's liability for loss on forbidden policy of which clerk forged his name; *Franklin F. Ins. Co. v. Bradford*, 55 L. R. A. 408, which holds company liable on policy delivered without knowledge of duty authorized agent, by his subagent; *Cole v. Union Cent. L. Ins. Co.* 47 L. R. A. 201, which holds credit for part of first premium extended by general agent binding on company; *Insurance Co. of N. A. v. Thornton*, 55 L. R. A. 547, which holds appointment of subagents within implied authority of insurance agent for territory with radius of 35 miles.

Effect of agent's knowledge of falsity of application.

Second appeal in 95 Va. 752, 30 S. E. 770, holding existence of encumbrance known to soliciting agent no defense to action on policy.

Cited in *Virginia F. & M. Ins. Co. v. Goode*, 95 Va. 771, 30 S. E. 366, holding insurer estopped to set up as defense facts disclosed to soliciting agent.

Cited in footnotes to *Home Ins. Co. v. Hancock*, 52 L. R. A. 665, which holds statement that life tenant has fee simple title to insured property will not avoid policy where agent knew facts; *Sternaman v. Metropolitan L. Ins. Co.* 57 L. R. A. 319, which denies insurer's right to rely on warranty by applicant that answers are properly recorded, where medical examiner know otherwise.

30 L. R. A. 845, *CANTERBURY v. BANK OF SPARTA*, 91 Wis. 53, 51 Am. St. Rep. 870, 64 N. W. 311.

Right to stop payment of check.

Cited in *Gregg v. Bi-Metallic Bank*, 14 Colo. App. 257, 59 Pac. 852, denying bank's power to recall draft sent in payment of check.

Cited in footnotes to *Gage Hotel Co. v. Union Nat. Bank*, 39 L. R. A. 479, which denies depositor's right to prevent application of future deposits to payment of check given; *State Sav. Bank v. Buhl*, 56 L. R. A. 944, which sustains right to stop payment of check given under mistaken belief of theft of property stored.

Payment by mistake.

Cited in *National Bank of Commerce v. American Exch. Bank*, 151 Mo. 333, 74 Am. St. Rep. 527, 52 S. W. 265, holding collecting bank surrendering draft for worthless check liable to payee of draft.

30 L. R. A. 848, *HURON WATERWORKS CO. v. HURON*, 7 S. D. 9, 58 Am. St. Rep. 817, 62 N. W. 975, 8 S. D. 169, 65 N. W. 816.

Right to sell or lease municipal property.

Cited in *Ogden City v. Bear Lake & River Waterworks & Irrig. Co.* 16 Utah,

454, 41 L. R. A. 310, footnote p. 305, 52 Pac. 697, denying city's right to lease or otherwise transfer waterworks; Lake County Water & Light Co. v. Walsh, 160 Ind. 41, 98 Am. St. Rep. 264, 65 N. E. 530, holding waterworks and electric light plant property held in trust for public use, which cannot be disposed of without legislative authority.

Cited in footnote to Baily v. Philadelphia, 39 L. R. A. 837, which sustains right of city to lease its gasworks.

Cited in note (61 L. R. A. 34, 35, 120) on establishment and regulation of municipal water supply.

Right of municipality to purchase or construct waterworks.

Cited in Water Comrs. v. West Chester County Waterworks Co. 176 N. Y. 252, 68 N. E. 348, denying right of city to contract for purchase of waterworks owned by corporation in absence of legislative permission.

Cited in footnotes to Bristol v. Bristol W. Waterworks, 32 L. R. A. 740, which holds enforceable, contract by town to purchase waterworks; Fawcett v. Mt. Airy, 63 L. R. A. 870, which sustains municipality's power to incur expense of owning and operating water and electric light plants without submitting proposition to voters.

Municipal waterworks as private undertaking.

Cited in footnote to Newport v. Com. 45 L. R. A. 518, which holds city taxable on waterworks franchise.

Public trusts.

Cited in Knoxville v. Knoxville Water Co. 107 Tenn. 675, 61 L. R. A. 895, 64 S. W. 1075, upholding power of municipality to fix reasonable charges from time to time to be charged by private water company.

Cited in footnote to St. Paul v. Chicago, M. & St. P. R. Co. 34 L. R. A. 184, which denies power of legislature to give any part of levee as permanent site for freight warehouse.

Ultra vires acts of municipality.

Cited in Watson v. Huron, 38 C. C. A. 267, 97 Fed. 452, holding city not liable to purchaser of unlawful warrants, proceeds of which not used for legitimate corporate purpose.

Cited in footnote to Fergus Falls v. Fergus Falls Hotel Co. 50 L. R. A. 170, which holds enforceable by foreclosure *ultra vires* loan of city's money on mortgage.

30 L. R. A. 860, J. J. DOUGLASS CO. v. MINNESOTA TRANSFER R. CO. 62 Minn. 288, 64 N. W. 899.

Carrier's right to limit liability.

Cited in Adams Exp. Co. v. Carnahan, 29 Ind. App. 612, 94 Am. St. Rep. 279, 63 N. E. 245, sustaining express company's right to limit liability to agreed sum, in consideration of lower rate; Calderon v. Atals S. S. Co. 170 U. S. 279, 42 L. ed. 1035, 18 Sup. Ct. Rep. 588, sustaining carrier's right to limit liability to agreed valuation, with proportionate freight rates; Ullman v. Chicago & N. W. R. Co. 112 Wis. 157, 56 L. R. A. 249, footnote p. 246, 88 Am. St. Rep. 949, 88 N. W. 41, sustaining carrier's right to secure entire exemption from liability as insurer for loss not due to negligence or misfeasance.

Cited in footnotes to Mears v. New York, N. H. & H. R. Co. 56 L. R. A. 884,

which authorizes carrier to stipulate for exemption from liability for wet. *Tecumseh Mills v. Louisville & N. R. Co.* 49 L. R. A. 558, which holds prohibition against carriers limiting liability inapplicable to contract by domestic corporation in other state for transportation entirely outside of state; *Rosen v. Weir*, 57 L. R. A. 527, which holds failure to comply with agreement for stoppage *in transitu* not within contract limiting liability to specified amount; *Central R. Co. v. Murphey*, 53 L. R. A. 720, which holds negligent carrier liable for true value, notwithstanding arbitrary preadjustment in bill of lading assented to by shipper; *United States Exp. Co. v. Koerner*, 33 L. R. A. 600, which denies right of express company to additional compensation because value of package carried exceeded amount represented; *Parker v. Atlantic Coast Line R. Co.* 63 L. R. A. 827, which holds requirement that perishable freight must be carried at owner's risk, void where no other terms offered by carrier.

Distinguished in *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding telegraph company liable for damages resulting from incorrect message, notwithstanding contrary agreement on blank.

Contract stipulation as to amount payable on breach.

Cited in footnotes to *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per 100 feet for logs not delivered by specified date, one for liquidated damages; *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time, liquidated damages; *Chicago House-Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable.



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